~~GI 2.G.4.~~

25, 1959

Kenya

IN THE PRIVY COUNCIL

No. 17 of 1959

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

SHEIKH MOHAMED BASHIR (Defendant) Appellant

- and -

THE COMMISSIONER OF LANDS
(Plaintiff) Respondent

RECORD OF PROCEEDINGS

T. L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.
Solicitors for the Appellant.

CHARLES RUSSELL & CO.,
37, Norfolk Street,
London, W.C.2.
Solicitors for the Respondent.

IN THE PRIVY COUNCIL No. 17 of 1959

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

SHEIKH MOHAMED BASHIR (Defendant) Appellant

- and -

THE COMMISSIONER OF LANDS
(Plaintiff) Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

DOCUMENTS NOT TRANSMITTED

Description of Document	Date
In the Supreme Court of Kenya	
Judge's Notes on application to strike out Defence and Counterclaim	24th September 1956
Judgment on above application	1st October 1956
Judge's Notes on application to file amended Defence by Consent.	5th November 1956
Deputy Registrar's endorsement of filing Amended Defence	7th November 1956
Deputy Registrar's endorsement of filing of Reply and Defence to Counterclaim	14th November 1956
Opening address by Plaintiff's Counsel.	6th and 7th December 1956
Evidence for Plaintiff:	
(1) Sydney Charles Lock	10th December 1956 & 11th December 1956
(2) Leslie Stewart Wink	11th December 1956
(3) Glynn Richard	11th December 1956
(4) G.P. Talati	11th December 1956
(5) George William Tame	11th December 1956

Description of Document	Date
Opening address by Defendant's Counsel	12th December 1956
Evidence for Defendant :	
(1) Patrick N. Flatt	14th December 1956
(2) Peter Angus Campbell	14th December 1956
(3) Arthur Tisdale-Jones	14th December 1956
(4) Alfred Edward Wevill	17th December 1956
(5) David John Roche	17th December 1956
(6) Simon Peter Pinto	17th December 1956
(7) Sheikh Abdul Rashid	17th December 1956
(8) Jack Oulton	17th December 1956
Notes of Arguments	17th, 18th and 19th December 1956

EXHIBITS NOT TRANSMITTED

Exhibit Mark	Description of Document	Date
Exhibit 1 (File of correspondence)	Letter, S.M.Bashir to Commissioner of Lands	13th May 1952
	Letter, Commissioner of Lands to S.M.Bashir	30th May 1952
	Letter, Commissioner of Lands to S.M.Bashir	6th June 1952
	Letter, Commissioner of Lands to S.M.Bashir	5th July 1952
	Letter, S.M.Bashir to Commissioner of Lands	7th July 1952
	Letter, Commissioner of Lands to S.M.Bashir	14th August 1952
	Letter, S.M.Bashir to Commissioner of Lands	15th August 1952
	Letter, S.M.Bashir to Director of Civil Aviation	15th October 1952
	Letter, Director of Civil Aviation to E.A.High Commission	28th October 1952

Description of Document	Date
Letter, Director of Civil Aviation to S.M.Bashir	28th October 1952
Letter, Commissioner of Lands to S.M.Bashir	30th October 1952
Letter, S.M.Bashir to Commissioner of Lands	4th November 1952
Letter, E.A. High Commission to Director of Civil Aviation	6th November 1952
Letter, S.M.Bashir to Commissioner of Lands	27th December 1952
Letter, E.A. High Commission to Commissioner of Lands	2nd February 1953
Letter, E.A. High Commission to S.M.Bashir	16th February 1953
Letter, S.M.Bashir to E.A. High Commission	18th February 1953
Letter, S.M.Bashir to Commissioner of Lands	23rd February 1953
Letter, E.A. High Commission to S.M.Bashir	2nd March 1953
Letter, E.A. High Commission to S.M.Bashir	20th March 1953
Letter, S.M.Bashir to E.A. High Commission	1st April 1953
Letter, Chief Secretary to S.M.Bashir	2nd April 1953
Letter, E.A. High Commission to S.M.Bashir	14th April 1953
Letter, S.M.Bashir to Nancarrow (for Chief Secretary)	30th April 1953
Letter, S.M.Bashir to E.A. High Commission	30th April 1953
Letter, Chief Secretary to S.M.Bashir	4th May 1953

Description of Document	Date
Letter, S.M.Bashir to Commissioner of Lands	13th May 1953
Letter, S.M.Bashir to E.A. High Commissioner	8th June 1953
Letter, E.A. High Commission to S.M.Bashir	17th June 1953
Letter, E.A. High Commission to S.M.Bashir	24th July 1953
Letter, Chief Secretary to E.A. High Commission	4th August 1953
Letter, Commissioner of Lands to S.M.Bashir	11th August 1953
Letter, S.M.Bashir to City Council of Nairobi	11th August 1953
Letter, City Council of Nairobi to S.M.Bashir	20th August 1953
Letter, E.A. High Commission to S.M.Bashir	24th August 1953
Letter, S.M.Bashir to Deputy Town Clerk	14th September 1953
Letter, S.M.Bashir to Commissioner of Lands	26th September 1953
Letter, S.M.Bashir to Commissioner of Lands	21st October 1953
Letter, District Commissioner to S.M. Bashir, with acknowledgement of S.M. Bashir thereon	8th October 1953
Letter, City Council of Nairobi to S.M.Bashir	28th October 1953
Letter, Commissioner of Lands to S.M.Bashir	10th November 1953
Letter, S.M.Bashir to Commissioner of Lands	24th December 1953
Letter, City Council of Nairobi to Jackson & Hill	12th April 1954
Letter, S.M.Bashir to Commissioner of Lands	15th April 1954

Description of Document	Date
Letter, Commissioner of Lands to S.M.Bashir	24th April 1954
Letter, S.M.Bashir to Commerce & Industry	26th April 1954
Letter, Commissioner of Lands to S.M.Bashir	26th April 1954
Letter, Commissioner of Lands to S.M.Bashir	10th May 1954
Letter, Commissioner of Lands to S.M.Bashir	18th May 1954
Lotter, Commissioner of Lands to S.M.Bashir	3rd June 1954
Letter, City Council of Nairobi to Jackson & Hill	16th June 1954
Letter, Commissioner of Lands to S.M.Bashir	23rd July 1954
Letter, Commissioner of Lands to S.M.Bashir	16th August 1954
Letter, Commissioner of Lands to S.M.Bashir	3rd September 1954
Letter, S.M.Bashir to Commissioner of Lands	8th September 1954
Letter, S.M.Bashir to Commissioner of Lands	11th September 1954
Letter, S.M.Bashir to Commissioner of Lands	13th September 1954
Letter, Commissioner of Lands to S.M.Bashir	20th September 1954
Letter, Jackson & Hill to Department of Lands	7th October 1954
Letter, Commissioner of Lands to S.M. Bashir	26th October 1954
Letter, Commissioner of Lands to S.M. Bashir	11th November 1954
Letter, S.M.Bashir to Commissioner of Lands	7th December 1954
Letter, Commissioner of Lands to S.M. Bashir	23rd December 1954

Description of Document	Date
Letter, Commissioner of Lands to S.M.Bashir	7th April 1955
Letter, S.A.Rashid to Commissioners of Lands	12th April 1955
Letter, Commissioner of Lands to S.M.Bashir	25th April 1955
Letter, Commissioner of Lands to S.M.Bashir	5th May 1955
Letter, Commissioner of Lands to Mervyn J.E.Morgan	13th May 1955
Letter, Mervyn J.E.Morgan to Commissioner of Lands	19th May 1955
Letter, Mervyn J.E.Morgan to Commissioner of Lands	25th May 1955
Letter, Commissioner of Lands to Mervyn J.E. Morgan	27th June 1955
Letter, Mervyn J.E. Morgan to Commissioner of Lands	15th July 1955
Letter, Commissioner of Lands to Mervyn J.E. Morgan	2nd August 1955
Letter, Mervyn J.E. Morgan to Commissioner of Lands	3rd August 1955
Letter, Mervyn J.E. Morgan to S.M. Bashir	10th August 1955
Letter, Commissioner of Lands to S.M.Bashir	15th August 1955
Letter, Shapley, Barret Allin & Co. to Commissioner of Lands	22nd August 1955
Letter, Commissioner of Lands to Shapley, Barret Allin & Co.	25th August 1955
Letter, Commissioner of Lands to Shapley, Barrett Allin & Co.	6th September 1955
Letter, Shapley Barret Allin & Co. to Commissioner of Lands	12th September 1955
Letter, Commissioner of Lands to Shapley Barret Allin & Co.	29th September 1955
Letter, Shapley Barret Allin & Co. to Commissioner of Lands	5th October 1955

Description of Document	Date
Letter, Masongaleni Sisal Estate to S.M.Bashir	21st September 1955
Letter, Abdul Ghafur Sheikh to S.M. Bashir	23rd September 1955
Letter, G.J. Dave to S.M.Bashir	26th September 1955
Letter, Abdul Ghafur Sheikh to S.M. Bashir	16th September 1955
Letter, City Council of Nairobi to Commissioner of Lands	11th October 1955
Letter, Shapley Barret Allin & Co. to Commissioner of Lands	20th October 1955
Letter, Senior Crown Counsel to Shapley, Barret Allin & Co.	2nd November 1955
Letter, Commissioner of Lands to Town Clerk	7th November 1955
Letter, Shapley Barret Allin & Co. to Senior Crown Counsel	12th December 1955
Letter, Swaraj Singh, Advocate to Senior Crown Counsel	17th December 1955
Letter, Senior Crown Counsel to Swaraj Singh	22nd December 1955
Letter, Swaraj Singh to Senior Crown Counsel	5th January 1956
Letter, Senior Crown Counsel to Swaraj Singh	5th January 1956
Letter, Swaraj Singh to Senior Crown Counsel	12th January 1956
Letter, Senior Crown Counsel to Swaraj Singh	14th January 1956
Letter, Swaraj Singh to Ag. Senior Crown Counsel	20th January 1956

DOCUMENTS TRANSMITTED BUT NOT PRINTED

Description of Document	Date
In the Supreme Court of Kenya	
Notice of Appeal	14th March 1957
Notice of Appeal	10th September 1957
In the Court of Appeal for Eastern Africa	
Order extending time for filing Appeal	15th August 1957
Order granting further extension of time	6th September 1957
Order granting further extension of time	13th September 1957

IN THE PRIVY COUNCIL No. 17 of 1959

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

SHEIKH MOHAMED BASHIR (Defendant) Appellant

- and -

THE COMMISSIONER OF LANDS (Plaintiff) Respondent

RECORD OF PROCEEDINGS

In the Supreme Court of Kenya

No. 1

Plaint.

16th November, 1955.

No. 1

PLAINT.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE No.958 OF 1955

BETWEEN

THE COMMISSIONER OF LANDS PLAINTIFF

- and -

SHEIKH MOHAMED BASHIR DEFENDANT

PLAINT

1. The Plaintiff is the Commissioner of Lands of the Colony and Protectorate of Kenya and his address for service is C/o the Attorney General of the Attorney General's Chambers, Nairobi.

2. The Defendant is Sheikh Mohamed Bashir of P.O. Box 1512, Nairobi.

3. By a Grant dated the 8th day of January, 1953, the Governor and Commander in Chief of the Colony and Protectorate of Kenya on behalf of Her Most Gracious Majesty Queen Elizabeth the Second in consideration of Shs.20,000/00 by way of stand premium granted unto the Defendant a piece of land in Nairobi Municipality containing by measurement 1.161 acres or thereabouts that is to say Land Reference Number 209/4279/- which said piece of land is delineated in the plan annexed to the said Grant and

In the Supreme Court of Kenya

No. 1

Plaint.

16th November 1955 - continued.

more particularly on Land Survey Plan Number 51700 deposited in the Survey Records Office at Nairobi TO HOLD for the term of 99 years from the 1st day of September 1952, subject to the payment of the rents therein reserved and subject to the provisions of the Crown Lands Ordinance (Chapter 155) and to certain special conditions set out in the said Grant.

4. Among the special conditions was a condition as follows:-

> "1. The Grantee shall erect complete for occupation within thirtysix 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 paintwork) in good and substantial repair and condition. The building shall be of at least six storeys and the cost of construction shall be at least Shillings Seven million."

5. The Defendant failed to comply with the said condition in that he had erected no buildings on the said land by the first day of September, 1955.

6. The Defendant has not remedied the said breach of condition.

7. The value of the land is £250,000.

8. The Plaintiff claims -

(1) Possession of the said land
(2) Mesne profits at £833 per month from the date of the Plaint until possession is delivered up to the Plaintiff.

If contrary to the Plaintiff's contention it is held that the condition above referred to is not in law a condition but is a covenant then, a notice having been served upon the Defendant on the 25th day of September, 1955, as required by section 83 of the Crowns Lands Ordinance, the Plaintiff claims -

(1) A declaration that the Lease be forfeited;
(2) Damages for breach of covenant.

DATED this 16th day of November, 1955.

H.G. Sherrin
AG:SENIOR CROWN COUNSEL

No. 2

In the Supreme Court of Kenya

No. 2

Letter, requiring particulars of Defence.

23rd April, 1956.

LETTER, REQUIRING PARTICULARS OF DEFENCE

ATTORNEY GENERAL'S CHAMBERS,
P.O.BOX 112,
NAIROBI.

Ref.No.140/54/6/52 23rd April, 1956.

SWARAJ SINGH ESQ.
ADVOCATE,
P.O.BOX 5445,
NAIROBI

Dear Sir,

THE COMMISSIONER OF LANDS
v.
SHEIKH MOHAMED BASHIR

We find that it is necessary for the purpose of drafting the Reply and Defence to Counter-claim in the above matter to have particulars of the Defence as follows -

Under paragraph 3:-

Of the implied covenant, as to whether it is alleged that such implication arise from the conduct of the parties the operation of law or by custom. If from conduct the date or dates on which the alleged conduct occurred and specifying the conduct on which the Defendant will rely. If from the operation of law of the facts on which such allegation is to be based. If from custom giving full particulars thereof.

2. In order to save the expense and inconvenience of an application to the Court, I shall be glad if you will kindly furnish these particulars within seven days from the date hereof, and if you will kindly extend time for delivery of Reply and Defence to Counter-claim until seven days after the delivery of the particulars.

Yours faithfully,

(Sd) A.C.B. Reid
AG: SENIOR CROWN COUNSEL

In the Supreme Court of Kenya

No. 3

Letter, supplying particulars of Defence.

7th May, 1956.

No. 3

LETTER, SUPPLYING PARTICULARS OF DEFENCE

SWARAJ SINGH
ADVOCATE,
NAIROBI HOUSE,
GOVERNMENT ROAD,
NAIROBI:

Ref.No.CF/230. 7th MAY, 1956.

The Acting Senior Crown Counsel,
The Hon. The Attorney General's Chambers,
P.O. Box 112,
Nairobi.

Dear Sir,

THE COMMISSIONER OF LANDS PLAINTIFF
versus
SHEIKH MOHAMED BASHIR DEFENDANT

In response to your letter ref:No.140/54/6/52 dated 23rd April, 1956 I append below the particulars required by you:-

UNDER PARAGRAPH 3.

The implied covenant arose -

(i) by operation of law;

(ii) from the Grantor's knowledge that vacant possession and/or quiet enjoyment of the said land without lawful interruption was/were necessary to enable the Defendant to comply with the condition set out in paragraph 4 of the Plaint;

(iii) from the oral representation made by one Firminger (on behalf of the Grantor) to the Defendant, in or about the month of September 1952, that the buildings mentioned in paragraph (i) of the particulars under paragraph 4 of the Defence were shortly being vacated and/or removed.

Kindly file your reply as suggested by you.

Yours faithfully,

SWARAJ SINGH.

No. 4

AMENDED DEFENCE

In the Supreme Court of Kenya

No. 4

Amended Defence

5th November, 1956.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 958 of 1955

THE COMMISSIONER OF LANDS ... PLAINTIFF

versus

SHEIKH MOHAMED BASHIR ... DEFENDANT

AMENDED

D E F E N C E

AMENDED PURSUANT TO THE COURT ORDER DATED - 5TH DAY OF NOVEMBER, 1956.

1. The Defendant admits the statements contained in paragraphs 1 to 4 of the Plaint, save that he contends that for all purposes the said grant is to be construed as, and has the effect of, a lease for a term of 99 years, and that the special conditions are, and are to be construed as, covenants.

2. The Defendant admits that he had erected no buildings on the said land by the 1st September, 1955, as alleged in paragraph 5 of the Plaint, but says that he was prevented from doing so by reason of the breach of covenant on the part of the Grantor, his servants or agents and/or by circumstances beyond the Defendant's control, as hereinafter mentioned.

3. It was an implied covenant of the said Grant -

(i) that the Grantor would deliver vacant possession of the said land to the Defendant on the 1st September 1952, or, alternatively, on the 8th January, 1953;

(ii) that as from the 1st September, 1952, or, alternatively, the 8th January, 1953, the Defendant should quietly hold and enjoy the said land without lawful interruption by the Grantor or any person claiming under him.

In the Supreme Court of Kenya

No. 4

Amended Defence

5th November, 1956 - continued.

4. In breach of the said covenants the Grantor failed to give vacant possession of the said land to the Defendant on either of the said dates, and the Defendant 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 after the expiration of 36 months from the commencement of the term of the said Grant, namely, until 28th October, 1955, as set out in the particulars hereunder.

PARTICULARS

(i) On the 1st September, 1952, the Grantor left certain buildings (hereinafter called "the said buildings") on the said land, occupying approximately 28,320 square feet of the total area of 50,560 square feet of the said plot, and permitted and continued to permit another building (called the Labour Office) to encroach upon and occupy a further 420 square feet of the said land.

(ii) The Grantor his servants or agents, permitted the said buildings to be occupied by the Department of Civil Aviation until the end of the month of April, 1953. Thereafter the Kenya Police Reserve occupied the same until the month of July, 1953, when the Defendant sought the permission of the Nairobi City Council to use part of the said buildings for the storage of building materials. Before such permission had been given, the Officer-in-Charge of the Extra Provincial District by notice dated the 8th October, 1953, requisitioned the said buildings for occupation by the Kenya Police, who remained in occupation of the same until the 24th July, 1954.

(iii) The Grantor, his servants or agents permitted the said Labour Office to encroach upon and occupy part of the said land as aforesaid, and failed to demolish or remove the same, until the 28th October, 1955.

5. Alternatively, by reason of the premises and of the further matters mentioned in the particulars hereunder, the Plaintiff, as the servant or agent of the Grantor, waived so much of the said covenant as required the Defendant to erect the said building within 36 months of commencement of the said

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 Defendant for the completion of the said building.

PARTICULARS

(a) In the month of April, 1954 the Plaintiff discussed with the Defendant the plans for the said building, including certain modifications thereof to meet the requirements of the Nairobi City Council, and, on or before the 23rd July, 1954, the Plaintiff knew that it was a physical impossibility for the Defendant to erect the said building within the period stated in the said Condition. Notwithstanding such knowledge, the Plaintiff did not then serve upon the Defendant any notice requiring him to comply with the said Condition, but, on the contrary, entered into negotiations with the Defendant for an extension of the said period. During the said negotiations the Defendant, with the knowledge of the Plaintiff, confirmed his contracts with his Architects, Structural Engineers and obtained permission to erect, and did erect, a hoarding to enclose the said land, demolished part of the said buildings and carried out excavations for the preparation of the foundations and committed himself in the sum of £60,229.0.0., but on the 25th September, 1955 the Plaintiff broke off the said negotiations and served upon the Defendant the notice mentioned in paragraph 8 of the Plaint.

6. The said notice did not require the Defendant to remedy the alleged breach, nor was he given any or any reasonable time to complete the said building.

7. The Defendant was at all material times, and still is, willing to erect the said building, but was unable to do so by reason of the matters aforesaid.

8. The Defendant has an absolute title to the said land and denies that the Plaintiff is entitled to possession of the said land or to the alleged or any mesne profits, and save as aforesaid expressly admitted, he severally denies each and every

In the Supreme Court of Kenya

No. 4

Amended Defence

5th November, 1956 - continued.

allegation contained in the Plaint.

WHEREFORE The Defendant prays:-

1. That the Plaintiff's claim may be dismissed with costs

2. Alternatively, that, by reason of the matters set out in paragraphs 2 to 7 inclusive herein, he may be relieved against forfeiture of the said land, pursuant to Section 83 of the Crown Lands Ordinance (Laws of Kenya Cap. 155) upon such terms as may appear just.

3. That he may have such further and other relief as may be just.

DATED at NAIROBI this 5th day of November 1956.

(Sd.) SWARAJ SINGH

Advocate for the Defendant

No. 5

Amended Reply and Defence to Counterclaim

No. 5

AMENDED REPLY AND DEFENCE TO COUNTERCLAIM

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO.958 of 1955

THE COMMISSIONER OF LANDS PLAINTIFF

v.

SHEIKH MOHAMED BASHIR DEFENDANT

AMENDED REPLY AND DEFENCE TO COUNTERCLAIM

Amended pursuant to an Order of the Court dated 5th day of November, 1956.

1. The Plaintiff joins issue with the Defendant on the Defence.

2. As to paragraphs 2, 3, 4 and 7 of the Defence

the Plaintiff denies that the Defendant was prevented from erecting buildings on the said land as alleged and the Plaintiff will contend that the failure to erect the said buildings arose from the failure of the Defendant to exercise any or any reasonable diligence in the performance of the Special Conditions of the said Grant and from the inability of the Defendant to perform the same.

3. In particular the Plaintiff will contend:

(1) that in accordance with the Special Conditions of the said Grant the Defendant could not commence to erect the said buildings 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 had been approved in writing by the Nairobi City Council and by the Plaintiff; and

(2) that the Defendant failed to obtain the said approval until the 15th day of September 1955 of the Nairobi City Council; and

(3) that accordingly by reason of his failure to exercise reasonable diligence in obtaining the said approval the Defendant was never in a position to comply with the Special Condition No.1 which required the Defendant to erect the said buildings complete ready for occupation before the 1st day of September 1955.

4. The Plaintiff will object that the matter alleged in paragraphs 3, 4 and 6 of the Defence is no answer in law to the Plaintiff's claim in this action.

5. And in further answer to paragraph 3 of the Defence the Plaintiff denies that there was an implied covenant as therein alleged or at all.

6. Paragraphs 4 and 5 of the Defence are denied.

7. Alternatively with regard to paragraph 4 of the Defence the Plaintiff will contend that the Defendant permitted the occupation of the land by the buildings referred to in the said paragraph as "the said buildings". By a letter dated the 15th

In the Supreme Court of Kenya

No. 5

Amended Reply and Defence to Counterclaim - continued.

August 1952 addressed to the Acting Commissioner of Lands the Defendant confirmed that he had no objection to the offices of the Directorate of Civil Aviation occupying the said buildings until the 15th October 1952. The Defendant further orally agreed with one Hall, acting for and on behalf of the East African High Commission that the Directorate of Civil Aviation could continue to occupy the said buildings for some period thereafter. The Plaintiff further says that the said buildings were neither the property of the Plaintiff nor of the Government of Kenya but were the property of the East African High Commission a body corporate until purchased from the said East African High Commission by the Defendant. With regard to the occupation of the said buildings by the Kenya Police Reserve the Plaintiff says that on the 30th day of April 1953 the Defendant agreed in writing to this occupation and that the Kenya Police Reserve vacated the said buildings on the 14th day of July 1953. On the 8th day of October 1953 the said buildings were requisitioned by the Officer-in-Charge of the Nairobi Extra-Provincial District for occupation by Police personnel from the Northern Province and this occupation by the said Police personnel continued until on or about the 27th November 1953.

8. The Plaintiff denies that the Labour Office encroached upon the said land as alleged in the Defence or at all. The Plaintiff will further contend that as soon as the Defendant notified the Plaintiff of such alleged encroachment the building in question was removed and the Plaintiff will in any event contend that the alleged encroachment (which is not admitted) did not in fact prevent the Defendant from building or carrying out the necessary arrangements preparatory to building in compliance with the said Grant.

9. With regard to paragraph 5 of the Defence the Plaintiff denies that as the servant or agent of the grantor he waived any part of the said covenant or impliedly agreed to vary the same so as to give extension of time and will object that in law neither he nor the Governor has power to extend the time for performance of a covenant.

10. As to paragraph 6 of the Defence the Plaintiff will refer at the trial of the action to the said notice for its terms and effect.

11. Paragraph 7 of the Defence is denied.

12. As to the Counterclaim the Plaintiff repeats paragraphs 1 to 9 inclusive of the Reply and will object that for the reasons hereinbefore set out the Counterclaim is bad in law and discloses no cause of action.

In the Supreme Court of Kenya

No. 5

Amended Reply and Defence to Counterclaim - continued.

H.G Sherrin
SENIOR CROWN COUNSEL
Advocate for the Plaintiff
(for Attorney General)

PLAINTIFF'S EVIDENCE

Plaintiff's Evidence

No. 6

No. 6

EVIDENCE OF FRANK EDWIN FIRMINGER

Frank Edwin Firminger.

1 P.W.: FRANK EDWIN FIRMINGER: Sworn

Examination.

Land Officer in Department of Commissioner of Lands. In 1951 I was Officer responsible for alienation of Hotel Site A, that is land in issue in this case. I had many conversations with Defendant before and after tender. Government was most anxious to get up a luxury hotel of a much better standard than anything then existing. It was believed that Tourist Industry was suffering considerable loss. Hotel accommodation position in Nairobi was very bad. No first class hotel. All hotels full of residents. No place where conferences could be held. No place where visitors could be sure of getting a bed. Normally Government assesses capital value of plot at current market rate and one-fifth of that is charged as stand premium and 5% of balance is amount of annual rental. If property worth £200,000, stand premium would be £40,000 and rent at £8,000. Here stand premium was £1,000 and rent for first ten years £10 per annum. Rents were considered nominal. Part of policy to get hotel built by all means. Four tenders were received. After prolonged examination of plans accompanying tenders, it was considered that building proposed by Defendant was the best. Defendant, with support of his father, also produced evidence of having

In the Supreme Court of Kenya

Plaintiff's Evidence

No. 6

Frank Edwin Firminger

Examination - continued.

the most money. Temporary buildings occupied by Directorate of Civil Aviation covered about 10% of the site. The High Commission owned them. They were temporary buildings put up by the Army during the war which Directorate of Civil Aviation had been allowed to occupy. I expect we acquiesced in use of land. Before grant made I spoke to Defendant about them. I knew they were there. I gave High Commission notice to get off the land by October 15th, 1952, after Defendant had agreed to that date. I understood Defendant at that time to be anxious that buildings should stay. He did not want grant delayed until buildings went. It was the other way round. The reason for alienating land with buildings on it (which was unusual) was (1) to get Defendant into the land as quickly as possible and (2) to allow Directorate of Civil Aviation such minimum time as was necessary to move. I wanted Defendant on the land as quickly as possible so that his architect could prepare working drawings. Bashir thought buildings would be of use to him in early stages of building operations. I placed him in direct communication with High Commission. Presence of these buildings would not prevent preparation of plans. A reasonably diligent man should have his plans ready and approved in perhaps nine months; specifications and contracts would take another three months. I first became aware of encroachment of Labour Office about May, 1955, when Defendant drew my attention to it. Only overhanging eaves above window projected over the land about six inches for the length of the building and about ten feet above the ground. I arranged to have the buildings demolished. It would have been sufficient to saw off six inches of eave. Buildings were removed to allow some accommodation space round plot by Defendant's assistance.

From outset of tender Bashir adduced evidence that he had some £825,000 in movable and immovable estate, including a large sum in respect of his wife's jewels. Also some £3,000,000 worth of property listed as belonging to his father. Over the thirty six months I several times suggested that Defendant should mobilise these resources and bring them to bear on construction of the hotel. Defendant told me he had tried to induce Swiss capitalists to provide £160,000 and come in with him. His land and £160,000 and their cash. We would take objection to his attracting £160,000 for something

we had given him for £1,000. His assets were in sisal in Tanganyika Territory; plots in Nairobi including two with hotels on them; land values of sisal estates were then very good. In original tenders he produced evidence of their value, but no evidence of their encumbrances. No satisfactory evidence was produced by Defendant when he was later asked to do so of his financial ability to build. He produced statement to effect that he had credit of 3,000,000/- in T.T. Company, but no evidence of the affairs of that company. See Exhibit 1, page . I know nothing about Kedai Estate. By September, 1955 I think Government had lost faith in Bashir. In 1954, say in April had he produced suitable evidence, I should have recommended that he be given an extension of tenure. In May, 1955, I was not present at meeting between members of Lands Department and Defendant. I received instructions immediately following the meeting. Another meeting was arranged for August. In April, 1955, if Defendant could have shown the colour of his money, I would still have recommended an extension. I would put the important date at May 9th., 1955. From then on we had lost faith. We intended, if site was recovered, to offer it again as a hotel site. We agreed with Defendant in 1952 not to offer another site within one mile of this site for twelve years. The kind of hotel wanted must be in centre of the City. Defendant is still in possession. Mr. Horner is in bed with jaundice.

Cross-examination.

Cross-examination: The value of land in plaint was not given by me, it was given by one of our Valuation Officers. Unless I was advised differently by my valuers, I put value of land at £250,000. This was not first occasion on which tenders had been called for for this land. I believe the first tender was on 9th March, 1948. Site is the site referred to in G.N. 453. Stand premium £24,000, ground rent £4,800 per annum. Tenderer to spend £5,00,000 on hotel. 50% to be spent in three years and current rent spread over four years. There were no effective tenders. I believe tenders were invited again by Notice 1998/ 4th October, 1948. No stand premium, no ground rent for first five years. £500 per annum over fifteen years, balance at £1,000 per annum. £2,500 deposit was required. Seven storey building. Half in three years and remainder in five years. At this time Officers of Department were leaving their job.

In the Supreme Court of Kenya

Plaintiff's Evidence

No. 6

Frank Edwin Firminger

Cross-examination - continued.

No effective tenders were received. In present tender we did not require guaranteed capital. All we wanted was general statement of resources and a banker's reference. We got a statement of assets as known to the bank. I investigated it as far as I could. We listed plots which he owned and which we could check that he did own. I do not remember if we checked for encumbrances. I suspect that I knew that the plots belonged to Defendant. I imagine I checked for encumbrances. I was impressed by his father's position and the fact that his father had promised support. I think we accepted Defendant's figure £827,000 as value of Defendant's property. We would not have accepted unless we were satisfied that he was in a financial position to carry out the programme, that is that he appeared to me to be a man who could build building six storeys, over value £350,000. I was satisfied that he was such a man. In 1954 valuation was reduced to £110,000. It was later reduced to £87,500. I did not know that Department's valuer put it at £8,900. I do not know if valuation at £87,500 is under appeal. There is no final project for Government to build another hotel. Government is considering it. I only know by hearsay that Government is considering building a £1,000,000 hotel by report attributed to Minister. I do not think such a hotel would affect value of this site. As to claim for mesne profits, the man in occupation would have to build a hotel to get any income from it. He cannot assign or sublet, he could only sell soil he dug out from excavation of foundations. Lugard No. 4280 is on opposite corner of Lugard Avenue. Grant was made on 12th December, 1952 in respect of that plot. Grant provided that buildings would be erected within three years and final plans for that plot were not offered until 31st October, 1954. (I take Mr. Salter's words for that). It is about right. I would accept it building only started in February, 1956, that is after grant expired. Effectively we have extended the time. In several instances of sites in that area, extensions have been granted. Officers in Department sometimes call these grant leases. They have certainly called conditions covenants. See letter Exhibit 1. page 82 paragraph 2, as to lease and Exhibit 1. page 86, lease and covenant and Exhibit 1. page 94. In practice lease and covenant have been used indiscriminately in the correspondence. Legal advisers were not consulted before

NOTE Exhibits above mentioned not transmitted.

notice (Document 20, p. 172) was drafted. This notice was given in order to found a right of action. (Refers to covenants in lease to lessee and to Section 83). About twenty or thirty cases have been brought to Court in last three years by Department for possession for breaches of special condition. In each case a notice in form Exhibit 1, page 101, was served to found action. They were all based on that form. As far as I know, as a matter of practice in such cases grant has been treated as lease and condition as a covenant. Whenever Crown has entered into lease of Crown lands, practice has been to draft document as a grant. In form B.1. or B.2, under Registration of Titles Ordinance, a private person granting a lease would do so according to paragraph (h). You would have no title to leasehold from Crown unless there was an original grant or an agreement to issue a grant, that is where survey not completed. Buildings on the plot were somehow acquired by High Commission. They were on Kenya Government's land. Kenya Government could demand that they be removed or they would have nothing of them. I gave High Commission notice to vacate on 15th October, 1952. I thought I had given Bashir the buildings by virtue of giving him the land. If Defendant had said he would not agree to buildings being occupied to 15th October, I would have delayed grant till after 15th October. I would have done all I could to get High Commission out by 15th October. As far as I know, it was for the Defendant to remove the buildings any time he liked. Bashir was quite agreeable to their staying. I wrote letter Exhibit 1, page 11. I think I was writing all this as a Kenya Government Official. I did not regard myself as responsible for seeing that Directorate of Civil Aviation got out. I gave the land to best of my belief, without restriction. Bashir was willing, but if he had come to me and said, 'get these buildings off', I would have considered it my business to get them removed. The situation did not arise, so I was not obliged to consider it. My position was that Bashir and High Commission were in agreement up to 15th October. If they had not been in agreement I would not have issued the grant. I cannot say what I would have done had the situation arisen. My understanding was that Defendant did not want the buildings vacated until he could make use of them himself, which could not be for about six months. I had given him the land without restrictions as to possession, except the

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Plaintiff's Evidence

No. 6

Frank Edwin Firminger

Cross-examination - continued.

exchange of letters that referred to October 15th. Area of land occupied by those buildings was about 10% of the plot judging from an air photograph. We have a system of transferring aerial photographs to cadastral plans and from such a plan I estimate area of the buildings was 10% of plot. As to Exhibit 1, page 36 I have no knowledge of Kenya Government being interested in the buildings.

I went with a surveyor, Mr.Whitaker, in Lands Department. He is not a qualified surveyor, to measure encroachment of the Labour Department building. The line of the beacons did not come under the awning by six inches, it was not two feet, seven inches. Beacon was not under floor of the building; one man stood on one beacon and another on the other. The plot was about one hundred and sixty feet long, but Labour Department was nothing like as long. Defendant was digging foundations on exact boundary of plot. There were discussions about the plans after tender and before grant with Defendant and also with Jackson and Hill. There was no stipulation at that time for a car park. In advertisement, we asked for detailed proposals for development of site. Arrangements for car parking would be one of the essentials. G.N. 453/48 required car parking one hundred vehicles on the site. October notice had that requirement, plus entrance to be set back and similar arrangements for tradesmens' vehicles. G.N. 910/52 deliberately omitted requirement of car park for one hundred vehicles on the site. The provision of car parking played considerable part in amendment of plan later. He had proposed underground car park and garages; I understood it to have been in original tender and it was fundamental factor to its acceptance, see Exhibit 1, page 8. No delay was caused by me by requirement of car parking in excess of that in tender. I cannot say what City Council's requirements were. It appears that a good deal of time was taken up on revision of car parking. Paragraph 3 of Exhibit 1, page 59, sets out our position if he had refused to supply car parking for more than residents. We would have asked him and sought a reasonable compromise. That would have taken about fourteen days. Minister of Lands and Minister for Local Government were then in the same chap. We did not like increase of number of shops. We wanted hotel to which shops might be an adjunct and not vice versa. There is a

NOTE Exhibits above mentioned not transmitted.

great difference between a spacious shop and a shop that is not spacious. I think he would get more rent for two small shops than for one large shop. The 1954 design showed approximately same total area for shops as the original one. I think twenty three shops would provide reasonable service to hotel. Fifty shops would make it shopping centre without regard to hotel.

At end 1952, preliminary sketch plans had been produced. I would not know when they were submitted to Council. Bashir was not anxious to start excavating for foundations till 1954. My understanding was that he wanted to keep buildings there till last possible moment. I see that he was asking for permission to put up a hoarding round the plot. He could get his plans prepared without area being enclosed by hoarding, but he could do nothing physically. It was through our good offices that he got permission to put up hoarding. That was in June, 1955. We knew he was excavating. We knew he could not do that without hoarding and we helped him to get the hoarding. We would not have cared whether buildings vacated in July, 1953 or not. If he had his building plans ready it would not take him two and a half years to complete the building. I think procedure is to produce sketch plans and discuss them with City Council and then go on and prepare working plans. Working plans were not prepared by July, 1953. There were negotiations for buildings to be allowed to be used for storage of material. It was refused. Then the buildings were requisitioned. We were sent copy of notice. We knew that physical work was then out of question. Had plans been ready we would have made representations. Buildings occupied from October, 1953 to July, 1954. If I had been determined to get a hotel up, I would have got one up, Police or no Police. When we got letter Exhibit 1, page 51, I knew that Lugard Avenue was never intended to go right through. I could not see necessity for alteration. Lugard Avenue goes right through now, but it is not to continue to do so. Defendant had taken a new decision to draw new plans. If City Council would agree, and he wanted to change plans, I would not have objected. There was a published final street plan of the area. I think we said if Council agrees, we will agree. We were still trying to accommodate him. As to Exhibit 1, page 54, I was present at the meeting; our letter page 55, makes it clear we

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Plaintiff's Evidence

No. 6

Frank Edwin Firminger

Cross-examination - continued.

had not approved. Page 55 makes our position clear, our position was "provided City Council agrees we do not mind". That was fifteen or sixteen months or so within end of period for building. To make changes envisaged at 24th April, would involve three or four months work before physical work could start. At that time we would have granted extension if Defendant could show colour of his money. I had doubt in my mind. So far I had put nothing in writing about my doubts. In May, question of car parking came up. I agree there were possibilities for delay thereto. My doubts had chrystallized by 23rd July. See Exhibit 1, page 64; we wanted to know that he had finance to put up the building and that he had his plans ready and clear in his own mind. I had made enquiries which led me to suppose that his financial position had deteriorated. My enquiries did not lead me to conclude that he had acquired more property. I probably knew he had acquired property in Salisbury Road, Ainsworth Bridge area. I took into account the overall information I got. I understood that he had quarrelled with his father and no longer had his backing. I cannot say at this distance what detailed things I took into account. All I had heard were rumors so the Defendant asked to say what his position was.

I believe it was sketch plans not building plans that had been submitted to Council by 23rd July, 1954. I was on leave at that time. On 3rd. September, 1954, we were prepared to grant extension subject to being satisfied as to matters stated in Exhibit 1, page 67. Exhibit 1, page 59, contains Defendant's interpretation of the history to 11th September, 1954. I think he got vacant possession on 1st September, 1952. Had he gone in on 16th October, I could not have said a word. The dates in Exhibit 1, page 69, are right no doubt. I think he expected to have plans ready at end of year. Last paragraph page 69; first paragraph page 70; second paragraph page 70 are probably correct, but I had nothing to do with these matters. The delay sprang entirely from his temperament and his way of going about it. Letter sets out history pretty correctly, except for question of possession. As to page 73, Exhibit 1, essential point is full particulars showing you are in position to carry out development. As to Exhibit 1, page 89, what we were asking for was sight of first £350,000, not imaginary later expense. We wanted to know his

NOTE Exhibits above mentioned not transmitted.

plans and that he was in position to build in accordance with them. In 1953 we thought he could manage £350,000. I would have recommended extension if he had provided financial details and agreed to development stages over two and a half years. Where we believe a man is going to build and has money to build, we do give extensions. For several plots in City Square grants have been issued on similar conditions and work has not begun. Extensions were given. Out of about ten plots only three have ever been developed, but some of the plots were sold this year. In two cases building period has expired. Seven plots were granted at same time as Defendant's on similar conditions. Two have been surrendered. In three, extensions were granted. Case of another is under consideration by Government. Two were slightly out of time, formal extensions were not considered necessary. Cargen House plot is about quarter size of this plot.

Stand over 10.30, 10th December, 1956.

10th December, 1956

Appearances as before.

1. P.W. Cross-examination continues:-

I think it would be true to say that in 1953 all persons erecting plots in City were affected in some degree by Emergency. In 1954, I should say it was more or less back to normal. Building graph in City increased it never fell, but in 1953 it was not so much. In 1953 rate of increase slowed down, but it never fell as compared with year before. If Government had been satisfied of Defendant's financial condition we would have agreed to extension at any time up to May, 1955, if he could have convinced us. We always ask for bank reference at the outset. Letter Exhibit 1, page 94, we suggest bank guarantee. We had not asked any other owner in areas on building to supply a bank guarantee. What we had in mind was that bank should guarantee that arrangements had been made for the finance to become successively available as required. I think we would have had to arrange overdrafts against assets acceptable to the bank. I have known bank to make such arrangement with developers. August 1955 was not beginning of the

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Plaintiff's Evidence

No. 6

Frank Edwin Firminger

Cross-examination - continued.

credit squeeze. My recollection is that it was in February, 1956.

So far as Government was concerned, the most important factor was finance. We wanted hotel as quickly as possible and if Defendant had the money that would have been the quickest possible. In Exhibit 1, page 6, Defendant deals with companies and trusts in which Sheikh Bros. were interested, and on page 7 he set out properties owned by these companies and trusts. We did not make detailed enquiries into these properties. Most of these properties are subject to equitable mortgage to Barclays Bank for an undisclosed amount. It was on this status that we decided to accept the tender. We ascertained that those properties did in fact belong to Sheikh Bros. under various trusts. We must have enquired as to whether values were reasonably accurate. Valuation Officer of the day would have done that. Salisbury Hotel, Queens Hotel, Azania Hotel and I think Nakuru Hotel were subject to equitable mortgage to Barclays. From memory I would not like to say further as to other properties covered by the mortgage. If neither Queens nor Salisbury Hotels were so mortgaged at that time, my recollection is at fault. As to Exhibit 1, page 9, bankers' reference was sent, it was entirely satisfactory. We received a letter from Sheikh Fazal that he would support Defendant in the project with a banker's reference and opinion that Sheikh Fazal Ilahi was good for any amount. Tender was made by Defendant on his own account and it was made to him on his own account as supported by his father. I expect there was no legal obligation on Sheikh Fazal Ilahi to support Defendant, but we had Sheikh Fazal's letter and a banker's reference better than any I had ever seen. Our satisfaction was conditioned by the letter from his father and banker's reference as to the father. We were profoundly influenced. Later we came to know that there had been a dispute or difference between Defendant and his father. What I did was to give Defendant an opportunity to explain what his condition was. I had not made enquiries about property in Salisbury Road which Defendant claimed to have acquired since tender. I know he had property in Ainsworth Road, Salisbury Road and large property in Eastleigh. The intention of Exhibit 1,

NOTE Exhibits above mentioned not transmitted.

page 73, was to invite Defendant to disclose his position. It may be true that the equitable mortgage was not on Defendants own property, but it was certainly on properties listed in the tender. I do not think that if we knew that Defendant had property of his own to value of £275,000 that that of itself would have been sufficient to satisfy us of his financial ability. It would have had some effect, but I should also have wanted to know that he had made arrangements to sell it. For first stage of the building he would not have required anything like so much. I suppose that if answer to Exhibit 1, 94, was that he had arranged for £100,000 to be made available immediately and £50,000 every three months thereafter, we would have been satisfied. I charged Defendant with having valued land in Switzerland at £160,000 and had tried to do a deal with them on fifty-fifty basis, with him supplying land at valuation £160,000. This was in 1955. He said he had. I said we would not agree to that. Exhibit 1, page 70, third last paragraph was not only conversation about finance from overseas. That and Exhibit 1, page 70 was not the only conversation on this point. I had seen it in newspaper that there had been approach to Colonial Development Corporation.

In September, 1955, notice was given to Defendant under Section 83. In March, 1956, I knew that Defendant had been in consultation with Colonial Development Corporation about facilities, but I did not know when. Mr. Jones told me and he said that the Corporation would not entertain Defendant's proposal. It is the fact shortly after that the Kenya Government became interested in building a hotel in association with Colonial Development Corporation, but the chronology is deceptive. Government and Colonial Development Corporation had decided that Defendant could not build the hotel and they would have to do it themselves. I think that conclusion was principally due to the impression Defendant had made on members of Colonial Development Corporation Committee. Kenya Government decided separately from Lands Department to build a hotel and the way we heard of it is we were asked to find an alternative site. Very recently in the last few weeks a site excluded from the one mile agreement has come back to Government's hands. It was excluded from the one mile agreement because it was already a hotel site. It is opposite Delamere

NOTE Exhibits above mentioned not transmitted

In the Supreme Court of Kenya

Plaintiff's Evidence

No. 6

Frank Edwin Firminger

Cross-examination - continued.

Flats on corner of Ngong Road and Valley Road. It was put out to a man who could not build and who has surrendered the plot. If this application is successful the principal hotel will be on Defendant's site. That would be the hotel to be built by Government and Colonial Development Corporation if their negotiations are successful. I have heard it described as a £1,000,000 hotel. As to Exhibit 1, page 110, in November 1955, if Defendant could have satisfied us on paragraph 7 he would have got an extension. That was after the notice on page 101. I think that at that time Defendant had informed us that he had committed himself to a considerable sum of money. We could see a hoarding and if anyone went inside he could see a considerable amount of excavation going on. As to particulars of paragraph 5 of Defence, we knew that his architect was suing him for his fees and we knew nothing else. We knew he had put up a hoarding. Lands Department helped him to get permission to put up the hoarding. I knew he had demolished part of Directorate of Civil Aviation buildings and that he had carried out excavations. I did not know that he had entered into contracts with structural engineers. I had no reason to doubt it. We knew if he had instructed his architect to put up a hoarding and so on and we issued a warning. I did not know and would need a lot of convincing that he had committed himself to the extent of £60,000. Exhibit 1, page 120, I do not know to what he had committed himself or what he had spent. Plaint was filed on 16th November, 1955. Matter was out of my hands then. Suggestions in Exhibit 1, pages 110 and 111 do not appear to have been considered. We approved plans without prejudice on 7th November, 1955, letter page 114.

Re-examination.

Re-examination:

This is the list, Exhibit 3, attached to Defendant's tender. It is in two parts (1) summary of assets; (2) list of property and assets under different concerns of Sheikh Bros. Ltd. As to (2), I think none of these properties are shown as in Defendant's name. Both (1) and (2) were enclosed with tender Exhibit 1, page 6. We placed reliance on (2) because we had a letter from Sheikh Fazal Ilahi supporting his son. Sheikh Bros. Ltd. were owners of vast properties which, in my opinion, were mismanaged. They seem unwilling or

NOTE Exhibits above mentioned not transmitted.

unable to mobilise their resources. I told Defendant at that time that he would have to mobilise this property to build the hotel. If he had told us he had bought property we would have thought that the money would have been better spent in building the hotel. We asked him several times to satisfy us as to his resources. He never did so satisfactorily. We considered the burden entirely on him. When the grant was made Defendant agreed Directorate of Civil Aviation should occupy buildings till 15th October. We gave possession on that basis. We had no locus standi after that. We had handed over the land without restrictions. We could not do anything after that even if we wanted to. Defendant has received different treatment from anyone else; he paid only £1,000 for land. Lugard House paid £6,000 and £1,200 per annum rent. All other grants in area were granted on full economic terms. Offices and shops pay a higher return. £40,000 would be the stand premium for this plot for use as shops and offices. £1,000 is the stand premium we charge for use as hotel. The difference is more than the economic difference but was considered desirable in order to secure that somebody took it for a hotel. K.F.A. got plot nearest Railway Station, failed - then paid £5,000 and £1,000 for rent for two years and they surrendered. M.D. Puri got a small plot - paid £2,100 stand premium and rent at one-fifth of that for two years and he surrendered. T.M. Patel surrendered out before he paid for it. Lugard House were granted an extension; they showed that they meant business, convinced us they had capital, got plans approved and have built. Pioneer General Assurance Company got an extension. They employed, in my opinion, wrong architect and there was long delay in getting plans approved. Jackson & Hill are not wrong architects for this job. Other buildings, except one, were for shops, offices and flats. Exception is an annexed plot and extension is being considered. If Defendant had satisfied us, he would have got an extension. Provisions of shops, offices and flats was not regarded as urgent at all by Government, especially on this site. Mr. Whitaker came with me to inspect encroachment of Labour Department. He produced a plan. He is a practical surveyor. This is the plan, Exhibit 4, (admitted by consent). Eaves, one foot wide, projected approximately six inches into Defendant's side. There was a theoretical encroachment of less than eighty square feet.

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Plaintiff's Evidence

No. 6

Frank Edwin Firminger

Re-examination - continued.

Exhibit 1, page 6, is Defendant's detailed proposals. They were accompanied by a sketch plan prepared by Jackson & Hill. We knew who were the Architects and I remember telling Defendant that it was his architects, not he, who had been successful. We gave weight to Jackson & Hill as architects. City Council attached weight to proposal for limited parking space. On strength of this, City Council representative and Town Planning Officer voted for tender. As to Exhibit 1, page 54, deletion of parking in building was a major departure. We were opposed to it. We agreed there was parking space available nearby, but that was no reason for Bashir to provide none. In Exhibit 1, page 54, O'Loughlin disagreed with page 54. Defendant's plans did vary from plans accompanying tender. Exhibit 1, page 56, the proposal to have sixty shops was serious, it changed site to a shopping centre. Original plans provided for twenty three shops. Twenty three shops could be seen as adjunct to hotel. Hotel would have to be seen as adjunct to sixty dukas. Twenty three shops were all on ground floor. Sixty shops were on two floors. This was a fundamental change. It came entirely from Defendant. We wanted a luxury hotel and it was agreed that every bedroom should have a bathroom, see Exhibit 1, page 14. In Exhibit 1, page 56, Defendant suggests outer rooms to have no bathrooms. Amendments like this would involve redrawing the plans. It was Defendant's responsibility to get plans done. Plans ought to have been ready by about August, 1953 if the hotel was to go up in time. There was no time to be lost. Mr.Hill was member of Town Planning Advisory panel and would have been well aware of the intention regarding Lugard Avenue.

At end of 1954 when I saw nothing had been done on the site I doubted that Defendant would be able to carry out the plan. We wanted something supported by his bankers to effect that his resources were in a state of mobilisation directed towards the hotel. If we had got that we would have recommended an extension. We did not get it. After correspondence with Morgan we saw nothing either as to £300,000 or £800,000 or the difference. My knowledge of "Mr. Vasey's £1000,000" hotel is from East African Standard. If Defendant had satisfied us on the four matters on page 111, we would have withdrawn the action. As to Exhibit 1,

NOTE Exhibits above mentioned not transmitted.

page 120, other than that letter we had no evidence of those two matters. If it was proved that he had committed himself to 1,201,590/-, we should still have required proof that he had the other half million or so required to put up the hotel.

G.B. Rudd.

In the Supreme Court of Kenya

Plaintiff's Evidence

No. 6

Frank Edwin Firminger

Re-examination - continued.

DEFENDANT'S EVIDENCE

Defendant's Evidence

No. 7

No. 7

EVIDENCE OF SHEIKH MOHAMED BASHIR

Sheikh Mohamed Bashir.

1 D.W. SHEIKH MOHAMED BASHIR: sworn

Examination.

Company Director and Landowner. About April 1952 my attention was attracted to notice inviting tenders for this site. This was the third invitation to tender. I had not submitted any previous tenders. I considered tendering for the site. I required more information. I wrote letter Exhibit 1, page 2. In my mind position was that as and when hotel started, the capital was required in a steady flow over three years during period of erection. I would not have tendered if whole capital was required immediately on tender. I consulted Jackson and Hill and asked them to draw a design of a hotel as required under the tender notice. I gave instructions as to what my own requirements were. They only had one month to work out a design to be submitted with tender early in July, 1952. I submitted tender on 7th July, 1952. Then I was called by Land Office for discussion early in August. I saw a Board of three or four members. They required a bathroom to each bedroom and that reception hall be on ground floor. That is a complete change from the design which I submitted with tender. That design had only a passage for passengers to go into the building and go to first floor where they would be attended. The passage went from Lugard Avenue to Sergeant Ellis Avenue. That was based on plans given me by the Commissioner of Lands on 18th May, 1952, Exhibit J. It was a plan

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Examination - continued.

made according to the tender notice. Passage was to run through centre of building at right-angles to Lugard Avenue. I said I was agreeable to the Board's conditions:- (1) Reception to be on ground floor; (2) each bedroom to have a bathroom. There was no question of agreeing to occupation by Directorate of Civil Aviation; it was a condition by Mr.Firminger that Directorate of Civil Aviation should occupy the land and they would remove by 15th October, 1952. I thought Directorate of Civil Aviation was a part of Kenya Government. At the stage when my tender was accepted the plot was unsurveyed except that I knew I was getting approximately 160' x 315' of land situate there. As I was going to erect a hotel the buildings could be useful to me for storing building material, excavation material, etc. I wrote to Directorate of Civil Aviation about the buildings. I thought that by offering for the buildings I would save time. If they were sold by tender it would take six months. I took it that it was the responsibility of the Lands Department to give me possession of the land. I instructed Mr. Hill to prepare alternative scheme as required by Commissioner of Lands. I could not interfere with the property because possession was not with me. I asked my architect in December, 1952 to obtain permission from City Council so that I could start work on excavating basement, as excavation work could be done on unoccupied land at that time. Such permission was not granted. Buildings occupied about 60% of my land. Correct figure 28,800 square feet; I measured the buildings. 316 feet by 160 feet was area of the plot. This is a sketch which I made on the site. It is very rough. It shows buildings on the plot. It shows measurements of the Directorate of Civil Aviation building, Exhibit K. I saw the revised scheme but it was not to my satisfaction as reception space on ground floor was too small to control a crowd of six hundred people and it was not a better appearance and there was less space in front for setting down passengers from cars. Exhibit 2 are the revised sketches which I agreed in principle, but the facilities which I required for a first class hotel were not there. I got them on 15th January, 1953. On 18th February 1953, I wrote to High Commission, Exhibit 1, page 26. No reply was received as regards vacating of premises. Emergency had been declared at end of 1952 and having emergency on the mind I thought

NOTE Exhibits above mentioned not transmitted.

there was nothing I could do except leave the thing to the pleasure of Government. Once I spoke to someone in Civil Aviation, Mr. Winship. Directorate of Civil Aviation got out somewhere in March 1953. There was correspondence later. After they vacated in March, 1953, I got letter dated 2nd April, 1953 Exhibit 1, page 31. In April, 1953, my own scheme for development was completed. Mr. Hill, my architect, was booked to go to U.K.

1. Excavation permission was refused.
2. Buildings not vacated.
3. Emergency was declared.

I hoped that my architect would make plans and submit to Council for preliminary approval in a few months. I wrote to Mr. Nancarrow, Exhibit 1, page 34, on 1st April, 1953. That letter was correct as far as plans were concerned at that time. K.P.R. Headquarters occupied the whole building which had been occupied by Directorate of Civil Aviation. They did not vacate at beginning of June. I wrote to High Commission and got reply Exhibit 1, page 38. I agreed to buy buildings for £200, see Exhibit 1, page 37. Buildings were to be used for storing tools and materials until I got my hoarding up, when they would be destroyed. I wrote letter Exhibit 1, page 42, asking for buildings to remain on plot for storage purposes. City Council refused, see Exhibit 1, page 43. I renewed my request, Exhibit 1, page 45, and it was refused, Exhibit 1, page 49. Meanwhile I had this served on me, notice Exhibit 1, page 48. Notice ordered me to give vacant possession forthwith. I complied. Those buildings remained out of my possession until June, 1954. So far as I know the Police occupied them. I had no derequisition notice. I wrote to the Officer Commanding Nairobi Extra-Provincial District on 1st June, 1954. I wasinformed by Mr. Lambert that buildings were not in use. This is the letter to Officer Commanding Nairobi Extra-Provincial District, Exhibit L. I was not asking for rent, it was compensation for expense which I had incurred for rates and ground rent. This is the reply, Exhibit M. I received no notification from Kenya Government or Kenya Police that premises had been vacated by Police in November. I took up the question of compensation in this letter Exhibit N. I took up the matter and they compensated from 8th October, 1953 to June, 1954. I was paid in

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Examination - continued.

October or November, 1955. There was another building occupied by Immigration Department and Labour Department. It was at the far end of the plot towards the Law Courts. The buildings were on cedar poles. There was a protrusion of eaves of about one foot, seven and a half inches. I measured it myself. I have experience to measure such things. I asked a photographer to take a photograph of those buildings while they were being demolished by P.W.D. My beacon was beside the cedar pole at one end and the building encroached about one foot there.

The plans were approved in principle by City Council in June, 1954 and architects were working on the working drawings. As to Exhibit 1, page 62, comments; all the comments were agreed by me and they were taken into consideration in preparing the final working drawings for the building. Exhibit F were the ones that were approved in principle in June, 1954. They then asked me to appoint structural engineers and I instructed Peter Amcott and Partners. They started working on the working drawings. They planned to be able to put to tender in March, 1955. The tender plans were merely a design. Plot was then unsurveyed. Later the plot was surveyed and we knew exactly what land was available. Plans in December, 1952 wasted so much land which could have been utilised by a better designed building. There was waste space under the terraces and there was waste in service area. Next sketches, Exhibit D, gave entrance to service area from Government Road. Shops were set back ten feet to fifteen feet both sides from boundary. Entrance from Lugard Avenue and Sergeant Ellis Avenue did not have enough space to let cars come onto my plot and move out. I wanted to utilise full area for development and cut out entrance to service area on Government Road. I have travelled a lot about the world, except the States, and all the main hotels have their entrances off the main roads, e.g. London, Paris, Belgium, Switzerland.

The next scheme which I prepared was a design to have entrance from Government Road and remove service area from the ground floor and put in into the basement, and provide basement for each shop which would increase area of each shop. In this design - it was due to the design - that I got thirty-eight shops on ground floor. But new feature was, I reserved 70,000 square feet more for cars to move in from Government Road and out

NOTE Exhibits above mentioned not transmitted.

through Sergeant Ellis Avenue. The area is over an acre; ordinary plots in City Square are about a quarter of an acre and have twelve to fourteen shops in about a quarter of my area. The idea was to have several shops of the same kind, such as jewellers, but not all together of course. The tender design showed no entrance, just a mere passage to lift. My architect advised that best entrance was from Government Road, with outlet to Sergeant Ellis Avenue. Exhibit J did not indicate that Lugard Avenue was going to stop next my building and it was only in November, 1953, that I saw that Lugard Avenue was to be closed. This type of hotel could not be in a closed road. I had not appreciated that Lugard Avenue was to be closed. It has been there for last ten years, fully open and tarmac-ed. That was one of the two factors that induced me to change entrance from Lugard Avenue to Government Road. I made that decision in November, 1953. When I made that change there was an increase in the number of shops. It was due to change in design of building. Service area was converted to a cellar. Original scheme was wasting some land. It was reasonable to do that. There was a shopping arcade in revised plan, ran from Sergeant Ellis Avenue to Lugard Avenue. It fitted in very nicely as I had entrance coming from back of my reception hall. A passenger from Sergeant Ellis Avenue or Lugard Avenue could come into the hotel along the arcade. It is "Z" shaped arcade with extension along to Government Road. There was easy access. Ground floor was largely shopping centre with large reception area and provision for cars to move about. I disconnected the parking programme at early stage in April, 1954, when Council commented on it. When we came to details of basement and found large area was required for hotel storage, we could not fit in any parking facilities in basement. I also heard that three large areas were reserved as parking space near the hotel. I considered that there was more parking available in City Square than there is at present in Government Road or Delamere Avenue. Parking was completely not put into the plans and secondary consideration was given as to the revenue that could be expected which was negligible, but main consideration was that there was not enough space available in the basement. Garages were cut out when I understood that petrol pumps would not be allowed in front of this hotel. When Exhibit 1, page 52, was received, to meet wishes of City Council and to avoid delay

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Examination - continued.

for another year before agreement could be reached, I instructed architect to have parking on first floor and centre of building could be used as shops, That was done in sketches F which were subsequently approved in principle. I never had in mind providing parking for sixty cars, at most I had ten to fifteen in mind. Mezzanine floor provided greater area than would have been given had car park been in basement. It had never been suggested before that I would provide parking for sixty cars. No basement plan was submitted with the tender. Apart from what is in Exhibit A, there was nothing else about a garage except for the Exhibit 1, page 6. My idea was a garage for oiling and greasing in basement. Exhibit B shows space for basement garages, etc. The sketches at that time did not show storage space on ground floor or above. Nobody suggested that provision for car parking was inadequate. In April, 1954, when I took my plans (revised scheme) Exhibit E, they agreed that there was adequate parking in the vicinity and it was my suggestion that in view of possibility of change in twenty years or so I would be ready to take another plot for car park.

On 7th April, 1954, I had discussion with Mr. Firminger and Mr. Horner, as these plans were returned by City Council and I was told to get permission of Commissioner of Lands before they could be approved. See Exhibit 1, page 53. Post script shows reason for the discussion. Eventually I got letter saying that if I could not get Council to agree I should come back to Lands Department. Then I decided to increase capital expenditure and put in mezzanine floor. Towards end of 1953 I submitted enquiries to London confirming houses, putting proposition that I would be requiring about £200,000 building material, but putting condition payment was to be 30% or 40% cash and balance over five years. That is normal in deal of such extent. One of my confirming houses, Robert Eden and Co. Ltd. approached Colonial Development if they were interested in this facility. I had information from the confirming house. I saw Mr. Norton who was looking after Colonial Development Corporation in Nairobi, who said that if Kenya Government confirmed that there was a priority for the hotel Colonial Development Corporation might be interested. Further interview was held with Adams of Commerce and Industry and as result letter Exhibit 1, page 56 was written by me on 26th April, 1954.

NOTE Exhibits above mentioned not transmitted.

That was my initial step towards provision of building material. Commerce and Industry never even replied to my letter and nothing went through.

In letter Exhibit 1, page 69, 70, at 70 I had received offers of material for shipment, steel bars, windows, paint, other building material, I could not place firm orders for specific quantity because the plans were not through. Every time when plans were submitted the Council raised new points; preliminary plans had been approved. I had not placed firm orders. I had offers for material on which I could have placed an order any time I wanted through my London agents. There never was a discussion about a Swiss group or any other discussion regarding disposal of a share in the property except that I might have to give security if I was allowed to pay balance of costs of materials over five years. I never thought of any suggestion of co-operation with a Swiss group or putting in the land at £160,000 for purposes of any deal of that kind. The only suggestion was to the confirming houses in London and the Colonial Development Corporation. I might have mentioned Colonial Development Corporation to Mr. Firminger. That is £140,000 for balance of material, that is a total of £200,000; 30% cash equals £60,000; balance £140,000 payable over a period.

Items set out in schedule of various properties and assets under different concerns of Sheikh Brothers etc. in Exhibit 3 was sent as appendix A to letter started Exhibit 1, page 5. In April, 1952, Kedai Fibre Estate was taken over by me personally from Sheikh Brothers and became my property. Paranga Sisal Estate was taken over in 1952 by me. In 1953 first item of merchandise, balance approximately 30,000 pairs lorry chains were taken over by me. Schedule was made in 1951 as complete assets of a family. There may have been small sale of lands from May, 1951 to May, 1952. Appendix B in Exhibit 3 is a summary of my personal assets, it was sent with same letter. It shows Kedai and in that Kedai really includes Paranga as well. Then I show list of shares all Sheikh Brothers of subsidiaries. Market value would be slightly less than £64,000 today, due to bad management. In 1955 value was £64,000. Loan to Sheikh Brothers is now not only £4,000; it is something like £21,000. My assets were £302,000 as shown on page 1 of appendix B. Items on following pages was capital available,

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Examination - continued.

over a period of three years estimated £879,000. There was nothing incorrect in appendix B when it was submitted in 1952. Between date of that letter and acceptance there was no query on the appendix, no inquiry was made to me personally. I would have answered any question that might have been asked concerning any item of these schedules. See Exhibit 1, page 9. Bank did not discuss reference with me. They agreed to send a reference. I did not get a copy. I said that Sheikh Fazal Ilahi and/or Sheikh Brothers were prepared to join in the tender. I was not asked to get that confirmation. In 1955 my assets were far greater than those listed in appendix B in 1952. Increase started over a period in 1953 and 1954. I bought machinery in 1953 and also property and I bought property early in 1954 and at end of 1954. These are surplus machinery on the plantations which could be sold due to purchase of new machinery. I have had my assets valued by a valuer, Mr. Tisdale Jones during last weeks. This is a list of the expenses which I have incurred in connection with this site. I prepared it myself.

Stand over 13th December, 1956 at 10.00 a.m.

G.B. Rudd.

13th December, 1956

Appearances as before.

1 D.W. continued:-

I have prepared a list of my expenses and commitments in respect of this plot. This is it, Exhibit O (admitted by consent, but truth not admitted). It comes to £55,421 already committed. Some figures are in dispute, that is claims by City Council. I had put in amount of claim. Stamp duty was paid. Jackson & Hill were only paid £1,000, balance is in dispute. If building is completed, they are entitled to £30,000. If the building is not completed and if the scheme is abandoned, they may be entitled to two-thirds of the fee but that is subject to terms of the contract with Jackson & Hill. Amcotts & Partners have been paid £1,150 on account; if building goes, then I have to pay their fee and if building does not go up I have to pay £3,600 for plans; £1,300 is their fee for supervision of six story building. I paid for model. Test holes have been paid for.

NOTE Exhibits above mentioned not transmitted.

Deposit of Plans fee has been paid through Jackson & Hill. Site value tax 1954/55 is disputed; appeal is pending, but I have paid £2,303 on account. Land Office registration and three years' rent have been paid. I have paid rent for 1954 also. Legal fees do not include this case. Fordson tractor was brought from Kedai Fibre Estate to be used for hotel excavation, it worked three or four months. Same applies to trailers. Estate bought tractor for £825 six months earlier, I consider £700 fair value. The transaction has not been entered into the books. Ripper loader and plough came from estate. £250 worth machinery was bought in Nairobi, balance was from estate. Austin tipper and Albion lorry were bought off ? I paid 40/- for supply of electric power. First two and a half feet was black cotton soil. Then there was hard Magadi for about four feet and below that light Magadi. I had a general quotation from Market quoting in region 30 cents to 50 cents black cotton soil, and 55 cents to 70 cents for Magadi. I did not enter into contract, I started excavation myself and excavated approximately 338,000 cubic feet. I calculated 126,000 cubic feet black cotton at 40 cents a cubic foot, using my own machinery and labour. I measured the quantity in November, 1955, taking average eight feet one side, four feet on other, making allowance for unexcavated parts. I then apportioned two and a half overall for black cotton soil, and balance Magadi came to 212 feet. I used my own lorries and hired lorries, some Magadi was given free, some dumped. I may have got about 2/- a load for a few loads. I got about £5. Black cotton soil cannot be used for any other purpose. Magadi could be used if there is a demand. When a person is constructing he cannot have Magadi on plot. Some corrugated iron sheets were used from my own store, some from outside. Second hand corrugated iron sheet is about 1/25 to 1/50 per running foot. Hoarding sheets have no value on the plot except to provide secrecy. It does not matter if they are new or secondhand, they serve one purpose. 2/25 to 2/40 was price in 1955 per running foot of 2 foot sheet. There is over 1,100 running feet of hoarding and at 6/- that would come to 6,600/-, but I do not accept 6/0 a foot. I consider that figures in Exhibit 0 for hoarding and stores, etc., are reasonable. They are below what I was quoted by a contractor. It should be £750 for hoarding and £1,000 for offices, stores, etc. Lorry takes eighty cubic feet. No one would

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Examination - continued.

take lorry two miles to load and discharge black cotton at 5/60 a trip. Nowhere in the world could you get that. If I am granted relief claimed I am quite prepared to start construction immediately, that is in a month.

City Council put a new restriction when my plans approved, reducing mezzanine floor by five feet on each side and also requiring shops to be let with the ground floor, that is ground floor shop and first floor shop to be let to one tenant instead of two. I have about 4,000 cubic feet approximately more excavation to do. I was prepared to go on the basis of the plans as approved, accepting five feet reductions on mezzanine floor and conditions as to shops. Building programme would be in three stages. Stage one would be ground floor and cellar on Lugard Avenue side. Stage two would be the like on Sergeant Ellis Avenue. Pillars would be started on after stage one, concurrent with stage two but would be finished with stage two. Stage one would take about nine months. Stage two would take six months perhaps less. The six storey building would be completed in one year and nine months. The whole building would take me three years. It is common practice and in case of City Council their own extensions is not complete but it is partly occupied. Agriculture House is not completed, but part is occupied. I could let shops on ground floor stage by stage as stages one and two were completed. I am a contractor; my original business was a contractor when I started in business. I would be my own contractor. On page 11 of Exhibit 1, I was asked about four points. If I was not to be allowed to build by direct labour, I would not have taken the site. I have experience of building. I have erected buildings in Nairobi. There is no point in me looking for Contractor when I know the work. Reputable firms engage supervisor. Clerk of works. I can bring those people, I can get them just as they can. I was committed to Jackson & Hill and structural engineers on question of supervision. I would be prepared to complete certain work in certain times. I consider the suggestion that I should undertake not to let the shops until hotel completed is quite irrelevant if building is completed in reasonable time. Government should not place such a restriction. I have myself received plans from City Council, myself, and in none is there a provision

NOTE Exhibits above mentioned not transmitted.

that certificate of occupation will not be given till building completed according to plans. I have plans for six storey building I want full development so that I can build higher later, but I cannot do that unless foundations are strong enough for whole building. In Exhibit 1, page 94, I was asked to produce a bank guarantee. It is a most unusual condition to ask a developer to provide a bank guarantee. I would have to deposit £350,000 with the bank before they could issue the guarantee. It is not at all a practical proposition. I might as well deposit it with Mr. Horner. I have worked out a calculation. There is more excavation to be done. Cost to completion of stage one at 40/- a square foot comes to £53,136, say £53,000. Stage two will cost a further £53,000. If you like, say £60,000 for each stage, (one and two), say £110,000 over fifteen months. Balance would cost approximately £260,000 for a six storey building, about £12,000 to £13,000 a month. Normal credit in the country is three months. Even importing is ninety and one hundred and twenty days bills. Arrangements could be made with suppliers, if I use all their materials they entertain facilities in payments. I have property in Nairobi which I am prepared to sell. My valuer has valued at about £70,000. I estimate it at £96,000. It would be a matter of two to three months to sell it at most. A property could be sold in two to three weeks, the only thing is one would lose 5% to 10%. It is encumbered for small amounts. I am prepared to sell everything I have to erect this hotel. I am prepared to sell my Nairobi property immediately. I have machinery surplus on the plantation which I value at £60,000. I had about 30,000 pairs approximately skid-chains which I value at £8,000. The valuer has made estimate. By selling Nairobi property I would complete stage 1 and half stage 2. Selling machinery and chains would take me to centre floor in third stage. At that stage there would be revenue from the shopping centre on ground floor. I estimate it at about £85,000 a year. Once leases of shops are there I can go to a bank and/or insurance company and raise money more easily. But when I complete stage one and stage three with machinery and chains I will be able to go to first floor of centre block. I am prepared to sell Kedai Fibre Estate and meet requirements of hotel building. I am completely ready to sell everything I have to complete this six storey hotel. I consider this is the most

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Examination - continued.

important building as far as I am concerned to be erected in Nairobi and I am giving more time to development of this building than to the rest of the business. My family is very rich. I have a number of shares in different concerns and it is normal whenever one member of the family requires money, he can simply go and meet his requirements. My financial condition has not at all deteriorated since 1952. it has increased since then. There has been no change in my intention and desire to build this hotel. The changes which have been made were actually required for a luxury hotel. I was second person to start excavation in City Square. I have asked time after time from City Council and Commissioner of Lands that my work of excavation required six months, as it is the only building in City Square which has a basement of full development.

Reasons for the delay in erection of this building were (1) Commissioner of Lands placed condition that lounge should be on ground floor and each bedroom should have a bathroom (2) I was not allowed to enter until 15th October, 1952; (3) Possession of the land was not given to me by the Land Office. I asked Jackson & Hill to apply for hoarding and excavation permission in 1952. Permission was not granted, although permission was granted to cinema plot before plans were approved and it has not yet been developed; (4) Emergency declared in October/November, 1952. Most developers were considering over their commitments; (5) I could not employ another architect in 1953. I was expecting Mr. Hill in three or four months. He had studied site from May to June. Giving matter to another architect would involve a fee and copyright question might crop up; (6) As Lugard Avenue was closed next to the plot, I had to redesign whatever I had worked.

Then my architects worked with full speed to complete the plans, but they were commented on as to this and that. It is common practice, even when preliminary sketches are approved, there are comments on final plans. I have worked on this scheme for over four years, from June, 1952 till today. I have done a lot of correspondence regarding the hotel. My present commitment is in region of £55,000.

Cross-examination:

I was called to a meeting and asked if I would make amendment to my plan to provide reception on ground floor and bathroom for every bedroom. I said yes. I accepted those alterations proposed by Commissioner of Lands. It was a requirement which required change of plan. If I had not accepted they would not have given me the site. The preliminary plans prepared in the tender scheme became completely wasted. I submitted a design. The design is the most important thing of the building. It would be difficult for architect to alter the design to provide space for reception and bathrooms. The design is according to scale. I cannot remember if I submitted a sketch plan as an amendment of the original tender, I asked Mr. Hill to send a rough plan. I do not know if he sent it or not. I do not think any plan was submitted with a bathroom. One may have been submitted with a reception hall, that is before 14th August, 1956. It was a condition that Directorate of Civil Aviation should remain till 15th October, 1952. I had to accept it, I did not object. When the plot was allotted to me it was not surveyed. As to Exhibit 1, page 16, I had not inspected the beacons on that date. Mr. Firminger said he must have confirmation of beacon before he issued title. I said I had inspected beacons in order to get title. I have no idea when it was surveyed. On 18th September it was not surveyed, see Exhibit 1, page 13. I think it must have been surveyed by 8th October, 1952, because they are charging for survey fees. I would not put my stores there till I got my hoarding. It was a condition of Commissioner of Lands that Directorate of Civil Aviation should stay there. They paid me no rent. K.P.R. did not pay me. Emergency was on, when I was rung up how could I object. The buildings were not mine. Buildings were Directorate of Civil Aviation's. As to Exhibit 1, page 31, I had conversation on phone with Nancarrow.

On 30th April, 1953, plans were just ready as far as I was concerned. I think paragraph 2 of Exhibit 1, page 34 is important. City Council had refused to give me hoarding permission and I could not start. I would have started excavation if Council had given me permission to start excavation.

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Cross-examination - continued.

This is the only building in Nairobi in which such extensive excavation was necessary. The Commissioner of Lands could have supported my application earlier. I could have started excavation at any stage if City Council had granted the permission to erect hoarding. I got hoarding permission 30th June, 1955. I could not start before that only because City Council refused me permission. Excavation would have cost about £30,000. I think I could have got permission for a hoarding if the buildings had not been there and occupied. In 1953 I wanted buildings to be allowed to remain for storage purposes. I have no idea whether my architect knew that Lugard Avenue was to be blocked. I have a plan for development of City Square, dated April, 1954. It was given me by either City Council or Commissioner of Lands. It shows closure of Lugard Avenue. If Commissioner of Lands really wanted hotel to go up they would not have demanded a bank guarantee or cash from a businessman. In 1952 I had satisfied myself with my finance and in July, 1954, had not authority to ask such questions as paragraph 5 of Exhibit 1, page 64.

The buildings in City Square were granted extensions. No bank guarantee was asked of them. I did not give the information asked for. I say the main dispute was why did I tell the East African Standard that I had not been given prompt possession. I had said something and they reported it wrongly. It is referred to in paragraph 2, Exhibit 1, page 64. I replied to Exhibit 1, page 73, but I did not give financial particulars. I thought it was unnecessary. I only wanted an extention of twenty-one months. I did not supply information sought in Exhibit 1, page 77. This was the time Jackson & Hill and Peter Amcotts were working on the plans and I had committed myself to over £30,000. I did not produce independent confirmation of funds I had available, but I refuted allegation of finance as immaterial, since I was working on the plans and I had every intention of building. They treated my letter as an extension. I only asked for twenty-one months which was about the time which passed till I got possession. I discussed the matter with Commissioner of Lands. I was owner of the land and I intended to build. I say the request was unreasonable, to ask for capital available when they had the list. If they had attached my schedules and said the conditions had

NOTE Exhibits above mentioned not transmitted.

changed I think I would have answered and refuted or explained the doubt away. I would have completed in thirty-six months provided I had possession from the start. I had meeting with Commissioner of Lands on 9th May, 1956. It was agreed that Government would help to get plans considered expeditiously. Mr. Morgan did say that I would satisfy Government at further meeting of my intention and financial ability to develop. My idea was that I would start work and excavate immediately and so show that there was no intention to delay and financial ability should not be doubted. My commitment with Commissioner of Lands or Government was to build a six storey building at not less than £350,000. I wanted to put foundations for nine storey, so that I could develop later. As to Exhibit 1, page 93, I instructed Morgan to attend meeting in August. That was after meeting in May. I did not give him later instructions. I was to appear with him. The time had not arrived that I should go to Morgan and give him information as to capital. In my mind I was to show by the three months that I had started work and was working in the speediest way. I used the three months more on the work of excavation and hoarding. The purpose of the delay was the time was expiring and they wanted to see me before the expiration. I would not say that finance was the principal purpose of the meeting. One question was, was I in a position to start even excavation; one was if I was just playing with my plans. The question of intention was shown by starting to excavate as soon as I got permission. Morgan wanted £350 for three hours' attendance. I had to pay him £250 to get my papers. Morgan and I had a number of discussions. I had a meeting with him on 28th May, 1955. I did not give him information as to my financial condition at that meeting. I do not think I had a conference with Mr. Morgan after that. If he had not gone to Mombasa there might have been one. Normal thing is to instruct just before the meeting. Then I went to Shapley, Barrett & Allin. My father died in Damascus in March, 1955. I had to arrange his burial in Medina, Saudi Arabia. Family is a large one, about one hundred and fifty people in Kenya. There was a lot to arrange, including import and export permit to Saudi Arabia. I do not agree that my financial position was the main object of meeting proposed for 29th August. There were two objects, one was finance the other was intention. My finances were to a certain extent

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Cross-examination - continued.

bound up with the administration of my father's estate. No one has power to administer it yet. As to Exhibit 1, page 98, Shapley, Barrett & Allin wrote a letter on 5th October. The delay was due to fact that one partner of Shapley, Barrett & Allin was going on leave and another was returning from leave. As to Exhibit 1, page 104, Sheikh Abdul Raschid and Sheikh Abdul Ghafur are my brothers. The letter referred to in Exhibit 1, page 104 is not in Exhibit 1. There was another letter signed by Mr. Ghafur; at that time Mr. Ghafur was looking after interests of Sheikh Fazal Ilahi. I took Exhibit 1, page 107, from Mr.Ghafur, as to what Sheikh Fazal Ilahi wrote I was to have. I have seen that will. I entered a caveat. I think Exhibit 6 is a photostat of the will. I gave Exhibit 1, page 107 to Shapley, Barrett & Allin for purpose of helping to establish my financial ability. I see paragraph 2 of the will and 3. I do not agree with all this. I had the figure of £1,500,000 from Mr. Ghafur. I am the eldest son of Sheikh Fazal Ilahi and started business with him in 1935, when he was a building and fuel contractor. We worked together till 1940, by which time his property was worth £20,000 to £25,000. Our main concern then was Sheikh Brothers Limited and I was made Managing Director of Sheikh Brothers Limited and retired my father from the business. I had all the power to work, on behalf of my father, the trusts and his companies on my own till 1953. In May, 1951, Sheikh Fazal assessed whole assets at approximately £2,500,000. In 1951 the fourth brother of mine, Abdul Raoof, for no reason at all fired at me with a pistol in my father's presence. The thing went to Court, he was sent to England. Then I said to my father I have worked for you, I must have a share out of the whole thing. The discussion between us went on. He allowed me to put on list that he was willing to give me £100,000 when I started the hotel. Before this application was made I took Kedai Estate from Sheikh Brothers. My father asked what my claim would be. I said 20% to 25% of the whole. No one would put a figure. I said alright, say a quarter of a million. Before the matter could be settled he died. These letters were given by my family to me.

Salter: Ghafur should be called to say if this document is the will referred to in Exhibit 1, page 107.

NOTE Exhibits above mentioned not transmitted.

I think that will was made by my father on 21st May, 1952. I cannot say if it is the will referred to in Exhibit 1, page 107. The contents of paragraph 8 were not true. Title deeds of Kedai Estate were transferred to me by Sheikh Brothers Limited and I hold the deeds. I paid £170,000. The consideration was £15,000 which is registered. Lump sum value was £170,000, land value was £15,000. At date of transfer I was Managing Director of Sheikh Brothers. Property was transferred to Sheikh Brothers in 1948 for about £10,000. Land Office are only interested in price of land, not the equipment. It was sold to me on 26th April, 1952, by Sheikh Brothers. I think that in June, 1953, Sheikh Brothers filed a caveat against title, but that caveat was removed. There is a cheque in favour of Barclays Bank with limit £6,000. When I walked out of the business I walked out with three pieces of clothes. I was not concerned with what he left me in the will, under Mohammedan law I am an heir. Sheikh Abdul Ghafur tried to get letter of administration, I entered caveat to the application. I do not know that he swore an affidavit for estate duty.

Solicitor: Wanted to ask witness if affidavit was true?

Court: I will not allow the affidavit to be proved in this way. I will allow facts apart from affidavit to be put to the witness, but fact that they are on this affidavit are irrelevant.

G.B. Rudd

I consider Sheikh Fazal's assets to be about £200,000. I would expect liabilities to be about £50,000. Kedai Estate is solvent. It meets its debts. I am very well familiar with all its assets and liabilities. Non-payment of rent for 1955 was an oversight. Action was filed. I do not know if judgment was obtained or not. I paid the rent in two instalments. Reason for payment by instalments may have been (a) credit squeeze; (b) sisal may have been slump. I gave two cheques, it was arranged in that way. It may be that I had other large payments to make in that month. Page 106 of Exhibit 1 shows credit balance in my account of Sh.3,096,492/16. I was sued by City Council for rates on this plot on two occasions. I did not try to evade service. I was stopped on road and I told

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Cross-examination - continued.

the Process Server to come to my office and I would take it. 1954 summons was for Sh.38,000/- City Council filed action for site value tax for 1954 on valuation of £110,000. I appealed, valuation £110,000 was confirmed. Some months later Mr.Kelly of O'Brien Kelly & Hassan wrote to Commissioner of Lands for certificate that there were conditions on the plot which were in public interest. At same time there was an application by E.A. Power & Lighting to Supreme Court. My certificate was to depend on result of that application, I paid £500 on account of my advocate's instructions. Six months later judgment was taken in default of defence. I do not know how. Judgment was for £1,900; I paid £500 in March, 1955, that was when judgment received. I paid £299 in January, 1956. I got £1,000 from Government as compensation. I had the money to pay if I wanted to. I am being sued for 1955 rates, defence is filed.

Stand over 10 a.m. 14th December, 1956.

G.B. Rudd.

1 D.W. on same oath

Cross-examination continued:

I am still Managing Director of Sheikh Brothers. To a certain extent they form a very valuable part of my assets. In 1952 Sheikh Brothers were principal source of my assets, they are no longer the principal factor. I do not rely on Sheikh Brothers Limited or any family conditions for financing my hotel. I advanced to them approximately £21,000. Sheikh Brothers are in a sound financial condition. I have no idea if Commissioner of Lands has an unsatisfied judgment against them for over £800. Plaint was issued. Sheikh Brothers Limited is at present run by three persons; myself Raschid and Ghafur. It is rarely bad management if some monies were not paid. They had assets, land, estates, etc. They have the funds. There is mismanagement of the company. I cannot say if demand was made or when. I remember being served with a summons. A registered letter of demand (second demand) may have been sent in May, 1956. I entered appearance when summons was served. It was for rent and penalties for rent for 1954, 1955, and 1956. I handed papers to the firm's lawyer. I told Ghafur and Raschid and left it to them and the lawyer. I considered that I had done enough in view of the

family dispute that was going on. I was not in a position to issue an order for payment. There is a dispute in the family. Sheikh Brothers Limited's registered office is in Armstrong House. Distress was levied on my office while I was in Court. It was returned at once when I pointed out it was my office, not Sheikh Brothers Limited. They have a separate office in the same building. I said the office was my own and belongs to Kedai Estates Limited. I was busy in this case. I cannot say if this judgment has been satisfied or not. It was only just before I was served that I was asked if I would authorise Swaraj Singh to accept service. My office was in Nairobi and I could have been served there. As to Exhibit O, the first item would be stand premium. Jackson & Hill are suing me for £10,000. I have filed defence. Rates of 40 cents and 60 cents for removal of black cotton soil and magadi are below the market rate. I still have the tractor, trailers, plough, ripper, bulldozers and loader. They are worth the same now. Everything in Exhibit O below legal fee was after 30th June 1955. If the scheme is abandoned I am liable, by their rates, to two-thirds of architect's fee. As to Exhibit 1, page 62, paragraph 5, in June 1954 the preliminary plans were approved. As soon as that letter, 62, was received, they started working on the working drawings. It was not a preliminary plan. It was an exact plan on smaller scale than that required for working drawings. I did not pay any attention to last lines of Exhibit 1, page 64, because plans were approved. Page 64 was written on basis of my statement and they might be annoyed. I still had a year. Only one developer in City Square had started and they were in a position to build quickly because they had built Secretariat nearby and could remove surplus material to their plot.

Re-examination:

As to Exhibit 1, page 11, paragraph 2, I understood the person to ask for removal of the buildings was Mr. Firminger. I thought I had to deal with Commissioner of Lands. I thought the buildings belonged to Kenya Government. Buildings were not mine, they were Governments so I did not ask for rent from Directorate of Civil Aviation. If buildings had been vacated I would have pressed for hoarding and started excavation. Use of the buildings would not have interfered with development.

NOTE Exhibits above mentioned not transmitted.

In the Supreme Court of Kenya

Defendant's Evidence

No. 7

Sheikh Mohamed Bashir.

Re-examination - continued.

I did not intend to use the whole of the buildings for storage. Corrugated iron sheets, timber, poles, nails pickaxes, excavation equipment, crowbars etc., were required to be stored on the site. As to Exhibit 1, page 73, I considered that my covenant would not expire on 31st August, 1955, because if I had not possession I could not build hotel. Further it was common practice for such covenants to be extended. I was the first person to take a site in City Square. I was second person to start hoarding and excavation. Lugard House started much later. At that time I thought I would require twenty-one months extension from 31st August, 1955. When I got letter Exhibit 1, page 89, I understood that Government was satisfied as to £350,000 and that they were anxious to know about balance. My commitment was for a six storey building costing £350,000. In November, 1953, I first discovered that Lugard Avenue was to be closed. I went to City Council and while waiting there I saw a model of City Square and I examined it. I immediately gave instructions to my architects to prepare a new design with entrance from Government Road. I have a plan with me "The Development of City Square", I think I got it from City Council. It was prepared in April, 1954, by Acting Town Planning Adviser. That appears on its face. It shows that Lugard Avenue is closed at the Law Courts end. Exhibit P, plan. The first time I saw the plan was at end 1954, but I am not sure of the date. As to Exhibit 1, page 104, I had spoken to my brother Abdul Raschid and I understood from the letter that he was willing to give me £75,000 for the hotel. As to Exhibit 1, page 105. I understood that £150,000 would be available once building started. As to Exhibit 1, page 107, at that date, 5th October, 1955, I had not seen the Will referred to.

G.B. Rudd.

NOTE Exhibits above mentioned not transmitted.

No. 8

In the Supreme Court of Kenya

No. 8

Judgment, 4th March, 1957.

J U D G M E N T

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 958 of 1955

THE COMMISSIONER OF LANDS PLAINTIFF

versus

SHEIKH MOHAMED BASHIR DEFENDANT

J U D G M E N T

The facts of this case are fairly complicated in themselves, and the case raises a new point of law which is by no means easy to decide.

The plaintiff is the Commissioner of Lands, and he sues on behalf of the Crown to recover possession of a plot of Crown Land known as Site 'A' in the City Square, Nairobi, which was let to the defendant for 99 years, subject to building and other special conditions set out in the grant. Possession and mesne profits from the date of this suit are claimed on the ground that the grant has been forfeited for non-performance of the building condition. Alternatively, the plaintiff claims under section 83 of the Crown Lands Ordinance a declaration that the lease has been forfeited and damages for breach of the building condition.

The reason that these two sets of relief are claimed in the alternative is that, in the submission of the Crown, section 83 of the Crown Lands Ordinance does not apply to this suit and so possession is claimed on the basis of a completed forfeiture with mesne profits until possession is given by the defendant. If, however, section 83 does apply, then the plaintiff claims a declaration that the lease be forfeited and damages for breach of covenant - that is to say, a breach of the building condition.

The importance of the distinction is that, if section 83 of the Crowns Lands Ordinance applies,

In the Supreme Court of Kenya

No. 8

Judgment,

4th March, 1957 - continued.

the Court has power to grant relief from forfeiture on such grounds as it thinks fit, being guided according to the principles of English law and the doctrines of Equity. Whereas, if the section does not apply, then, in the plaintiff's submission, the Court has no power to grant relief from the forfeiture by applying the principles of English law and the only grounds on which relief from forfeiture could be granted would be those based on the pure doctrines of Equity without the statutory enlargement of the cases in which relief can be granted, which was effected in England by the Conveyancing Act of 1881 and later by the Law of Property Act 1925.

The defendant's title arose by virtue of a grant dated the 8th January, 1953, in the following form (Exhibit 2):

> "KNOW ALL MEN BY THESE PRESENTS that in consideration of the sum of Shillings twenty thousand by way of Stand Premium paid on or before the execution hereof the GOVERNOR AND COMMANDER-IN-CHIEF OF THE COLONY AND PROTECTORATE OF KENYA on behalf of HER MOST GRACIOUS MAJESTY QUEEN ELIZABETH THE SECOND under and by virtue of the powers vested in him hereby GRANTS unto SHEIKH MOHAMED BASHIR of Post Office Box Number 1512 Nairobi in the said Colony (hereinafter called "the Grantee") ALL that piece of land situate in Nairobi Municipality in the Nairobi District of the said Colony containing by measurement one decimal one six one acres or thereabouts that is to say Land Reference Number 209/4279 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed hereto and more particularly on Land Survey Plan Number 51700 deposited in the Survey Records Office at Nairobi TO HOLD for the term of ninety-nine years from the first day of September One thousand nine hundred and fifty-two subject to the payment therefor of the annual rent of Shillings two hundred during the first ten years of the term that is to say until the first day of September One thousand nine hundred and sixty two; the annual rent of Shillings six thousand during the next following fifteen years of the term that is to say until the first

day of September One thousand nine hundred and seventy-seven and the annual rent of Shillings twenty thousand during the residuary seventy-four years of the term all of which rents shall be payable in advance on the first day of January in each year and subject also to the provisions of the Crown Lands Ordinance (Chapter 155) and the following Special Conditions (namely):-

SPECIAL CONDITIONS

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 paintwork) 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.

2. The buildings 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.

3. The Grantee shall properly connect the drainage and sewage systems with any town systems when in the opinion of the Commissioner of Lands and the Local Authority the latter systems are so far completed as to enable the Grantee so to do.

4. The land and buildings shall be used for hotel purposes only except that shops may be constructed on the ground floor.

5. The Grantee shall not subdivide the land.

6. The building shall conform to a building line prescribed by the Local Authority.

7. The Grantee shall not sell transfer sublease or otherwise alienate or part with the

In the Supreme Court of Kenya

No. 8

Judgment,

4th March, 1957 - continued.

possession of the land nor enter into any charge (other than with the consent of the Commissioner of Lands for the raising of a loan for building purposes) or agreement of sale in respect thereof until Special Condition Number 1 has been complied with.

8. The Grantee shall pay to the Commissioner of Lands on demand such sum as the Commissioner may estimate to be the proportionate cost of constructing all roads drains and sewers serving the land.

9. The Grantee shall pay such rates taxes charges duties assessments or outgoings of whatever description as may be imposed charged or assessed by any government or local authority upon the land or the buildings erected thereon including any contribution or other sum paid by the Governor in lieu thereof.

10. The Governor or such person or authority as may be appointed for the purpose shall have the right to enter upon the land and lay and have access to water mains service pipes and drains telephone or telegraph wires and electric mains of all descriptions whether overhead or underground and the Grantee shall not erect any building in such a way as to cover or interfere with any existing alignments of main or service pipes or the telephone or telegraph wires and electric mains aforementioned.

11. The main entrance to the building shall be set back to provide for the setting down of vehicular passengers on the land and similar provision shall be made for tradesmen's vehicles.

12. The water supply system of the building shall include storage for at least twenty-four hours requirements."

This is the form provided under the Registration of Titles Ordinance, Chapter 160, of the Laws, and is the only form authorised for creating title under a lease from the Crown for a term of years. This Ordinance was enacted in 1919, and it would appear that prior to this enactment there was no

set form of conveyance which had to be used and such interest were usually created by conveyances executed by or on behalf of both parties in which the lessee's obligations could be set out in the form of covenants by him, but since the enactment of the Registration of Titles Ordinance the form, B1, provided in the first schedule to that Ordinance, has to be used, and the ordinary form of a lease executed bilaterally - that is, by each of the parties, - cannot be used.

It follows from this that in all original grants for leasehold created by the Crown after 1919 express covenants by the lessee could no longer appear as such and they had to be stated in the form of special conditions.

According to English Law, strictly speaking, a condition in a lease is a stipulation the breach of which enables the other party to avoid the lease and, in the case of the lessor, to effect a forfeiture of the lease if he wishes to do so. In English law, the breach of a condition imports a right of re-entry against the lessee when he is in breach of it. Under the ordinary law of India and of Kenya, however, the breach of a mere condition does not give rise to a right of forfeiture unless there is provided an express right of re-entry applying to breach of the condition or, in the case of Kenya, a provision that on breach of the condition the lease shall be void - section 111 of the Transfer of Property Act. But as by the Crown Grants Act the Transfer of Property Act does not apply to grants from the Crown, it would appear that such grants have to be construed without reference to the Transfer of Property Act.

Under the law of England, a covenant by a lessee differs from a condition in that, on breach of a mere covenant, the lessor is not entitled to claim a forfeiture. In order to enable a lessor to claim a forfeiture for breach of covenant by the lessee, there must be, in addition to the covenant, a specific right of re-entry, usually called a proviso for a re-entry, which is applicable on breach of the covenant. In that case, the proviso for re-entry makes the covenant into a condition as well as a covenant or more properly the proviso is a condition which comes into effect upon breach of the covenant and gives the lessor

In the Supreme Court of Kenya

No. 8

Judgment,

4th March, 1957 - continued.

a right to claim a forfeiture.

Section 83 of the Crown Lands Ordinance is one of a group of section in Part VII of the Ordinance which is headed "General Provisions relating to Leases, Licences and Agreements", and it is one of four sections enacted under the sub-heading "Forfeiture for Breach of Covenant or Condition". It provides as follows (Vol. 2 of the Laws, p.2038 -):

> "83. If the rents 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 express or implied by virtue of this 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.
>
> 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."

It was argued on behalf of the Plaintiff that the section only comes into operation in relation to a lease and that the grant in this case was not a lease within the meaning of the section. And it was further argued that, even if the grant were a lease, then, except in the case of non-payment of rent or royalties, the section only applies to covenants, and that the special conditions of the grant in this case were conditions and not covenants. On both these grounds it was argued that on breach of the building condition, the Plaintiff had forfeited the grant and that the power of relief provided by the section - that is to say, on such terms as may appear just subject to guidance according to the principles of English law and the doctrines of Equity - does not exist in the present case.

As to the first point, I have no difficulty in deciding that the grant was a lease within the meaning of the section. It comes within the definition of a lease in Foa, 7th Edition, p.6, as "A conveyance by which a person having an estate in land transfers a portion of his interest therein to another usually in consideration of a certain periodical rent or other recompense". The Crown Lands Ordinance clearly refers to leases from the Crown and to covenants and conditions in such leases. The Registration of Titles Ordinance, in section 2, defines the word "grant" as to include leases. Such grants have always been considered by the Department of Lands to be leases. Since the hearing of this case the Court of Appeal for E. Africa has held in Civil Appeal 8 of 1956 Dedhar v. The Special Commissioner and Acting Commissioner for Lands that a grant in similar form is a lease for the purposes of the Crown Lands Ordinance and that section 83 of that Ordinance applied and gave the Court a discretion to grant relief for forfeiture claimed on the basis of breach of a special condition as to building in the grant. That decision is binding upon this Court and I respectfully agree with it. It does not appear that it was argued before the Court of Appeal in that case that such a building condition was not a covenant for the purpose of S.83 of the Crown Lands Ordinance although that point was material.

The second ground of objection to the application of the section would have been more difficult to decide, if the matter were not covered by Dedhar's case but it is the case that special conditions in a grant of a leasehold interest by the Crown in the form B1 of the Schedule to the Registration of Titles Ordinance have always, up to the present case, been considered by the officers of the Department of Lands to be covenants and have been treated by them as if they were covenants within the meaning of section 83 of the Crown Lands Ordinance. Up to this case it has never been questioned but that the Supreme Court had power to grant relief from forfeiture of such grants on breach of a special condition, on such grounds as appear just, being guided by the principles of English law and the doctrines of Equity, The Supreme Court has granted relief on that basis in recent years to my own knowledge, and its power to do has never been questioned before. The Court of

In the Supreme Court of Kenya

No. 8

Judgment,

4th March, 1957 - continued.

Appeal has also granted relief and granted it under section 83 in Dedhar's case where a forfeiture was claimed on the basis of breach of a similar condition.

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.

The law as to relief from forfeiture has never made a distinction between a condition 'simpliciter' and a condition in the form of a covenant coupled with a proviso for re-entry. I do not consider that in passing the Crown Lands Ordinance, which clearly envisaged in section 83 the application of the principles of English law, the legislature intended to make a distinction between the power of the court to grant relief from forfeiture or breach of covenant and to take away that power in the case of breach of condition; nor do I think that in passing the Registration of Titles Ordinance, which, in effect, provided that lessees' covenants could only appear in a grant from the Crown in the form of special conditions, the legislature intended to take away the power to grant relief from forfeiture on breach of the lessee's obligations, other than the payment of rent or royalties.

In Brookes v. Drysdale 3 C.P.D. 52, the word "covenant" was held to apply to a condition in a head lease; and in Hayne v. Cummings 143 E.R.1191, it was held that the words "covenant" and "condition" did not necessarily mean a covenant under

seal or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean contract or stipulation.

If section 83 of the Crown Lands Ordinance has no application to a breach of condition, then there is no express provision in that ordinance as to the procedure to enforce a forfeiture for breach of condition in a lease or grant. Such an omission would be extraordinary in my opinion, because in section 84 there is provision for forfeiture of a licence on breach of condition. The explanation for the use of the word "covenant" in section 83 is probably due to the fact that this section was substantially a re-enactment of section 18 of the Crown Lands Ordinance 1902, and up to the passing of the Registration of Titles Ordinance in 1919, the practice was to state the lessee's obligations in the form of covenants and not as conditions. In my opinion, that accounts for the absence of the word "condition" in the section. The word "covenant" had to appear in order that covenants could have effect as conditions.

It was argued by the Plaintiff that section 157 of the Crown Lands Ordinance was the section which applied to forfeiture on breach of condition. That section reads as follows:

> "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 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

In the Supreme Court of Kenya

No. 8

Judgment, 4th March, 1957 - continued.

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 a day as the court thinks fit to name and that the defendant do pay the costs."

That section refers to an absolute and completed forfeiture. It contains no provisions for notice; it does not mention the word "condition"; it does not give the defendant any right of remedying any breach of condition that was capable of remedy; it certainly does not override section 83.

Looking at special condition 9 of the present grant it might be argued that, if section 83 does not apply, and if section 157 does apply, then the Crown could claim forfeiture for unpaid rates at any time after the rates became payable, without any relief being available to the lessee. In my opinion, section 157 has not got that effect. As far as that section applied to forfeiture for breach of condition, I think it merely provides a means whereby the Crown can get an order for actual possession on a named day. It may also refer to a different forfeiture, such as a forfeiture of a licence for temporary occupation under section 50, or forfeiture under section 72 for treason or rebellion.

In my opinion, section 83 of the Crown Lands Ordinance does apply to this case and the court has power to give relief from forfeiture on such grounds as may be just, being guided therein by the principles of English law and the doctrines of Equity. The decision in Dedhar's case fortifies me in that opinion and the fact that this particular point was not argued in that appeal does not cause me any difficulty because the point was open but was not taken. In my opinion the decision in Dedhar's case is binding on me.

Even if section 83 of the Crown Lands Ordinance does not apply, the Court would still have a restricted power to grant relief under the pure doctrines of Equity; but where the breach by the lessor was not remediable by the payment of money, such relief was only granted in rare cases of fraud,

accident, surprise, or the like. The grounds upon which relief could be granted were greatly extended in England by the Conveyancing Act, 1881, and later by the Law of Property Act, 1925, but it was held in Dedhar's case that the extension of the grounds upon which relief could be granted which was created by the Law of Property Act 1925 in England does not apply in Kenya.

However, apart from those Acts, there is in my opinion a case for consideration as to whether even under the pure doctrines of Equity the defendant is not entitled to some relief on the grounds of accident or surprise. The grant was negotiated before the outbreak of the Emergency. It is difficult to assess the effect of the Emergency upon large building operations in Nairobi. It appears that, in fact, none of the building conditions attached to other grants of property in the City Square area were fulfilled in time.

As far as the present plot is concerned, the Emergency had an effect, in so far as certain temporary buildings on the plot were used by the Crown with the defendant's consent up to June 1953, and they were later requisitioned from October 1953 and not returned to the defendant until the end of May 1954 at the earliest. The defendant cannot claim any relief on the ground of the occupation by the Crown with his consent up to June 1953, because it is clear from the correspondence that he gave his consent to that occupation on the basis that it did not interfere with his building plans. As regards the period during which premises on the plot were requisitioned, the defendant had not got his plans approved and passed and so was not in a position to start building before the premises were handed back to him but there would not have been time for him to have completed his building in time in accordance with the special condition even if he had been in a position to start building on the 1st June 1954. The delay in getting the building plans passed was due to changes of plan on the part of the defendant and to his failure to get approval of designs and plans which he submitted at various times.

There is one other matter which might come under the head of "Surprise" to the defendant. The plot has a frontage on Lugard Avenue and the

In the Supreme Court of Kenya

No. 8

Judgment,

4th March, 1957 - continued.

defendant worked out plans whereby the main entrance to the hotel would be from Lugard Avenue. Lugard Avenue was at all material times, and is still a named thoroughfare with an apparently permanent tarmacadam surface running from the Law Courts to Government Road. It joins up with another thoroughfare at the Law Courts. I accept it as true that the defendant was under the impression that Lugard Avenue was, and would continue to be, a through road, and I think that that impression was reasonable. But it turns out that under the Town Planbing Scheme, part of Lugard Avenue is to become part of a pleasure garden and the remaining part is to be merely a cul-de-sac off Government Road, leading to no other thoroughfare. When the defendant discovered this, he decided to change his plan, and in my opinion he was entitled to do so. This would cause delay. I do not consider that the fact that the defendant's architect knew that Lugard Avenue was to become a cul-de-sac affects the matter. I have no reason to believe that the defendant knew of it until 1954. It occasioned some delay altering plans, but was not the sole cause of delay.

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 the 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.

I do not propose to deal extensively with the defendant's argument that the Crown is estopped by its conduct from claiming performance of the building condition or that there was a waiver of that condition. Both contentions are based on the conduct of officials of the Government and of the Department of Lands. If that conduct were to have the effect of waiver of the condition it would have to amount to an unequivocal waiver and I do

not think that any such conduct has been proved. Similarly as regards estoppel I do not consider that there has been conduct which amounts to an estoppel which prevents the Crown from claiming the benefit of the condition.

I do however find that for the reasons already stated the Court has power to relieve from forfeiture for breach of the building condition.

In my opinion the defendant genuinely intended to put up the building required to be erected in accordance with special condition No. 1 of the grant. He failed to do so within the time stipulated in the condition. I think that the Emergency may have had some bearing on that failure but that if so it is relatively slight. The main cause of delay in my opinion was the difficulty which the defendant experienced in getting a plan approved. He employed a reputable and competent firm of architects from an early stage but the plans were not approved until after the time for erection of the building had expired. The grant did not require that the building should be erected to any particular plan. It is true that the defendant submitted a sketch plan with his original tender but that plan was not accepted. The plaintiff required that it should be modified in two respects so as to provide reception facilities on the ground floor and a private bathroom for every suite. The defendant agreed that the plan should be modified so as to give effect to those requirements but I am satisfied that the necessary modifications were never worked out fully on a plan and in fact the condition of the grant did not require that the building should be erected to a modification of that particular plan. In my opinion the defendant was not bound by the grant to erect the building to that plan if he could get another plan approved instead. The defendant did in fact submit several different plans or proposals for plans and he was informed that there would be no object by the plaintiffs provided the plan met with the requirements of the Nairobi City Council. This was notified by letter dated 24th April 1954 by which time it would have been virtually impossible for the defendant to get modified plans approved and to complete the building according to them before the expiration of the time stated in the condition. The delay up to that was probably attributable mainly to the decision

In the Supreme Court of Kenya

No. 8

Judgment,

4th March, 1957 - continued.

of the defendant not to build to the original sketches modified only so as to provide reception on the ground floor and a private bathroom for each bedroom but instead to submit other different plans or proposals for approval by the City Council and the plaintiffs. That decision on the part of the defendant was originally a dangerous one and risky in that such plans and proposals might not be passed and the preparation of them and consequent negotiations would necessarily take up time which could not be spared if the building was to be completed in time. On the other hand when the defendant got the letter of 24th April 1954 he might in my opinion fairly assume that he would not be bound to a modification of the original sketch plan so as to provide merely reception on the ground floor and a bathroom for every bedroom but that he could introduce any modification which was acceptable to the City Council. And I think that he could further assume that he would not be held strictly to the time for completion that was stipulated in the condition, but he was not entitled to assume that unnecessary delay on his part would be tolerated. Indeed the correspondence shows that fairly steady pressure was being put on him to get his plans approved so as to enable completion to be effected as soon as possible.

It is in evidence that the defendant's advisers were working "flat out" on the plans from August 1954 into 1955. Delays did occur early in 1955 but by that time the plaintiff had started to threaten that an extension of the time for completion might not be granted. The first time this threat was actually put into words was in a letter dated 23.7.1954 by which time the plaintiff's Department had changed its mind to the extent that while they had previously been anxious that the defendant should erect the building after this date they were continually advising him of the possibility or probability of a claim for forfeiture if the building was not erected by 1st September 1955 but it is fair to say that the plaintiff's department always claimed to be ready to consider an application for an extension provided that it was accompanied by certain requirements as to finance.

There are two possible explanations as to why the plaintiff's attitude hardened in July 1954.

One is that the Government may have decided to build a luxury hotel itself in conjunction with the Colonial Welfare Fund but this had not been proved as a fact. The other reason is that the defendant's financial repute had worsened. I think that the second reason is probably the real reason.

When the issue of the Grant was being negotiated the defendant appeared to be in a particularly good financial position. He had been promised the support of his father Sheikh Fazal Ilahi in respect of whom a bank reference was produced to the effect that he was good for any amount. He had also been promised the support if necessary of his brother Sheikh Abdul Raschid and in addition to moving private property of his own the defendant was managing director of Sheikh Brothers Limited which appeared to be a wealthy and influential concern. Subsequently however the defendant appears to have quarrelled with one of his brothers a fellow director of Sheikh Brothers Limited and his father Sheikh Fazal Ilahi has died and was probably not on the best of terms with the defendant shortly before his death. The management of Sheikh Brothers Limited appears to have become completely disorganised and will need pulling together considerably but this will be difficult so long as there is serious dissension among the directors. The defendant still has property of his own but some of it is encumbered. He still has the support of his brother Sheikh Abdul Raschid. In these circumstances the doubts which were entertained by the plaintiff as to the defendant's financial ability to carry through the project were not without substantial reason but the course adopted was not one which was likely to be helpful. The plaintiffs demanded a time schedule for the building in stages to be submitted by the defendant which is very reasonable but the plaintiff demanded in addition what was virtually a bank guarantee that the defendant had the necessary funds available before an extension of the time for completion would be authorised. This would involve the freezing of very substantial sums of money for a considerable time before it would be needed in the building. The Plaintiff further demanded to know the steps which would actually be taken by the defendant to raise the money that would be required. This the defendant in my opinion was entitled to refuse to disclose. Leakage of his plans might be fatal to the execution of

In the Supreme Court of Kenya

No. 8

Judgment,

4th March, 1957 - continued.

them and further there is no reason why he should not change his plans provided he is able to finance the building. I see no reason why the defendant should not be allowed to let the ground floor shops when they are ready for occupation provided that he does not delay the completion of the further stages but difficulty was threatened as to that. Personally I am left with a suspicion that in spite of professions of readiness to consider an extension of time or terms there may well have been adopted a policy of trying to squeeze out the defendant and of making the erection of the building by him impossible. I am not however prepared to find that as a fact in view of the fact that there appears to have been at least some reasonable grounds for believing that the defendant's financial resources were not adequate. Further more the plaintiff's advisers were entitled to endeavour to get the best terms for their point of view that could be arranged and agreed.

Were it not for the fact that there is a doubt about the defendant's resources I would certainly grant relief from forfeiture on terms. Even as it is I think that the defendant should be allowed the chance to complete if he can. I do not think that the plaintiff will be seriously prejudiced if the defendant is granted relief but I think the relief should be on fairly strict terms. The question of the actual termswas agreed to be left over until after the decisions as to whether relief was grantable or not and whether relief should be granted or any terms was decided. It would therefore not be proper for me at this stage to state the terms on which relief should be granted and I do not propose to do so. Nevertheless as at present advised I do not think that the defendant should be required to show the colour of his money at once to the extent necessary to finance the whole building. Nor do I think that he should be prevented from letting the shops when they are fit for occupation provided this does not interfere with or delay the erection of the rest of the building. The plan now agreed to with the modifications agreed to by the defendant should be the plan for the building that is to say there should be no further shilly shallying about the plan. The building should be erected by stages and times should be fixed for the completion of the stages.

The plaintiffs should be enabled to satisfy

themselves that the building construction will be properly supervised and that the construction will be to proper standards. The defendant should not be bound to build higher than 6 storeys in the first instance.

These are only suggestions not decisions and are made in the hope that they may be helpful to the parties when I will hear later if terms cannot be agreed.

At the present stage I will only say that in my opinion this is a case in which relief from forfeiture can be granted and should be granted on suitable terms which will have to be decided after hearing the parties.

In case there should be an appeal and I should be held to be in error I will deal shortly with the claims for damages and for mesne profits which are alternative and which would only apply in the case of forfeiture without relief therefrom.

In my opinion the claim for mesne profits is governed by section 2 of the Civil Procedure Ordinance. I think that the claim by plaintiff is excessive and that in the circumstances of this case the defendant could not make any profit at all from the building until it is erected. Certainly he could not make more than the rent reserved by the Government.

Similarly as to damages I consider that the plaintiffs have not proved damages by reason of the defendant's breach of contract exceeding the rent reserved. It is true that if the defendant had vacated the plot the plaintiff could have let it to someone else at a much higher rent if the user was not restricted to a luxury hotel but it was never contemplated by the parties that the user should not be so restricted. To depart from that restriction would be to go far beyond anything that ever was within the contemplation of the parties and I consider that it would not be right to assess damages on such a basis. In my opinion the plaintiffs are not entitled to more than the rent reserved by way of mesne profits or damages but they are entitled to the amount of the rent reserved. This has never been disputed. The plaintiff must have the costs of this suit as regards the claim for forfeiture and the claim for relief from forfeiture. I do not consider that the plaintiff

In the Supreme Court of Kenya

No. 8

Judgment,
4th March, 1957
- continued.

should have costs on the claim for damages or mesne profits and I think that each party should bear his own costs on the issues of damages and mesne profits.

G.B. Rudd, J.

4/3/57.

Solicitor General asks for costs on advocates and clients basis.

Order: Costs on advocate and client basis. I certify case fit for Queen's Counsel and junior.

G.B. Rudd, J.

Judgment read in presence of Conroy Solicitor General.

Swaraj Singh for Defendant.

No. 9

Decree,
2nd May, 1957.

No. 9

D E C R E E

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 958 of 1955

BETWEEN

THE COMMISSIONER OF LANDS — PLAINTIFF

- AND -

SHEIKH MOHAMED BASHIR — DEFENDANT

D E C R E E

THIS COURT DOTH ORDER AND ADJUDGE that the plaintiff doth recover possession of the piece of land in the Statement of Claim described as L.R. No. 209/4279 but no steps are to be taken to recover such possession unless and until the defendant has failed to comply with any of the conditions

for his relief specified in the Order Schedule hereto

AND IT IS ORDERED that it be referred to the Registrar of the Supreme Court to tax the costs of the plaintiff in this action as regards the claim for forfeiture and the claim for relief from forfeiture as between Advocate and Client

AND IT IS ORDERED that the defendant do pay to the plaintiff the amount of such taxed costs as hereinafter mentioned

AND in regard to the defendant's prayer for relief against forfeiture of the lease in the Plaint mentioned if the defendant shall duly and punctually comply with all and every the conditions specified in the said Order Schedule in that case IT IS ORDERED that the said Judgment in so far as it adjudges recovery of possession to the plaintiff stand and be deemed discharged as if such judgment for recover of possession had not been pronounced

Otherwise IT IS ORDERED that the said Judgment do stand of full force and effect

AND the parties are to be at liberty to apply.

ORDER SCHEDULE

Conditions of relief of defendant against foregoing judgment for recovery of possession:

(1) That the defendant do erect a building on the said land in accordance with the plan already approved by the City Council and by the Commissioner of Lands.

(2) That the defendant do commence structural work upon the said building not later than the first day of September, 1957.

(3) That the defendant do complete structurally the foundations and basement of the said building by the 31st May, 1958.

(4) That the defendant do complete the ground floor including the slab structurally by the 31st January, 1959.

(5) That the defendant do complete all work to

In the Supreme Court of Kenya

No. 9

Decree,

2nd May, 1957 - continued.

the top of the mezzanine floor by the 31st October, 1959.

(6) That the defendant do commence work from the first floor upwards not later than 1st November, 1959.

(7) That the defendant do complete the whole work by the 1st March 1961 provided that if the defendant can obtain all the necessary permissions to build to six stories only the work shall be completed to the sixth storey by the 30th September, 1960.

(8) That the work shall be supervised by a registered architect who shall be approved by the plaintiff.

(9) That the defendant shall employ continuously on the site at least one Clerk of Works who shall have been approved by the plaintiff.

(10) That the plaintiff or his representative shall have full right of access and inspection at any time.

(11) That the defendant shall be at liberty to let the shops on the ground and mezzanine floors subject to the necessary Occupation Certificates being obtained, provided that pending the completion of the whole building no such tenancy shall extend beyond the day fixed for the completion of the whole building without the consent of the plaintiff.

(12) That the defendant do within 14 days from the date of the Certificate of Taxation or agreement pay to the plaintiff the amount of his said taxed costs or agreed costs as the case may be.

GIVEN under my hand and the Seal of the Court at Nairobi this 2nd day of May, 1957.

BY THE COURT:

(Sd.) J. CHAMBERS

DEPUTY REGISTRAR:
SUPREME COURT OF KENYA

No. 10

MEMORANDUM OF APPEAL

In the Court of Appeal for Eastern Africa

No. 10

Memorandum of Appeal.

5th October, 1957.

The Commissioner of Lands the Appellant above-named, appeals to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decision above-mentioned, save in so far as it relates to costs, on the following grounds, namely:-

1. That the learned Judge had no jurisdiction to make the order the subject of this appeal.

2. That on the facts proved or admitted at the trial the learned Judge was wrong in holding that this was a case in which relief should be granted from forfeiture.

3. That the learned Judge erred in granting relief on terms which were unjust to the Plaintiff.

4. That the terms on which relief has been granted cannot be complied with.

5. That the learned Judge failed to adjudicate upon either the claim for mesne profits or the claim for damages for breach of contract.

6. That the learned judge erred in law in holding that the claim for mesne profits failed by reason of section 2 of the Civil Procedure Code.

7. That the learned Judge misdirected himself in holding that the claim for damages failed because the Appellant had not proved damage exceeding the rent reserved.

8. That the learned Judge was wrong in law in refusing to admit as evidence the estate duty affidavit of the estate of Sheikh Fazal Ilahi, deceased.

Dated this 5th day of October, 1957.

H. G. Sherrin

Advocate for Appellant

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P.

No. 11

JUDGE'S NOTES. O'CONNOR P.

30.1.58 Coram: O'Connor P.
Briggs V.P.
Forbes J.A.

Sherrin, Davies with him, for Appellant.
Gledhill, Swaraj Singh with him, for Respondent.

Sherrin:

Plaintiff claimed:

Possession and mesne profits.

Alternative: Damages for breach of covenant.

Para. 1. Special conditions to be construed as covenants

Judge granted relief under section 83.

Main ground of appeal is that the Judge had no jurisdiction to make the order.

Memo. of Appeal.

Appellant submits that this lease came to end on the issue of the plaint. That is the only construction which can be placed upon the lease.

2. The lease having come to an end, on the issue of the plaint there was no power under s.83 to grant relief.

s.83 of the Crown Lands Ordinance empowers Court to refuse forfeiture and the relief is a refusal of forfeiture.

Laws Vol. II p.2038.

That section gives a power to relieve the tenant by refusing to allow forfeiture.

The relief granted by the Courts of Equity was to revive the lease and that was also the effect of the relief under the Conveyancing Act 1881.

The term of years came to an end on the issue of the Plaint. Court had no power to revive it and s.83 could not apply.

Elliott v Boynton (1924) 1 Ch.236. Mesne profits assessable from the day of the writ not from the breach of covenant.

p. 249 Warrington .L.J.

Mesne profits p.250.

Under a breach of condition in a lease the landlord is entitled to possession from the day of the issue of the writ and the lease terminates at the issue of the writ.

If this lease terminated at the issue of the writ, why does not the landlord have to execute a new lease? He did have to until 1731.

By the Landlord & Tenant Act, 1731, s.4:

"Provided always ..... if the tenant shall pay or tender ..... all the rent in arrears then all further proceedings on the judgment shall be discontinued and if they shall be relieved in Equity they shall hold the premises without a new lease ....."

Re-enacted from time to time.

Supreme Court of Judic. Consolidation Act, 1925, s.46. Hold..... without the necessity for any new lease.

This Grant was made under the Registration of Titles Ordinance

Unilateral document. Deed Poll or Letters Patent.

If this lease had been drawn in accordance with the provisions of the Crown Lands Ordinance before the Registration of Titles Ordinance, there would still be no relief for breach of covenant.

Registration of Titles Ordinance. (Cap.160).

p.2198. Form B.1. Unilateral. (s.21).

p.2202. Form H.

Bi-lateral. (s.40).

Both are leases.

Crown cannot imply covenants into a unilateral document.

Crown Lands Ordinance:

p.2019. s.12.

s.14.(c) 'building conditions'

(d) special covenants.

Distinction. Legislature must be taken to

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

use these words in the accepted sense and that they are distinguished.

Since the enactment of Form B.1. it is no longer possible to have lessee's covenants in Town Property Leases. (s.21, s.33, Cap.160. Must conform with Forms).

? 1829 Crown Lands Act, 1828.

Submit. Draftsman of Crown Lands Ordinance produced a form of lease of the same effect as for similar document in England.

s.83 of the Crown Lands Ordinance and that Ordinance had same effect as in England.

Encyclopedia of Forms and Precedents. 3rd edn. Vol. 8. p.136.

(? intention to use s.84 and grant licence subject to bldg. conditions u/s.84. For use of licence in bldg leases see Enc. Vol. 8 p.326).

Draftsman has laid down that that there should be building conditions and s.83 does not apply to conditions.

Governor has power to remit or extend time for performing conditions.

s.3(ii) and (iii).

The effect of the enactment of the Registration of Titles Ordinance is to make s.83 of the Crown Lands Ordinance a dead letter so far as leases of Town Property are concerned.

Unfortunate; but that is the effect.

There are a number of Leases dated before the enactment of the Registration of Titles Ordinance.

Effects on inter-action of these two Ordinances are by no means always beneficial to the Crown. For instance, can the Crown sue for money due under a condition, e.g. for road charges?

Crown Lands Ordinance. Pt.VII. p.2037. Heading.

N.B. s.18 1902 Cr. Lands Ord. has not got the proviso to s.3 Vol.2 p.2105.

Whether at the commencement of the 1902 Crown Lands Ordinance or the 1915 Crown Lands Ord. the most recent Conv.Leg. in England was the Conv. Act, 1881. That sets out covenants for title etc. so that they need no longer be set out in a deed.

That principle is found in Pt.VII of the Crown Lands Ordinance. Usual covenants. Hill & Redman 12th edn. p.132, 11th edn. p.125.

This is subject to a declaration by the Court.

Draftsman has set out all these. s.77(a).

s.83 is equivalent to an implied proviso for

re-entry and there are statutory provisions for relief against forfeiture.

S.83 applies only to covenants because it is unnecessary to have one for breach of a condition.

(Ct.

Does 'condition' mean something different from 'condition' in England as the remedy is different? - see s,84).

Temporary Occupation Licences are creature of this Ordinance. P.2028.

(Ct.

How does s.50 square with s.84?).

s.84 is a quick and summary method. Under s.50 the Commissioner's declaration would be subject to legal proceedings in any Court. (Temporary Occupation Licence may be a special kind of Licence) s.157. P.2060.

Submit. A forfeiture resulting from breach of condition should be dealt with under s.157 and there is no statutory provision for relief.

Judge suggested that 'forfeiture' meant forfeiture for treason.

It includes forfeiture for breach of condition but not of covenant because it is not forfeited under s.83 until the Court declares it to be so.

(Ct.

What about s.84(3)?)

I can't answer that.

Civ. App. 8/56. Hassanali Dedhar v. Spl. Commmr. This Court allowed relief against a forfeiture for breach of a building condition.

In that case you were not asked to consider whether the Conv. Act, 1881 applied to the Crown.

I submit that the Conv. Act 1881 did not bind the Crown.

s.81? 83. Last 3 lines must apply to ordinary equitable principles of relief against forfeiture.

In re Brain (1875) 44 L.J.Eq. 103

Gledhill:

Point not argued in the Court below.

Sherrin:

Province of Bombay v Municipal Corporation of Bombay, (1947), A.C. 58.

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

? Object of s.157 really to get possession.

Crown has right of re-entry for breach of condition in a conditional lease; but Eq. would relieve against forfeiture. Eq. rules regulated by 4 Geo.II Cap.28, L & T.Act 1730 Q.V.

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes

(a) O'Connor, P. - continued.

Compare:

Law of Property Act, 1925. s.208.

Land Charges Act. s.25.

Trustee Act. s. 71 and

Conv. Act, 1881. It is silent.

Where silent, does not bind the Crown. Land Registration Act '25, s.80.

There were about 21 Crown Lands Acts in the 19th century. There is nothing in the Conv. Act which binds the Crown by necessary implication.

Adjourned to 2.30.

2.30 p.m. Bench and Bar as before.

Sherrin continues:

Sherrin:

I apply for a Bench of 5 Judges.

Gledhill:

I oppose.

Young v Bristol Aeroplane Co. (1944) 291, 297.

p.298. p.298, bottom, 299.

Order:

Without deciding whether the decision in Hassanali Dedhar's case was given per incuriam or not, it seems clear that since both parties in that case assumed that the Conveyancing Act, 1881, bound the Crown and the question of whether or not it bound the Crown was never raised to the Court, if it should now be held that that Act did not bind the Crown, that might entail a finding that Dedhar's case was decided per incuriam. If so, it would be open to review; and we think it would be convenient that a Court of five Judges should review it. (Joseph Kabui's case, (1954) 21 E.A.C.A. 260). We therefore, adjourn the hearing for a Court of five Judges to be convened. The question of whether or not that Court is bound by Dedhar's case can be argued before that Court.

K.K. O'CONNOR,
P.

30/1/58.

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes

(a) O'Connor, P. - continued.

24.2.58. Coram: O'Connor P.
Sinclair C.J.
Forbes J.A.

Sherrin, Davies with him, for Appellant.
Gledhill, Swaraj Singh with him, for Respondent.

Sherrin: (Contd.)

Adopt argument at previous hearing.

Conveyancing Act, 1881, does not apply to the Crown. Case covered by Bombay Municipal Corporation case (cited last time) and by the way the property legislation binding the Crown is dealt with in those statutes (1947 A.C. 58). Crown must be named or bound by necessary implication. There is no necessary implication that the Conveyancing Act 1881 applies to the Crown.

22 Crown Lands Acts passed during 19th Century.

Land Registration Act, 1925.
(1845) s.45.

The question of whether the Conveyancing Act 1881 binds the Crown is part of the law of England which is imported by the proviso to s.83.

S.2 Cr. Lands Act (1852). Powers of Commissioners to release from covenants.

Case against me which I should cite.

I submitted that before the Landlord & Tenant Act 1731 it was necessary for the Courts of Chancery to force the landlord to execute a new lease.

Dendy v Evans (1910) 1 K.B. 263, p.265 'This appeal .....

A new lease is only granted after the landlord has obtained judgment in an ejection action. Otherwise there is merely an injunction to restrain further proceedings in the action at law.

The issue of the writ made the lease voidable.

Elliott v Boynton makes it clear that if ejectment goes through, the tenant becomes a trespasser from the issue of the writ. In that case the value was more than the rent and the landlord had tried to get mesne profits.

Submission that lessee became a trespasser as at date of issue of plaint is unaffected by Dendy's case.

s.83 Crown Lands Ordinance keeps the lease alive until the Court declares it forfeited.

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes

(a) O'Connor, P. - continued.

Covenant or Condition.

Effect of breach of condition is to bring lease to end on the date of writ.

Court of Equity acted in personam and stayed action, and that caused lease to continue.

There is in law a distinction between covenants and conditions.

Where an Ordinance uses "condition" and "Covenant" in same section as Crown Lands Ordinance does in s.14 it clearly intends to distinguish them.

"Covenants" can in contracts include "conditions".

But in the Crown Lands Ordinance it is clear that the Legislature has used the two words in their different meanings.

Crown Lands Ordinance. s.14 (c)(d) distinguished.

Crown Lands Ordinance 1902. s.15. p.2104. This was covenants - they were all covenants. Altered in the later Ordinance to a provision that a lease should contain building conditions.

So does Sec.83.

ss. 14 and 18(1) contains the word covenant only.

Boyce v Edbrooke (1903) 1 Ch.836

p.841. Farwell J.

p.842. "Now, when the Act of Parliament mentions 'covenant' it means a legal covenant which can be sued upon at law."

per contra where the Ordinance says a "condition" it means condition.

The Building condition is a 'condition' under both the Ordinance and the Grant.

Some of the other conditions in the instrument should be covenants under the Crown Lands Ordinance.

Under a Grant there can be no conditions.

Where covenants are implied by the Crown Lands Ordinance on the part of the Crown they are effective as covenants. The document is unilateral - there can therefore be no covenant by the grantee.

Transfer of registered land in England is a unilateral document.

Chelsea & Walham Green Building Society v. Armstrong.(1951) 1 Ch.853.

Point: whether Building Society could enforce a covenant in a lease which it had not executed.

This is a deed not inter partes and accordingly it is impossible to imply into it a covenant by the grantee.

Document must be construed in accordance with Real Property Law.

Where Crown Lands Ordinance says that building restrictions shall be in the form of conditions and where you find the building restrictions in a document not inter partes, it would be wholly wrong to construe them as covenants because there is authority that in a deed inter partes in order to give effect to the intention of the parties a stipulation expressed as a condition may be construed as a covenant.

The Judge at p. 52, was wrong.

The proviso for redemption is a condition.

2nd para. "To effectuate the intention of the parties."

There can be no intention of the parties in a deed which is not inter partes.

Brookes v Drysdale 3 C.P.D. 52 was a document inter partes. Quite another thing to construe a statute otherwise than in accordance with its plain and ordinary meaning.

Hayne v Cummings. 143 C.R. 1191.

p.1194 Byles J.

These are merely authorities as to the meaning of 'conditions' and 'covenants' in loosely worded agreements.

In re Brain (1874) 44 L.J. Eq.103. The only other case I have found of a lease by deed poll except the Chelsea case.

Equity relieves against the Crown in respect of forfeiture. Distinction between covenants and conditions.

Malins V.C.

Q. Hassanali Dedhar's case - Whether binding on this Court.

Dedhar's case has decided nothing on the point

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

'covenant' or 'condition'. The question of any difference between covenant and condition was never raised.

Pleadings. Prayer for order in the form authorised by s.83.

p. "Such relief as may be just and equitable."

The question of whether this case properly came within s.83 or did not arise.

Memo. of Appeal. p. Prayer.

The point was not and could never have been argued on these pleadings.

Gledhill:

I am not going to argue that Dedhar's case governs you on the question of covenant or condition; but whether it binds you generally on giving relief under s.83.

Sherrin:

Qn. is whether the Conveyancing Act is one of those principles which has to be considered under s.83 proviso.

It is not an authority on that point.

But if it is, you should disregard it because it was made per incuriam and alternatively because it has the effect of abridging the Royal prerogative.

Young v Bristol Aeroplane Co. (1946) A.C.163.

After the Court 'has pronounced on a point of law.' That was a point never pronounced on by this Court. The Court did pronounce on the wider question as to whether the 1881 Act should come into the Court's consideration at all. Dedhar's judgment should be binding where it decides that the law to be applied was the law at the time of passing of the Crown Lands Ordinance. If the Court has pronounced on a wider area without considering the actual point, the pronouncement is not binding on that point.

Joseph Kabui v Reg. 21 E.A.C.A.260.

Exceptions where liberty of subject is concerned. So also where the prerogative of the Crown is concerned.

Keshavlal Punja Parbat Shah, 22 E.A.C.A.216 at p.217

'was given per incuriam.'

Berkeley v Papadoyannis (1954) 2 Q.B. 149, Last para. of headnote.

p.159.

The omission to draw to the Court proposition that the Conv. Act does not bind the Crown is of some importance. If a decision was given that the Conv. Act bound the Crown this was per incuriam as in the Keshavlal case. If the Court pronounced on the point whether the Conv. Act, 1881 should be referred to under s.83, it did so per incuriam. Application of Conv. Act to Crown was never argued.

Stare decisis does not apply where the effect is to curtail a Royal prerogative. Halsbury 3rd Vol. 7. Constitutional Law p.221.

The prerogative of the Crown cannot be parted with by the Crown. If the Royal prerogative is abridged by H.M. Judges erroneously that decision cannot stand. Stare decisis does not apply.

Reg v. Eduljee Buramjee, 13 E.R. 496. p.503. It may be argued .....

Dedhar's case is no authority for the proposition that forfeiture for breach of condition comes under s.83. That point was never decided.

As to the point of whether reference should be made to the Conv. Act, 1881, the Court did not pronounce upon the point that that Act did not apply to the Crown. If it did, it did so per incuriam; and the pronouncement had the effect of abridging the Royal Prerogative: and if erroneous it should not be followed.

Mesne profits.

Grounds of Appeal 5 and 6.

s. 2. Civil Procedure Ordinance.

"In this Ordinance unless there is anything repugnant etc. mesne profits means."

Confined to the Ordinance and absence of repugnancy.

Definition taken from the Indian Code of Civil Procedure. S.2(12) identical.

The only reference in the Civil Procedure Ordinance to 'mesne profits' - s.81(2)(f)(ii). This is a provision for summary procedure which does not matter to us.

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

The rule as to mesne profits is a branch of the law of trespass rather than real property.

Civil Appeal 23/57. Heptulla Bros.

That definition differs from the Common Law.

According to the C, L. if the property is let at a nominal rent the mesne profits may exceed amount of the rent.

Indian definition regards what the trespasser made and the English definition regards what the landlord lost.

The trespasser (Bashir) made nothing out of the property. There was no use to which he could reasonably put it.

On the other hand, the Crown was kept out of possession of a very valuable piece of land. The loss to the Crown differs from the gain to Bashir.

Elliott v Boynton refers. (1924) 1 Ch.247.

"in Aslin v Parkin ....."

Adjourned to 2.30 p.m.

2.30 p.m. Bench and Bar as before.

Sherrin continues:

Clifton Securities Ltd. v. Huntley (1948) 2 A.E.R. 283.

At C.L. mesne profits may exceed rent at which the lessee holds the premises - they must be assessed at the fair value which may be a rent or may not.

P.284. C.

This runs counter to the Civil Procedure Ordinance definition.

Record evidence, p. £10,000.

In the Plaint Crown ask for mesne profits at £833 p.m. which is £10,000 p.a.

The term mesne profits was not in the Ordinance but in a plaint. And the text was repugnant. It clearly means the English meaning of mesne profits.

Plaint must have same result whether you use the words "damages for trespass" or "mesne profits"

Refer to s.77 Crown Lands Ordinance.

Although the Land Office adds the words "under the provisions of the Crown Lands Ordinance" Grant under the Registration of Titles Ordinance. This applies only when a lease is drawn as a lease inter partes. Such leases still exist - drawn before Registration of Titles Ordinance.

Gledhill:

Really only one point - ability of Court to award relief against forfeiture. S.83 specifically empowers Court to award relief 'on such terms as appear just'.

This Court did lay down the principles which should guide the Court in granting relief, i.e. those in Hyman v Rose (1912) A.C.623, 631, per Lord Loreburn.

In Hassanali you were considering whether the relief should be granted under the Hyman and Rose principles or under the old principles.

You were deciding what are the limits of the granting of the discretion.

Per incuriam.

Morrelle v Wakeling (1955) 1 A.E.R. 708.

Headnote.

p.715B.

p.716. There is a difference between a statute or a binding decision and a doctrine of the Common Law.

Question is not whether the Conv. Act of 1881 is binding on the Court but whether s.83 gives power to relieve on terms which are just.

I agree that Hassanali's case is not an authority whether this is a covenant or condition.

Reads s.83 leaving out the proviso.

Cf. s.18 of the 1902 Ordinance. Only difference is 31 instead of 20.

The words of the 1902 Ordinance are as wide as they can be. Crown is in same position as an ordinary landlord in England.

In 1915 the new Crown Lands Ordinance came in and the second paragraph is inserted. "Court shall be guided." Effect is to take away from the Supreme Court almost the whole of the power which

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

they had. That is merely a guide.

Dedhar's case, p.6.

"I have no doubt that the English law to be applied is....."

I agree that the law to be applied is the 1915 law.

The principles of English law must include statute law.

'Principles' is not the same as 'common law'.

Craies, 5th Edn. 3rd para. p.202.

Construction of proviso.

Odgers' Construction of Deeds and Statutes, 3rd edn. p.231.

Provisos.

Section must be construed as a whole.

West Derby Union v Metropolitan Life Assurance Society. (1897) A.C.647. p.656 Lord Shand.

This is a proviso in effect.

R. v. Dibdin (1910) P.57. p.125.

If the words had not appeared at the end of the section, the Court could and would have given relief on such terms as appear just. You should afford relief on the principles of s.14 of the Conv. Act, 1881 as between subject and subject. That is the only reasonable interpretation. The question is not did the Conv. Act, 1881, bind the Crown in England, but did the general principles of English Law bind the Court here.

Can anyone say that there is a manifest slip or error in Hassanali's case. No binding authority or binding statutory enactment was ignored.

Adjourned till 9.45 a.m. 25.2.58.

25.2.58. Bench and Bar as before.

Gledhill continues:

The main point is the question of whether the provisions are conditions or covenants.

Section of Crown Lands Ordinance difficult to reconcile.

Bird's eye view - whether draftsman intended various provisions to be subject to relief.

Judgment Weight must be given to the practice. Court have always taken

view that these were covenants.

Forfeiture in Crown Leases are creatures of statute, and date of forfeiture is date laid down by the Court and not date of issue of writ.

A covenant in a Crown Lease in Kenya is a covenant with a proviso for re-entry imported by s.83. There is no legal difference between a covenant and condition in effect.

s.157

cf. s.169.

Effect would be that the lessee subject to a forfeiture would be liable to a fine. Unlikely.

s.14. Crown Lands Ordinance. 'Building conditions.'

Generally speaking the words 'covenants' and 'conditions' have not been construed strictly. Court has looked to the intention of the parties.

Foa. 7th, p.311. Definition of conditions. Under s.83 covenants and conditions are equated.

Hayne v Cummings, 143 E.R. 1191.

Bastin v Bidwell (1881) 18 Ch. 238, p.246, Kay J.

'Look fairly and reasonably on the whole scheme of the deed.' Applies to Ordinance.

Condition = Covenant plus proviso for re-entry.

Brookes v Drysdale (1877) 3 C.P. 52. Headnote, last para.

p.57. Grove J. 'Upon the first point.....'

It is a covenant if introduced by words of condition.

p.59. Contra proferentem.

Intention of parties.

Crown intended the provisions to be construed as covenants, because it served a notice under s.83,

Reference to 'covenants' in correspondence.

Crown Lands Ordinance.

Part VII. Generally speaking 'covenants' relate to leases and 'conditions' to licences.

From s.83 to 86 relates to forfeiture for

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

breach of both conditions and covenants.

s.83 - relief against forfeiture for breach of covenant, breach of conditions in licences.

S.84 - relief for non-payment of rent.

Crown relies on s.14(c) and (d) and s.16(e). Crown says this is a special reference to building conditions and this is inconsistent with s.83.

These sections apply only to matters preliminary to disposal of town plots.

This is purely precedural and does not affect s.83.

See section 17.

Refers to auctioneers' 'conditions of sale'.

Cheshire 7th p.659.

Similarly under s.3(i) 'condition' is not here used in the technical conveyancing sense.

Part vii. s.76. 'Covenants' in lease.
77. 'Conditions' in licence.
79.

Crown relied on s.3(i) powers of Governor.
3(ii) 'Conditions' refers to licence.
3(iii) 'Conditions' here used as an onmibus word, vide 'upon such terms and conditions.'

Crown said that only the Governor can relieve against conditions and the Court to deal with covenants.

Not so - Governor can remit any covenant or condition. If unreasonable he can to the Court.

Sum up:

Covenants in leases.

Conditions in licences.

Crown says Registration of Titles Ordinance has altered everything - unilateral form - no parties.

Agreed that up to 1919 Crown Leases were in ordinary subject and subject form.

Vol. 2, p.2165, Registration of Titles Ordinance.

s.2 'grant' means any conveyance ..... lease or licence - made by or on behalf of Crown.

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

s.21.

Crown says there may have been leases with covenants before 1919, but in 1919 that right of relief was taken away because the Legislature prescribed a form and took away the right to grant relief. Remarkable way of proceeding.

Preamble to the Registration of Titles Ordinance 'to provide for the transfer of land by registration of titles.' cf. Crown Lands Ordinance preamble - to regulate the leasing of Crown Lands.

Registration of Titles Ordinance is only concerned with conveyancing procedure.

Crown says there is a repeal by implication of a right to relief.

Broome's Legal Maxims, 9 edn. p.17. Repeal by implication not favoured. Whether the Registration of Titles Ordinance has not taken away any right of relief against forfeiture.

Garnett v Bradley (1878) 3 A.C. 944, 969.

Relief against forfeiture and Crown leases are in Kenya all creature of statute and Kenya law does not make any distinction between statutory covenant with provision for re-entry (condition) and covenant.

General: Crown Lands Ordinance scheme is to regard conditions in leases as covenants and give relief: provisions in licences as conditions and to give no relief.

If there is any legal distinction between condition and covenant, you must look to the intention of the parties and Crown has elected to serve notice under s.83.

Even if there is a distinction, a breach of condition only renders a term voidable at the option of the lessor and the lessor had not said "I elect to avoid your lease", he has said "I am going to the Court and asking the Court to determine it at a later date for breach of covenant".

Crown Lands Ordinance awarded a privilege to lessees which cannot be taken away by a procedural Ordinance like the Registration of Titles Ordinance.

Mesne Profits.

I agree by C.L. 'mesne profits' are damages for trespass and they are claimed from the date of the plaint.

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

If s.83 of the Crown Lands Ordinance applies, then (unlike England) the appellant is in lawful possession until his lease is forfeited by the Court.

Even if s.157 applies, the appellant would not become a trespasser until Court declared title extinguished.

(2) Trial Judge said "Mesne profits in Kenya are defined by the Civil Procedure Ordinance: until hotel up, lessee could not make any profits and I award rent."

Crown says that there are damages for trespass - another kind of mesne profits.

Elliott v Boynton (1923) Ch.236

Up to the Common Law Procedure Act, 1852, action for ejectment and for mesne profits could not be joined.

Corresponding provision in Kenya Civil Procedure Rules O.II, r.3(a).

Except for this, cannot be joined.

If they say these are Common Law mesne profits, there is a misjoinder.

They are only entitled to mesne profits at 200/- p.a.

Sherrin in reply:

Repeal effect of Registration of Titles Ordinance.

Had this lease been drawn in accordance with the directions in Pt.VII, it would have been drawn with a condition relating to the building stipulations. S.83 would not have applied anyhow.

The Registration of Titles Ordinance has affected the inclusion of covenants in Grants. Different point. But I do not need to have it decided because this building stipulation would be a condition under either Ordinance.

Gledhill said the 'proviso' to s.83 did not take the sense further. I do not agree that it is a proviso. Gledhill said that 'conditions' in s.14 was not to be distinguished from covenants.

Preamble Crown Lands Ordinance - further and better provision.

Ss. 83 and 14 differ from the corresponding

sections in the 1902 Ordinance, i.e. from s.18(1) and s.15.

S.18(1) has no 'detached sentence'. The detached sentence must be taken to vary the meaning of the whole.

When the Judges had no guide they dealt. with the matter so individually that no one could tell what the result of the case would be. Legislature probably did not consider what was the law of England.

S.14.

Change is from 'building covenants' to 'building conditions'.

A change must be presumed to have been intended.

Gledhill argued on the practice of the Land Office in the Courts. We do not know how many of the cases which came before the Courts were on leases inter partes under the Crown Lands Ordinance and how many under Grants in the Registration of Titles Ordinance.

There might be building covenants, e.g. under the 1908 Ordinance s.15 or by mistake under the 1915 Ordinance.

This point has never been raised before by the Courts.

As in Dedhar's case the Crown has brought proceedings under s.83 and point has not arisen.

Record, p. If the judge was right that the practice was, up to 1919, to state the lessee's obligations as covenants that would be wrong. There was no evidence of that practice.

p. First sentence not correct. Court of Equity would always grant relief in respect of a forfeiture in respect of a security which was merely a payment of money.

Barrow v Isaac (1891) 1 Q.B. 417.

p.425

That is the principle lying behind forfeiture.

But if wrong this makes no difference. Payment of rent under the Crown Lands Ordinance would be under a covenant.

It may be that the Registration of Titles Ordinance did remove protection for a tenant against non-payment of rates.

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

But building stipulations are conditions under either Ordinance.

This document has to be construed more as a statute than as a deed. It is in statutory form, and the wording is not controlled by the intention of the parties.

Gledhill made a point that sections 14 and 15 were preliminary.

But s.14 speaks of 'the building conditions to be inserted in the lease' and the special covenants to be inserted in the lease. 'Special' is to distinguish it from the usual covenants which are implied by Pt.VII.

Gledhill said that there was no distinction between covenants and conditions in s.3.

Governor only has power to 'remit' covenants. But he can't extend time for performing covenants which is given to the Court by s.83. He may extend the time for performing conditions.

Extending time to perform conditions is what the trial Judge did and he had no power to do so.

Gledhill said that we had given a notice under s.83. By so doing we would elect to treat the provisions of the grant as a condition or covenant.

It was given out of abundance of caution. The pleadings were in the alternative.

Gledhill said the leases cannot come to end for breach of condition because lessee would be liable to a fine under s.169. In such a case as this Crown would not ask Magistrate to fine a tenant; but in suitable cases Crown can use that section.

Mesne Profits.

Gledhill read s.157 and tried to deduce from it that the title of the lessee was not extinguished till the Court made an order. The declaration that the title is extinguished doesn't mean that the title continues until the Court makes the declaration, e.g. where the lease has expired. 'To be extinguished' may mean to have been extinguished, for if not, a lease would go on until the Court made an order under s.157.

O.II. r.3.

The inclusion of a claim for damages for trespass would not amount to a misjoinder.

(c) the trespass which arises from holding over could be said to come within the expression 'a wrong to the premises claimed'.

Court.

What 'principles of English law' to which those words could apply?

'Where there has been a breach of condition contrived by the landlord, the landlord could not take advantage of it.' Coke's Commentaries on Littleton's Tenures 206(b).

? the Province of Bombay principle.

Common Law Procedure Act restricted powers of Equity to relieve against forfeiture. That Act bound the Crown. It was applied in IN re Brain.

Relief for forfeiture for failure to insure. Crown Lands Act 1845, s.8. 'Commissioners may relieve.....'

C.A.V. K.K.O'CONNOR. P.

25/2/58.

5.3.58 Resumed. Bench and Bar as before.

Argument asked for on the cross-appeal.

Gledhill (on the cross-appeal).

Mesne profits. Judge was right in not awarding mesne profits. The rent 200/- p.a. is being paid and I agree that that is due.

The claim was for £11,000 p.a.

Fazal Dhirani v Abdul Mohamed Ismail Ganji. 13 E.A.C.A. 69, at pp.70, 71. Costs should follow the event unless there is good reason contra. Judge did not really consider the question of costs. Record p.276.

Jiwan Singh v Ragnath Jeram, 12 E.A.C.A. p.21. Headnote para. 4.

Party to get costs of separate issue if it has affected the result in whole or in part.

p.31, last para., p.32.

Claim of the Crown was for £11,000 substantial. Issues can be separated, may be different. Action for forfeiture is distinct from action for mesne profits. 'Issue which has affected the amount of the decree'.

Valuers were called on the question of mesne profits alone.

Sherrin:

I don't agree: value was relevant on the

In the Court of Appeal for Eastern Africa

No. 11

Judge's Notes.

(a) O'Connor, P. - continued.

question of relief against forfeiture.

Cinema Press Ltd. v. Pictures and Pleasures Ltd. (1945) 1 K.B. 356, 364.
P.276

Costs as between Solicitor and client.

(1) If Court was not empowered to grant relief against forfeiture, order awarding costs between Solicitor and client is wrong. I have only found one case in which the Court awarded costs to the landlord under 'on such terms as seem just'.

Gardner v. Cone (1928) Ch.955, p.968. Maugham. 10

'On the whole I think that the proper order is to grant relief .....'

Solicitor and client costs only awarded in special circumstances - fraud, etc.

If no relief is granted, the landlord has got his property back and relief on terms is inapplicable.

(2) If Court decides that relief can be granted, Gardner's case applies. If I am successful leave Judge's order alone. 20

Sherrin:

Gledhill cannot be successful on mesne profits and on damages for breach of covenant.

I am entitled to judgment for mesne profits even though I have paid the rent.

Distinction between claim which has failed and has succeeded for a reduced amount.

Question is whether the excessive claim has increased the costs.

I may have failed on quantum, not on the claim 30 itself.

Advocate and client costs.

Agree if successful on appeal and no relief is granted, then there must be a normal order for party and party costs.

Gledhill:

If I am successful I do not ask for costs order to be changed on the mesne profits point. Judge may have thought that the mesne profits point was such a minor one that it had not altered the 40 length or expense of the case. Judge never decided the point - issue small.

No views on proportionate order v. costs of separate issues.

Gledhill:

Claim for £11,000 not a minor issue and difference is major.

Instruction fee for £11,000 is about Shs.4,000/

C.A.V. K.K.O'CONNOR.
P.

5/3/58. 50

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(b) Sinclair C.J.

24.2.58 Coram: O'Connor P.
Sinclair C.J.
Forbes J.A.

Sherrin, Davies with him. for Appellant.
Gledhill, Swaraj Singh with him, for Respondent.

Sherrin:

Submit Conveyancing Act, 1881, does not apply to Crown.

Covered by Province of Bombay's case.

See also how Acts affecting property deal with this subject.

Not a necessary implication that 1881 Act should apply to Crown.

See also S.80 Land Registration Act, 1925. See S.87 of 1845 Act and S.2 of 1852 Act. Have not found any power given to the Court in any of the Acts.

Principle as to when Acts bind Crown is imported by proviso to S.83.

I submitted that before Landlord & Tenant Act 1751 it was necessary for Courts of Chancery to force landlord to execute a new lease.

But see Dendy v Evans, (1910) 1 K.B.263,265. That does not affect my argument that lease comes to an end on issue of writ.

Tenant becomes a trespasser from issue of writ. Landlord has a right to waive forfeiture. Issue of writ is not a final election. Elliott v Boynton still good law.

Effect of a breach of condition is to bring lease to an end as from issue of writ. Effect of order staying proceedings as mentioned in Dendy v Evans is to revive lease - to force landlord to waive the forfeiture.

Distinction between covenants and conditions.

Where an Ordinance uses the words "conditions" and "covenants" as Crown Lands Ordinance does in

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(b) Sinclair C.J. continued

S.14 it is clearly intention of legislature to use those words in their distinguished meaning. "Covenants" can in contracts, by intention of parties, be taken to include conditions. But in Crown Lands Ordinance clear that legislature has used the two words in their different meanings. See for instance S.14.

See Crown Lands Ordinance 1902, Vol.2 p.2103 - S.16, 15;

In later Ordinance legislature altered provision as to covenants to a provision that a lease should contain building conditions.

Court must give effect to the change.

Boyce v Edbrooke (1903) 1 Ch., 836, 841.

Here, where Ordinance has mentioned a condition it must be taken as meaning a condition and nothing else.

Under lease by grant there can be no covenants notwithstanding the provisions of Crown Lands Ordinance where covenants are implied by the Crown Lands Ordinance on part of the Crown they are effective as covenants. There can be no covenants on part of grantee on lease by grant as he is not a party to the deed - deed poll or unilateral document.

Chelsea etc. Building Society v Armstrong (1951) 1 Ch. 853, 855.

Covenants cannot even be implied in unilateral document. This must be considered as a deed not inter partes. Accordingly it is impossible to imply into it a covenant on the part of the grantee.

Document must be construed strictly in accordance with real property law.

Say only remedy for breach of condition in a lease which is met also a covenant is by forfeiture.

Where C.L. Ordinance provides that building restrictions shall be in the form of conditions, and where those restrictions are found in a deed not inter partes it would be wholly wrong

to construe them as covenants merely because there is authority for saying that in a deed inter partes in order to give effect to the intention of the parties a stipulation expressed as a condition, may be construed as a covenant

P. of judgment

No such thing as a forfeiture for breach of covenant - only for breach of condition.

P. line there can be no intention of the parties in a deed which is not inter partes.

Brookes v Drysdale 3 C.P.D.52. No authority for construing word "covenant" in an Ordinance as including conditions. Document and Ordinance must be construed in different ways. Intention of parties not relevant in an Ordinance.

Hayne v Cummings. 143 E.R. 1191 - same argument. p.1192.

Meaning of words in loosely worded agreement. Not even helpful in construing a statute.

In re Brain. 44 L.J.Eq.103 (1874). Lease by deed poll.

Judgment of V.C. Mallins.

Is this Court bound by decision in Dedhar's case (Civ.App. No.8 of 1956)? That case did not decide anything in regard to difference between conditions and covenants. That was never raised. Relief asked for under S.83. See plaint.

In defence relief against forfeiture asked for.

On those pleadings question as to whether that case properly came within S.83 or not, did not arise. Could not have arisen on those pleadings.

(Gledhill :-

Will not argue that Dedhar's case binds this Court on difference between covenant and condition).

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(b) Sinclair C.J. continued

Not an authority on question whether Conveyancing Act, 1881 should be considered when exercising powers under proviso to S.83.

If it is, it should be disregarded because it was made per incuriam or alternatively because it has the effect of abridging the Royal prerogative.

Young v Bristol Aircraft Co. (1946) A.C. 163 at p.169.

The E.A.C.A. did not "pronounce" on questions whether 1881 Act bound the Crown. Only portion of judgment which is binding is that law of England which applies is that at the time of the passing of the Crown Lands Ordinance.

Pronouncement covering a wide area is not binding in relation to a particular point.

Stare decisis.

Joseph Kabui v Reg. 21 E.A.C.A.260,261 where liberty of subject is concerned - Shah v Attorney General 22 E.A.C.A.216 - per incuriam.

Berkeley v Papadoyannis (1954) 2 Q.B. 149 on meaning of per incuriam.

In Dedhar's case Court did not have its attention drawn to principle that some Acts do not bind the Crown. Pronouncement was per incuriam if there was a decision on application of 1881 Act.

Royal prerogative concerned.

7 Halsbury 3rd edn. p.221, 222, para. 475.

Prerogatives of Crown cannot be parted with by the Crown. Decision of Court ineffective to abridge prerogative. If decision wrong it should not be followed.

Reg. v Eduljee Byramjee. 13 E.R.496, 503 (penultimate paragraph)

Dedhar's case no authority that applications for forfeiture must be brought under S.83 as that point was never decided.

Court did not pronounce on point that 1881

Act did not apply to the Crown. If it did so pronounce, it did so per incuriam. Lastly pronouncement had effect of abridging the Royal prerogative and was therefore null - should not be followed.

Grounds 5 and 6.

Mesne profits. Definition S.2 C.P.O.

Taken from Indian Code of Civil Procedure, S.2(12). Identical with our definition. Only reference in C.P.O. is S.81(2)(f)(ii). Rules as to mesne profits are branch of law of trespass rather than law of real property.

O.2 r 3 of C.P. Rules.

(Civ. App. 23 of 1957. Heptulla Bros. Ltd. v London Photographic Arts).

Definition does not follow the common law of England.

Mesne profits may well exceed amount of the rent if properly let at a nominal rent.

Indian law regards mesne profits as amount trespasser makes. English law regards them as amount landlord lost. Pashir lost nothing and made nothing. He could not put it to any use.

On the other hand Crown kept out of a very valuable piece of land.

Elliott v Boynton. p.247

Clifton Securities Ltd. v Huntley. (1948) 2 All E.R. 283.

2.30 p.m. Bench and Bar as before.

Sherrin continues:

Above case is authority that mesne profits may exceed the rent. That definition runs counter to definition in C.P.O. As to fair value or real value see p.108. Crown asked for mesne profits at £10,000 a year - £833 p.m.

Claim for mesne profits in plaint - not Ordinance. Damages for trespass were claimed by use of "mesne profits". Plaint must have same result

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(b) Sinclair C.J. continued

whether claim is for mesne profits or damages.

S.77 of Crown Lands Ordinance - implication is that it applies to ordinary lease inter partes.

Gledhill:

Only point is ability of Court to give relief against forfeiture.

In Dedhar's case Court held principles laid down in Hyman v Rose should be followed here. Unfettered discretion. That case decided what the limits of the discretion were. Morelle Ltd. v. Wakeling (1955) 1 All E.R. 708 as to per incuriam - at 715 B. Must be given in ignorance of binding decision of Court or of a statute.

If Bombay case, a decision of the Privy Council, had been cited, the decision would have been the same. Question is whether Ordinance binding on Crown in Kenya.

What did draftsman have in his mind in S.83. Cf. S.18 of 1902 Ordinance which is about as wide as it could be - as wide as 1881 Act

In 1915 new Crown Lands Ordinance enacted. S.83 commences in first part in exactly same words as S.18 of 1902 Ordinance.

Proviso is a guide only.

Agree that "English law" to be applied is the law in force at the time when the Ordinance came into force. Must include statutes or wording would be "the common law of England and the doctrines of equity".

Craies on Statute Law, 5th edn., page 202,3rd para. as to proviso.

West Derby Union v Metropolitan Life Assurance Society (1897) A.C.647, 656.

R. v Dibdin (1910) p.57.

If those words had not appeared at end of S.83 the Court would give relief on such terms as appeared just. Court must grant relief on terms

of Conveyancing Act as between subject and subject.

Question is whether the general principles of English law bind the Crown here, not whether Conveyancing Act binds the Crown in England.

No manifest slip or error in Dedhar's case. No binding authority or statute ignored.

That concludes my argument on stare decisis.

Ct:

Adjourned to 9.45 a.m. on 25.2.58.

R.O. SINCLAIR
C.J.

25.2.58. Bench and Bar as before.

Gledhill continues:

Main point is whether provisions in the title deeds are conditions or covenants.

Various provisions of Crown Lands Ordinance are very difficult to reconcile. Necessary to take a bird's eye view of the scheme of the Ordinance.

Not argued that the grant was not a lease.

Some weight must be given to the practice of Courts since 1915 of granting relief under S.83.

Breaches of provisions in Crown leases are not on same footing as common law breaches; entirely creatures of statute.

A covenant in Kenya in a Crown lease is a covenant with a proviso for re-entry imported into it by S.83. So in Kenya there is no legal difference between a covenant and a condition.

Last para. on p. is most important. If Crown's argument is right there is no provision for enforcing breach of a condition.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(b) Sinclair C.J. continued.

See S.169 Crown Lands Ordinance.

In English law words "covenants" and "conditions" have not been construed strictly - effect given to intention of parties.

Foa, 7th edn. p.311.

Hayne v Cummings, 143 E.R. 1191.

Bastin v Bidwell (1881) 18 Ch. D. 238, 246. Covenant treated as a condition.

Whole scheme of Crown Lands Ordinance must be looked at. Draftsman equated covenants with conditions.

Brookes v Drysdale 3 C.P.D. 52, 57.

Intention of parties and legislature must be looked at.

Obvious intention of Crown to treat the conditions as covenants. Notice under S.83 served - p.

Throughout Ordinance generally "covenant" relates to leases and "condition" to licences. Part VII(3) intended to cover whole question of forfeiture of leases and licences. Unlikely there would be a third class there - conditions in leases.

Crown relies on S.14(c) and S.16(e). Appears some inconsistency with S.83. Court entitled to look at heading. s.s.14 and 16 relate to what must be done before disposal of plot. Purely procedural. Cannot take away power under S.83.

"Conditions" in S.17 not a term of art - conditions of sale only.

Cheshire p.659, 7th edn. Similarly under S.3(v) - "conditions" not a term of art.

S.3(iii) - "conditions" used in same sense as in 3(i). Omnibus word including any provision is an agreement, lease or licence.

Under S.3(iii) Governor given full power to deal with covenants. If Governor unreasonable, lessee can go to court.

Scheme of Ordinance is "covenants and leases", "conditions and Licences."

Crown's argument that there cannot be covenants in a grant to which lessee is not a party.

Up to 1919 when Registration of Titles Ordinance enacted leases were in form as between subject and subject.

Registration of Titles Ordinance (Cap.160) p.2165. "Grant" defined in S.2.

S.21 (2172) relates to grants. Form at 2198.

Crown says that after 1919 covenants were turned into conditions and the rights of relief was taken away - merely by prescribing a form.

Remarkable way of taking away someone's right.

Crown say S.83 operates only in relation to leases before 1919.

See preamble to two Ordinances. Crown Lands Ordinance deals with leases and R.T. Ordinance merely with registration of titles - conveyancing procedure and forms.

R.T. Ordinance dealing with procedure only cannot repeal right to relief.

Broom - 9th edn. p.17, 18. Has R.T. Ordinance altered the C.L. Ordinance which did give relief.

So-called building conditions are covenants. R.T. Ordinance has not taken away any right to forfeiture.

Garrett v Bradley (1878) 3 A.C. 942 on repeal by implication - p.969.

If Crown intended to take away the right they would not do it in a hole and corner manner.

1. As far as Crown leases are concerned in Kenya relief against forfeiture is a creature of statute. Statutory covenant with right of re-entry is exactly the same as a condition.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(b) Sinclair C.J. continued

2. General scheme of Crown Lands Ordinance is to regard provisions in leases as covenants and to give relief and to regard provisions in licences as conditions and not to give relief.

3. If there is a distinction in Kenya between a condition and a covenant with a proviso for re-entry we are entitled to look to intention of parties. Crown elected to serve notice under S.83.

4. Even if there is a distinction, a breach of condition only renders lease voidable at option of lessor, and the lessor has not said he elected to avoid the lease but gave notice he was going to the Court to determine the lease for breach of covenant.

5. Crown Lands Ordinance awarded a privilege to lessees which cannot be taken away by a purely procedural Ordnance like the R.T. Ordinance.

6. Mesne profits.

In England they are damages for trespass. Claimed here from date of plaint.

If S.83 applies to this transaction, then, unlike England, appellant is in lawful possession until his lease is forfeited by the Court. Even if S.157 should apply, the appellant would not become a trespasser until Court declared his title to be extinguished.

Second leg of my argument is - Judge said rightly that mesne profits defined by C.P.O. in S.2. Until hotel was up appellant could not make any profit.

Crown says there are two kinds of mesne profit -

Elliott v Boynton (1924) 1 Ch. 236, 247.

Up to Common Law Procedure Act 1852 action for mesne profits and for ejectment could not be joined. Common Law Proc. Act not applicable here.

But see O.2 r 3(a) which authorises such joinder. Such joinder governed by definition of mesne profits as defined under C.P.O. If common law profits there was a misjoinder.

Sherrin:

Repeal by implication.

Had this lease been drawn in accordance with the directions given in Pt. VII of Crown Lands, Ordinance, it would have been drawn with a condition relating to the building stipulations. S.83 would not have applied anyhow. Had the lease been a lease inter partes drawn in accordance with Part III it would have contained building conditions and special covenants. R.T. Ord. has affected the inclusion of covenants in grants. Building stipulation would be a condition under either Ordinance.

Last para. of S.83 is not in the form of a proviso.

Crown Lands Ordinance enacted to make "further and better provision" etc. Both Sections 14 and 83 differ from corresponding Sections in 1902 Ordinance viz. S.18(1) and S.15. S.18(1) has no proviso. Proviso must be taken to carry meaning of whole of S.83. Legislature may have intended to give a guide to Court as to what was just.

In S.14 the change is from building covenants to building conditions. As it is a change weight must be given to the changed words.

As to practice of courts, we do not know in how many cases the leases were inter partes and how many under the new type of grant. Inter partes leases might have included building covenants under 1902 Ordinance or erroneously under R.T.O.

Courts never had this point taken before them before.

Crown has always brought its proceedings under S.83. No evidence as to the practice referred to by Judge as to practice up to passing of R.T. Ord.

p. Court could always grant relief in respect of a forfeiture which was merely security for the payment of money.

Barrow v Isaac (1891) 1 Q.B. 417, 425.

(But equity court grant relief only for non-payment of rent?).

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(b) Sinclair C.J. continued

May be that tenant has no protection from forfeiture for non-payment of rates.

Document must be construed more as a statute than a deed. Form is laid down by statute and not controlled by intention of parties.

S.14 speaks of "the building conditions to be inserted in the lease". Not merely conditions of sale. Followed by "special covenants to be inserted in the lease." Word "special" used to distinguish between usual implied covenants.

As to argument that no distinction made between covenants and conditions in S.3. - Governor given power to remit covenants. Not empowered to extend time for performing covenants which is given to court by S.83. But given power to extend time for performing conditions which is not given to the Court. That power is reserved to Governor.

As to notice given by Crown under S.83 - by so doing we did not thereby elect to treat breach of condition as breach of covenant.

S.169 C.L. Ordinance - in such a case as this Crown would be foolish to bring a charge. No reason why Crown should not use that section in suitable cases.

Mesne profits.

S.157 C.L. Ordinance - even if term of lease expired Court can declare title extinguished but that does not mean title continues until the declaration. If Gledhill's argument correct it would mean lease continued until Court made a declaration under S.157.

O.2 r.3 - inclusion of claim for damages for trespass would not be a misjoinder see r.3(c). Trespass is a wrong or injury to premises claimed.

Where there has been a breach of condition contrived by the Landlord the Landlord is prohibited at common law from taking advantage of it. Coke's Commentaries on Littleton's Tenures. p.206 (b). Also law as to when statutes bind the Crown.

Think Common Law Procedure Act, 1852 binds the Crown - see in re Brain.

No.11

Judge's Notes

(b) Sinclair C.J. continued

Also statutory relief from forfeiture in cases of failure to insure. Crown Lands Act,1845. 4 Halsbury Statutes p.288. (C.L. Commissioners given power to grant relief, not the Court).

R.O. SINCLAIR
C.J.
25.2.58.

C.A.V.

5.3.58. Bench and Bar as before.

Argument on Cross-Appeal.

Gledhill:

Judge right in not awarding mesne profits as claimed.

Rent due has been paid.

Claim unsuccessful in toto.

Fazal Dhirani and anor. v A.M. Ismail Ganji, 13 E.A.C.A. 69.

Costs should follow the event.

Jiwan Singh v Ragnath Jeram, 12 E.A.C.A.21, 31, 32.

Claim for £11,000 odd damages. Two valuers called solely on question of mesne profits and damages.

Sherrin:

That evidence was also relevant to relief from forfeiture. Proper to prove value of land (see Cinema Press Ltd. (1945) K.B. 364).

Solicitor and Client costs.

If respondent unsuccessful?

Order awarding costs between Solicitor and Client would then be wrong.

Know of only one case where solicitor and client costs awarded on relief against forfeiture being granted.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(b) Sinclair C.J. continued

Gardner & Co.Ltd. v Cone, (1928) Ch.D.955,968.

No reason for awarding such costs if Court cannot grant relief.

If respondent successful?

In discretion of Court.

Judge gave no reasons at all.

Sherrin:

Must get judgment for mesne profits or damages

Has claim added to costs. Where it fails entirely Judge may award costs on that issue.

Did not entirely fail on that issue. Failed on fact and not in law.

Solicitor and client basis.

If I am successful and no relief granted entitled to party and party costs only.

If relief forfeited.

Gledhill:

If I am successful, do not ask for that order to be changed.

Mesne profits point might be so minor that it did not alter length of case.

Gledhill:

Claim for £11,000 not a minor issue as against £10.

R.O. SINCLAIR,
C.J.

C.A.V.

(c) Forbes, J.A.

30.1.58. Coram: O'Connor P.
Briggs V.P.
Forbes J.A.

Sherrin, Davies with him for Appellant.
Gledhill, Swaraj Singh with him, for Respondent.

Sherrin:

Pl. for possession and mesne profits.

Alternative claim under S.83 of Crown Lands Ordinance.

Defence - para.1 - Grant to be construed as lease and condition as covenant.

Ground of appeal that Judge had no jurisdiction to grant relief.

Two other legal points - Grounds 6 and 7.

Crux is that appellant submits that lease came to an end at issue of plaint and that that is only construction which can be put on lease and therefore no power under S.83 to grant relief.

Submit S.83 empowers Court to refuse forfeiture and only relief Court can give is refusal of forfeiture.

Vol.II of Laws 2038.

Submit s. gives Court power to relieve tenant by refusing to allow forfeiture.

Relief granted by Courts of equity was to revive the lease. So was effect of statutory relief which could be granted under Conveyancing Act, 1881.

My submission that term of years came to an end at issue of plaint and could not possibly be revived under S.83.

Elliott v Boynton (1924) 1 Ch.236 at 249. Submit that under breach of condition, landlord is entitled to possession from issue of writ and lease terminated at the issue of the writ. When Ct, of Chancery granted relief landlord was made to execute new lease till 1731.

Landlord & Tenant Act 1731 - S.4 made statutory provision removing necessity for new lease. Submit clear in theory that before that provision new lease would be necessary. That provision continued from time to time. Latest, Supreme Ct. of Judicature (Consolidation) Act, 1925, S.46.

Submit clear that at common law there was a necessity for a new lease after termination for breach of covenant coupled with proviso for re-entry.

This is a unilateral lease in statutory form provided. Reg. of Titles Ordinance.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

Submit no importance in particular form of lease, as effect would have been the same if drawn in accord with Cr. Lands Ord. i.e. Reg. of Titles Ord. has not changed law. Reg. of Titles Ord. provides (p.2198) Form B(1) lease in form of grant and Form H. at p.2202 a bi-lateral form.

Both types can properly be called leases.

See no reason why Cr. should not make use of bi-lateral form.

Agree that perhaps Crown restricted to Form B (1). 10

Covenants for title in Cr. Lands Ord. are covenants in narrow sense.

Part III of Cr. Lands Ord. (p.2019) S.12, 13, 14, S.14(c) and (d) Distinction between condition and covenant. Submit clear distinction kept in Ord. Submit must be taken that legislature must be taken to use them in ordinary sense.

Form B(1) - No longer possible to have a loans covenant and Form B(1) must be used. 20

Crown Lands Act, 1828 - Provision very similar to this one, but could find no case based on that type of conveyance.

Submit the provisions for disposal of land in townships (Cr. Lands Ord.) would have same results as brought about by ordinary conveyancing document in England.

Devices to overcome right to relief.

(a) lease for short term.

(b) licence to enter with provision for lease on completion building 30

Enc. of Forms and Precedents Vol.8, p.136 (3rd Ed.)

Builder a tenant at will.

Submit that here draftsman faced with difficulty of protecting Crown's interest.

Submit he has therefore laid down "building

conditions" as opposed to covenants, and in S.83 only gives relief against breach of covenant.

S.3 gives power to extend time for conditions.

Draftsman has given some powers to Court and some to Governor. Nowhere has he given Court power to overrule Governor. S.3(iii) of Cr. Lands Ord.

Submit that is safeguard which lessee has.

In S.(ii) - power to remit covenants, agreements and conditions. Court is given power to give relief for breach of covenant, therefore covenant excluded from S.3(iii).

(P. What is operation of S.83 in regard to town property).

Think effect of Reg. of Titles Ord. is unfortunate. Cr. Lands Ord. in itself complete and scheme was that condition dealt with by Governor and covenant by Court.

Effect of Reg. of Titles Ord. is to make S.83 of Cr. Lands Ord. a dead letter in relation to town land. Unfortunate effect.

Effect of inter-action of two Ordinances not always to benefit of Crown.

Lease under consideration - liability for rates. Suit for rates by landlord - difficulty of suing on a condition.

(V.P. S.14 - "conditions" may be limited to matters relating to building).

Would argue that at least as regards building conditions Reg. of Titles Ord. has made no difference.

Pre-1919, building condition would be a condition. No reason to regard it as a covenant because other "covenants" now have to be conditions under Reg. of Titles Ord.

Part VII of Cr. Lands Ord. - Heading.

Latest Eng. statutory provision at enactment of Cr. Lands Ord. was Conveyancing Act, 1881.

In the Court of Appeal for Eastern Africa

No.11
Judge's Notes
(c) Forbes, J.A. continued

Draftsman would have had that as a pattern. That Act set out general words and covenants of titles so that they would no longer need to be set out in a deed.

Submit that Part VII is further application of that principle.

Hill & Redman 12th ed. p.132 - sets out usual covenants (S.173).

Part VII - Draftsman has set out each of usual covenants except covenant to keep in repair.

S.77(a) - Covenant to pay rent.

77(b) - Covenant to pay taxes.

Submit that in general "covenant" applies to leases and "conditions" applies to licences.

See SS.83 and 84.

See also S.79.

S.76 - Covenant for quiet enjoyment.

Submit S.83 is really the implied proviso for re-entry under this system of implied covenants. Draftsman has incorporated statutory provision for relief.

Suggest S.83 is in lieu of proviso for re-entry. It contains statutory provision for relief.

No need for proviso for re-entry in case of building conditions which carry own provision for re-entry. But there is necessity to provide for re-entry in case of other covenants. Submit building condition never intended and did not come within S.83. Estate has already terminated.

(P. ? S.84).

Submit a matter of convenience to allow matter to come before 1st class Magistrate.

Power of relief under S.84 restricted to non-payment of rent.

Under licence licensee has no tenure - only has right to occupy.

Crown Lands Ordinance contemplates that only stipulations in case of licences are conditions - not covenants.

(V.P. Condition of licence under Ordinance different from condition of licence under English law).

Ordinance does make distinction between covenant and condition in regard to lease and submit only meaning that can be given is usual one. "Temporary Occupation Licences" are peculiar tenure different from English law - Part V.A. - p.2028. Statutory provision for licence to continue - S.48.

(P. How does S.50 compare with S.84)

Possibly S.84 provides convenient way of recovering rent before Magistrate.

S.50 - If Comm. declares licence forfeit -

(Gledhill - Different types of licence - S.50 relates to Temporary Occupation Licences).

S.157 - Recovery of land.

Submit that a forfeiture arising from breach of condition brings into force S.157.

There no statutory provision for relief.

"Forfeiture" submit means forfeiture for breach of condition - not for breach of covenant because of S.83.

(P. S.84)?

If licence declared forfeited under S.84, no provision for re-entry, so would have to rely on S.157.

S.83 and S.84 - may be no forfeiture till declaration made and only then that S.157 applies.

S.83 provides expressly for re-entry.

(P. Is not main object of S.157 to get order for possession).

Yes, that is so.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

Have completed submissions on Crown Lands Ordinance.

Judgment in Court below.

Dedhar. Civ. App. 8/1956.

E.A.C.A. applied principles laid down in Conv. Act, 1881.

P.9. Submit unfortunate that Court not asked to consider whether Conv. Act bound the Crown. Submit did not.

(J.A. Effect of S.83?).

Relief granted on principles of equity.

Equitable relief has been given against Crown

In re Brain, 44 L.J. (Eq.) 103. (1874) - (1875 L.J.)

(P. Court of 5 Judges necessary to overrule Dedhar).

Submit point was conceded without argument before and so not necessary to convene Court of 5 to overrule.

(P. Dedhar - relief given against building condition similar to this).

Gledhill. Would argue Court should follow Dedhar. Court below not told Act did not apply. Short notice).

(P. Will hear argument on point)

Province of Bombay v. Mun. Council of Bombay, (1947) A.C.58.

Nothing in Conv. Act to say binding on Crown. 1925 legislation has express provision.

Law of Property Act, 1925, S.208.

Land Charges Act. S.25.

Trustee Act - S.71.

Settled Land Act is silent.

So is Conv. Act, 1881.

Submit where silent it does not bind the Crown.

21 Acts dealing with Crown Land in 19th century.

May be reason for expect it would not bind Crown.

Bombay case - p.61.

Submit no necessary implication contained in Conv. Act.

Adj. to 2.30 p.m.

A.G. FORBES.

2.30 p.m. Bench and Bar as before.

P. Subject to Counsel's views, think we should have Bench of 5 Judges. Kabui v R. 21 E.A.C.A. 260.

Sherrin:

Would ask for Bench of 5.

Gledhill: Kabui a criminal case.

P. Same principle applies - exception only in criminal cases.

Gledhill:

Refer Bristol Aeroplane Co. (1944) 2 A.E.R. 293. Full Court no greater power than ordinary Court. Bound to follow earlier decision.

v.p.297 - Judgment of Lord Greene.

p.299 - Q. of full Court canvassed - from p.298.

(E) Appears to be dealing with 2 inconsistent decisions.

Submit decision in Dedhar not per incuriam.

Court considered whether statute applied.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

Order.

Q. Whether decision in Dedhar case was per incuriam is one for argument and it is desirable that it be considered by 5 Judges. If held to be per incuriam they may proceed to consider the issue. Adj. for Court of 5 Judges to be convened.

A.G. FORBES, J.A.
30.1.58.

24.2.58. Coram: O'Connor P.
Sinclair C.J.
Forbes J.A.

Sherrin, Davies with him, for Appellant.
Gledhill, Swaraj Singh with him, for Respondent.

Sherrin: (Asked to repeat arguments on Conv.Act, 1881).

Submit point as to whether Act binds Crown is decided by Prov. of Bombay v Mun. Council of Bombay. Crown only bound is so stated in statute or if by necessary implication.

Submit no necessary implication that Conv. Act 1881 should apply to the Crown.

Large number (22) of Crown Lands Acts passed during 19th century. Land Reg. Act '25. S.80 - not important, but omitted to mention it last time.

Crown Lands Acts gave power of relief against forfeiture to Commissioners and not Court in case of failure to insure. 1845, S.8.

(P. Did 1852 Act give such power to Commissioners in other cases).

Not sure.

(P. S.2 of Crown Lands Act, 1852?)

Had not noticed that.

(P. Any power given to Court to relieve against forfeiture?).

Have not come across any.

S.83 of Crown Lands Ordinance. Law binding or otherwise on Crown is part of the law of England and is imported by proviso to S.83.

Case found since last hearing - against me but does not affect structure.

I submitted that before Landlord & Tenant Act, 1831 it was necessary to force landlord to execute a new lease. But our reports did not go back far enough. But see Dendy v Evans (1910) 1 K.B. 263 where point was considered.

P.265.

Does not affect my argument that case came to an end on issue of writ.

But I was wrong in saying new lease granted even if landlord had not obtained judgment. Position before judgment if injunction granted would appear to be compulsory waiver.

Elliott v Boynton (1924) 1 Ch.236 at p.249.

My submission that appellant a trespasser from issue of writ not affected.

S.83 keeps lease alive in respect of breaches of covenant until Court declares it forfeited. Effect of condition is to bring term to an end on issue of writ in consequence of breach. Submit only relief which could be granted would be stay of proceedings under old law - i.e. waiver. Submit distinction in law between covenants and conditions.

Where Ordinance uses words condition and covenant as e.g.in Crown Lands Ordinance, S.14, it is clearly the intent of legislature to use words in their "distinguished" meanings.

"Covenants" can - in contracts - be taken by intention of parties to include conditions. But submit in Crown Lands Ordinance the legislature has used the two words in their different meanings. And therefore no effect on construction that in other circumstances "covenant" can include condition, e.g. v. s.14.

Cf. earlier Crown Lands Ord. 1902 - Vol.III,

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

p.2103 of 1948 Laws - S.15 - Covenants implied to erect buildings, etc.

i.e. building stipulations to be drawn in form of covenants. In later Ord. the legislature altered that provision to one that lease should contain building conditions.

S.83 - Proviso - S.18 of earlier Ord. (No. proviso). Tho' building conditions now referred to, the section left relating to covenants only. Submit construction to be applied must give effect to that change. Cumbrousness of Court procedure, e.g. present case. Plaint filed Nov. '55 - Judgment March '57. Effect of change would be gradual as old leases still in force.

Boyce v Edbrooke (1903) 1 Ch. 836 at p.841-2. Submit when Ordinance says "condition" it must be taken as meaning a condition and nothing else. Effect of Reg. of Titles Ordinance on Crown Lands Ordinance. Building condition is a condition in both Ordinances. Difficult position as regards "covenants" in Crown Lands Ordinance which are in grant as conditions. e.g. S.77. Covenants on part of Crown-still covenants.

Lease by deed poll or letters patent. Can be covenants on part of grantor but not on part of lessee. Unilateral document. Cf. Registration of Land in U.K. - also unilateral document. Chelsea & Walham Green Building Society v Armstrong (1951) 1 Ch. 853. Not quite same point. Q. whether Society could enforce covenant in lease it had not executed. Submit cannot be covenants by grantee - not even implied by law. Submit not possible to imply a covenant which cannot be written into document. Crown Lands Ordinance earlier in date.

Reg. of Titles Ordinance Prevails in case of conflict.

(P. Can we say provisions of S.77 of Crown Lands Ordinance are a dead letter. Must these be special conditions if not inserted in grant).

Would say covenants in S.77 would not be implied as wrong to imply covenants in unilateral instrument. Not necessary to my argument.

With Chelsea case in mind that I suggested

that Crown could covenant but not any other party. This not a deed inter partes and so impossible to imply into it a covenant by the grantee.

(P. But if statute so provides? Is that not to be carried on?).

Submit only way to construe is in accord with real property law.

I argue that where Crown Lands Ordinance say building restrictions shall be in form of conditions and where the conditions are in a document not inter partes it would be wholly wrong to construe them as covenants merely because there is authority for saying that in deed inter partes in order to give effect to intent of parties a stipulation expressed as a condition may be construed as a covenant.

Judge relied (p. 52) on Brookes v Drysdale and Hayne v Cummings.

p. 53 of Record - Fallacy lies in words "to effect intention of parties." Cannot be any in deed not inter partes.

Submit these cases are not even helpful in construing a statute - only apply to construction of an agreement inter partes.

Refer In re Brain 44 L.J. (Eq.) 103 (1874). Forms no part of my argument, but may be helpful as it is only case I can find of a lease by Deed Poll.

This was Petition of Right for relief against forfeiture. Judge does deal with leases not inter partes.

Q. Whether Court bound by Dedhar's case (Civ.App.8/56). I submit that case has decided nothing.

The Pleadings show that question of difference between covenant and condition were never raised.

Refer Plaint - sets out special conditions.

Refers S.83 of Crown Lands Ordinance and claims

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

declaration of forfeiture - i.e. order Court authorised to make by S.38.

Defence - para. 2 claim for relief against forfeiture. Would say should be "statutory" relief - not "equitable" relief. Prayer for relief.

Submit on those pleadings to question whether case properly came within S.83 did not arise.

Memo. of appeal - prayer

Submit point whether S.83 applied to breach of condition was not argued and could not be argued.

(Gledhill - Will not argue that Dedhar binds Court as to difference between covenant and condition. Will argue it binds Court as to giving of relief under S.83).

Q. Whether Conveyancing Act, 1881 is one of parts of English Law to be considered under proviso to S.83.

Submit not an authority on that point. If it is, Court should disregard it as made per incuriam; alternatively, because it has effect of abridging Royal prerogative. Refer Young v Bristol Aircraft Co. (1946) A.C.163 at p.169.

"has pronounced on a point of law."

Q. Whether Conv. Act 1881 applied to Crown was one never pronounced on by this Court, Court did pronounce on wider question whether 1881 Act should come into Court's consideration at all. Submit Dedhar's judgment is binding in so far as it holds law applicable is that applicable at time of passing of Crown Lands Ordinance.

But "point of law" must be taken as smallest area of legal thought. If Court has pronounced on wider area without considering narrower point, then submit judgment not binding as to that particular point.

Stare decisis.

Joseph Kabui v R. 21 E.A.C.A. 260 at p.261, para.3.

Liberty of subject an exception.

Submit another is where prerogative of Crown is concerned.

In re Shah v Attorney General, 2 E.A.C.A.216. Last two paragraphs - in particular last paragraph.

Refer Berkeley v Papadoyannis (1954) 2 Q.B. 149. Headnote. Where previous decision not cited, may be Court acted per incuriam.

Last 3 paragraphs of judgment.

Here Court has not had its attention drawn to principle that some acts do not bind the Crown.

Submit clearly follows that if decision was given that 1881 Act applies to Crown, decision was per incuriam. Submit therefore this is a proper case in which to hold that application of 1881 Act was per incuriam.

Clear from judgment of Court that application of Conveyancing Act was never argued. Last submission is that where prerogative of Crown is concerned, Court should refuse to follow Court's previous decision if of view it is wrong.

Some authority for submission.

Vol. 7 Halsbury's Laws (3rd Edn.) p.221. Part of prerogative that statutes do not bind the Crown.

Para.465 (p.222).

Prerogatives of Crown cannot be parted with by the Crown.

Submit therefore that if prerogative abridged by decision of Judges, that decision ineffective, i.e. it cannot stand on stare decisis rule, if decision is considered erroneous.

R. v Eduljee Byramjee. 13 E.R. 496 at p.503 (at foot).

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

Submit accordingly that Dedhar's case is no authority whatever that relief from forfeiture can be granted under S.83 for breach of condition.

Q. Whether reference should be made to 1881 Act. Court did not pronounce on point whether that Act applied to Crown. If it did so pronounce, it did so per incuriam.

If it did so pronounce, it had effect of abridging Royal prerogative and therefore should not be followed. 10

Other points of law in Memo. of Appeal. (Paras. 5 and 6 of Memo.)

S.2 of Civil Procedure Ordinance.

Definition of "mesne Profits".

"In this Ordinance."

Effect of definition confined to Ordinance and unless something repugnant in subject or contract. Definition taken from Indian Code of Civil Procedure.

S.2(12) identical in terms with Civil Procedure Ordinance. Only reference in Ordinance to mesne profits is in S.81(2)(f)(ii). 20

Only provision in Ordinance is one that does not matter to us - only summary procedure.

(J.A. - definition applies to Rules? e.g. O.XX, r.12?).

Yes.

(Gledhill. O.II, r.3).

May be only mesne profits as defined by Ordinance, that can be recovered. 30

But curious result if say - damages for trespass claimed.

Submit that if definition in our Ordinance and Indian Civil Procedure is sound as regards Indian Law it is not sound as regards English Common Law. According to Common Law, if property let at nominal rent and landlord claims mesne

profits, then mesne profits may well exceed rent - but not under definition.

Indian definition seems to regard mesne profits as what trespasser made out of land.

English law regards what owner lost by reason of trespass. Here Appellant/Trespasser made nothing out of property. On other hand the Crown was kept out of possession of an enormously valuable piece of land.

Loss to Crown differs greatly from gain to Appellant.

Point referred to in Elliott v Boynton (1924) 1 Ch. at p.247, para.3.

Mesne profits - damages for holding over.

But Indian provision makes it equivalent to what tenant has gained by holding over.

Clifton Securities Ltd. v. Huntley.

Adj. to 2.30 p.m.

A.G.F.

2.30 p.m. Bench and Bar as before.

Sherrin continues:

Clifton Securities Ltd. v Huntley (1948) 2 A.E.R.283. At Common Law mesne profits may well exceed rent at which former lessee held the premises.

My submission that true statement of law at p.284 and it runs entirely counter to definition in Civil Procedure Code.

p. of Record - p. of Record - XXM.

Crown claimed £10,000 a year. Little dispute therefore as to value.

Claim here was in a plaint and even in plaint submit contract was repugnant to that meaning.

Submit "mesne profits" in plaint must be

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

taken in English meaning of the word. Strange situation otherwise - mesne profits less than damages for trespass would be.

Conclude my case, but would refer to S.77 of Crown Lands Ordinance.

On consideration I should submit that tho' Land Office adds words "under Crown Lands Ordinance" I think Court would have to say grant is not a lease "under this Ordinance." Lease is not in form contemplated by Crown Lands Ordinance - i.e. an ordinary lease inter partes with certain implied covenants. That form cannot be used since Reg. of Titles Ordinance.

Gledhill:

Part of appeal under consideration only deals with ability of Court to award relief against forfeiture. S.83 gives Supreme Court power to award relief "on such terms as may appear just."

Q. is whether these words are limited proviso. Then Q. whether stipulation here a condition or a covenant. Dedhar's case. Court laid down principles which should guide Court in granting relief. Court said principles of Hyman v Rose (1912) A.C.623 applied. Principles at p.631.

In Dedhar, Court almost entirely concerned with whether relief to be granted in accordance with that unfettered discretion, or under old rules of Equity.

Court was deciding what were limits of discretion of S.C. to grant relief.

Q. Whether decision reached per incuriam.

Morrelle v Wakeling (1955) A.E.R. 1 708.

Headnote - end p.715.

Forgetfulness of a decision or a statute binding on them. Distinguish a doctrine of law or principle of common law and a binding statute.

pp. 715-718 - authoritative exposition of law per incuriam.

(P. If Bombay case cited in Dedhar's case would result have been the same).

Submit yes. Q. is not whether 1881 Act binding on Crown but whether S.83 binding on Crown.

I do agree that Dedhar's case not an authority is whether stipulation is a covenant or a condition.

But S.83 gives S.Court power to relieve on such terms as appear just.

Q. - What had draftsman in mind.

Under S.18 of Crown Lands Ordinance 1902 - similar except as to proviso.

Submit 1902 Ordinance as wide as they can be. As wide as 1881 Act.

Crown put in same position as ordinary landlord in England.

1915 - new Crown Lands Ordinance.

First part of S. left intact.

At the end proviso added - Court "guided" - not bound - by principles of English law and equity. Crown argument is that those words take away almost the whole power they had had to grant relief.

Submit proviso merely put in to assist the Court - merely a "guide".

Submit does not take away power conferred in main part of section.

Refer Dedhar's case - p.6 of judgment.

I concede that the law to be applied is the law as at 1915.

But say "principles of English Law" must include Statute Law.

Proviso does not say "Common Law and principles of Equity" but deliberately uses wider wording. "Proviso" at end of S.83.

Craies Statute Law (5th Ed.) p.202 Refers to West Derby Union case - effect of a proviso. R. v Dibdin. Proviso dependent on the main enactment.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

Odgers. Construction of Deeds and Statutes (3rd Ed.) p.231.

Proviso subordinate to main clause.

West Derby Union v Metropolitan Life Assurance Society, (1897) A.C.647 at p.656 (Lord Shand) (Lord Davey).

(P. Is this in fact a proviso?).

Submit yes. If prefaced "Provided that" would not alter meaning.

R. v. Dibdin (1910) p.57 at p.125.

Stress that these words at end of S.83 are a proviso; and without those words the Court could have given relief "upon such terms as might appear just." Submit proviso does not derogate from that power.

General principles meant, including statute law i.e. 1881 Conv. Act.

S.14 of 1881 Act as between subject and subject is law to guide S.C. in exercising power to grant relief.

Submit only reasonable interpretation to be adopted.

Q. is whether general principle of English law bind Crown here under S.83.

Submit no binding authority or statute which was ignored in Dedhar's case.

Concludes my argument on stare decisis and whether general principles of English law apply.

Adj. to 9.45 a.m. on 25.2.58.

A.G. FORBES, JA.
24.2.58.

25.2.58. Bench and Bar as before.

Gledhill continues:

Main point of appeal - Q. Whether provisions

in the title deed are conditions or covenants. Sections of Crown Lands Ord. difficult to reconcile. Q. whether draftsman intended relief to be given. Trial Judge dealt with matter starting at p. line p. Weight must be given to practice - i.e. view taken since 1915 that conditions were convenants. "S.83 makes covenants into conditions". - Q. of forfeiture here almost entirely a creature of statute. Forfeiture when Court orders it to be forfeited. Crown leases therefore quite different from Common Law leases in England. Submit correct (p.) that no essential distinction between a condition and a covenant.

Emphasize point that legal effect of covenant with proviso for re-entry is same as a condition.

Covenant in Crown lease in Kenya is a covenant with a proviso for re-entry imported into it by S.83.

Therefore no legal difference in a Crown lease between a condition and a covenant.

(J.A. S.14 of Cap.155 - "building conditions" - any similar provision in 1902?).

S.15 of 1902 Ordinance - <u>covenant</u> to build p. - Impression - no remedy for breach of <u>condition</u>.

S.157 - Cf.S.169 of Crown Lands Ordinance. If Crown is right, as soon as anyone commits a breach of a building condition, lessee becomes an unlawful occupant and can be convicted and fined.

Submit there can be no automatic forfeiture under the Ordinance (C.J. If you are right, Crown would have to go to Court twice, first under S.83 and then under S.157).

Submit sections difficult but that would appear to be so. But if Crown right, Crown could just prosecute.

Difference between plots within or without townships.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

If trial Judge's argument accepted there are no anomalies.

Stress that under English law "conditions" and "covenants" not construed strictly and Courts have looked to intent of parties.

Foa Landlord & Tenant 7th Ed. p.311.

Hayne v Cummings, 143 E.R. 1191

Case where covenant and condition discussed at p.1194.

Bastin v Bidwell (1881) 18 C.D.238.

Submit here must look at whole scheme of Crown Lands Ordinance and see how draftsman equated covenants with conditions.

Brookes v Drysdale (1877) 3 C.P.D.52 et seq.

See also p.59 - "construction least favourable to party whose language it is."

So far as intention of parties, submit obvious Crown intended conditions in lease to be covenants. Crown served notice under S.83.

"breaches of lessee's covenants."

Intention of parties clear. Crown proceeded under S.83. Reference also to covenants in correspondent.

Crown Lands Ordinance.

Part VII (s.76) Pt. I. Implied covenants and conditions. Generally, "covenants" have related to leases and "conditions" to licences. Part III (S.83) was obviously intended to cover whole ground of forfeiture. SS.83 to 86 intended to deal comprehensively with forfeitures. Not likely to be a 3rd class - conditions. S.83 allows Court to grant relief for breach of covenants in leases. S.84 allows relief for non-payment of rent in licences - not for breach of condition.

Crown saying Ordinance does not deal with conditions in leases.

S.84(3) - no automatic forfeiture of licence.

Crown rely to certain extent to S.14 of Ordinance.

Para. (c).

and S.16(c).

Special reference to "building conditions."

Does appear at first sight inconsistent with Part VII.

Court entitled to look at headings - v. respective headings.

SS.14 and 16 relate entirely to offering of town plots for sale. Procedure before plot can be disposed of. Cf.S.16. All preliminary to disposal of town plots. Submit Part III is merely procedural. Borne out in this by S.17.

Refer Cheshire 7th Ed. p.659 - Auctioneers conditions of sale.

Submit draftsman obviously referring to conditions of sale. Submit natural interpretation to be put on SS.14 and 16. Similarly S.3 - "condition" not used in narrow conveyancing sense.

Refer again to Part VII (S.76) - S.76 - lease and covenant linked.

S.77 - covenant linked with lease, condition linked with licence. This generally case under Ordinance, e.g. S.79.

Crown also relied on S.3 of Ordinance.

(i) Power to alienate.

(ii) Power to remit.

(iii) Power to extend time.

Submit that there "condition" is used in general sense as in S.3(i).

Under S.3 Governor has full power both in respect of covenants and conditions.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

To sum up:

General scheme of Ordinance and in particular Part VII is firm: covenants in leases, conditions in licences.

Effect of Registration of Titles Ordinance. (Cap.160). Crown submit now no covenants because now only a unilateral grant, and reference to "special conditions." Agreed that up to 1919 leases were in normal form as between subject and subject.

S.2 - "Grant" means ... lease or licence.

S.21 - "Grant" - includes lease or licence under S.2.

Grants to be in form B(1) or B(2) (pp.2198-9). Crown saying that after 1919 covenants turned into conditions and right of relief taken away - done by prescribing a form for Crown leases.

If S.83 repealed by implication, surely a most roundabout way of repealing it.

(P. Crown don't say S.83 entirely without operation - e.g. pre-1919 leases).

Yes.

Refer preamble to two Ordinances.

Reg. of Titles Ordinance - merely to provide for transfer of land by registration of titles. Crown Lands Ordinance is to regulate leasing of Crown lands.

Refer Broom's Legal Maxims - 9th Ed. p.17 - repeal by implication - "never to be favoured." P.18 - General statute not to repeal special statute.

Q. is whether general Ordinance regulating procedure takes away a privilege given to a class under S.83.

Argue (a) no difference between condition and covenant in Kenya.

(b) building conditions in any case are covenants.

(c) Reg. of Titles Ordinance has not taken away right of relief.

Garnett v Bradley (1878) 3 A.C. 944. Authority for saying that if Government intends to take away a right such as relief against forfeiture, they will do it openly and not by implication.

Summarises :

(a) In Kenya relief against forfeiture creatures of statute and no distinction made between statutory covenant and statutory right of re-entry and a condition.

(b) General scheme of Crown Lands Ordinance is to regard provisions in leases as covenants and to give relief and to regard provisions in licences as conditions and not to give relief.

(c) If there is a distinction in Kenya between a condition and statutory covenant with proviso to re-entry, then entitled to look at intent of parties and Crown have elected to proceed under S.83 for breach of covenant.

(d) Following from that, if there is a distinction, breach of condition only renders lease voidable at option of Lessor and lessor in this case has not said "I elect to determine prior lease" - he has said "I am going to Court to determine lease as for a breach of covenant."

(e) Crown Lands Ordinance awarded a privilege to lessees which cannot be taken away by a purely procedural Ordinance like the Reg. of Titles Ordinance.

Final point - Mesne Profits.

(i) Agree that by English law they are damages for trespass.

Claimed here from date of plaint. It held that S.83 applies, then position - unlike England - is that appellant is in lawful possession until his lease is forfeited by Court.

In the Court of Appeal for Eastern Africa

No.11
Judge's Notes
(c) Forbes, J.A. continued

Even if S.157 applies, then appellant would not become a trespasser until Court declared his title to be extinguished.

(ii) Trial Judge said that mesne profits defined by Civil Procedure Ordinance. Submit that is correct. Judge held that until hotel built, appellant could not earn anything out of land.

Refer Elliott v Boynton (1924) 1 Ch.236 at p.247.

Common Law Procedure Act - action for ejectment and for mesne profits may be joined. Act does not apply here. Here O.II r.3(a) authorises similar joinder. "Mesne profits" there governed by definition in Ordinance.

Nothing further to add on points now before Court.

Sherrin in reply:

Repealing effects of Reg. of Titles Ordinance.

That argument was made in Court below. But here, I tried to avoid it and argued that if lease drawn in accordance with directions given in the Crown Lands Ordinance (Part VII) it would have been drawn with a condition relating to building stipulations. Contemplated my argument applied to lease under either Ordinance, i.e. S.83 did not apply anway.

If lease drawn under Crown Lands Ordinance lease would have contained building conditions and special covenants.

Registration of Titles Ordinance has affected the inclusion of covenants in Grants and it is a difficult point to be considered. But it does not arise today.

Building stipulation is a condition under either Ordinance.

Suggestion that detached sentence of S.83 does not take matter further. Submit it is not in form of proviso. Also argument on "building conditions" in S.14 - that they were not to be distinguished from covenants.

Ordinance is "to make further and better provision" for leasing of Crown Lands. Both these sections differ from corresponding provisions in Crown Lands Ord. 1902, i.e. S.14 and 83. Corresponding sections are SS. 15 and 18(1). 18(1) does not contain detached sentence of S.83.

Submit that as that provision changes, detached sentence must be taken to vary meaning of the whole.

In construing meaning of detached section I submit intention was to give some guide to Judges, and merely intended law of England to apply. S.14 - Change there is from "building covenants" to "building conditions".

Submit as there is a change, weight must be given to change in construing section. Change must have been intended.

Next point - that Land Office had always taken view there was no distinction between conditions and covenants - do. Courts. Don't know how many cases concerned leases under Crown Lands Ordinance and how many grants under Registration of Titles Ordinance.

But Courts have never had this point placed before them before.

As in Dedhar's case, Crown has always brought its case under S.83 and Court has never had to consider whether that section applied.

No evidence as to what practice was up to 1919. (p. of judgment.) Judge assumed. p. - first paragraph - submit that does not realy follow. Court always bound by rules of equity and would grant relief where forfeiture merely a security for payment of money.

Barrow v Isaac (1891) L Q.B. 417 at p.425.

Submit that is general rule and relief for non-payment of rent is only an example of general principle.

(P. Would that extend to relief against covenant to pay money to someone else?).

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued.

Have not had chance to prepare this point fully. If no power to relieve against non-payment of rates - still does not affect case. Under Crown Lands Ordinance payment of rates was to be provided for by a covenant.

May be unfortunate effect of Registration of Titles Ordinance to deprive a tenant of relief for non-payment of rates, but that does not have to be considered in this case. Here a condition under either Ordinance.

As regards construction of document, submit it must be construed more as a statute than as a deed. Form prescribed by statute and in no way controlled by intention of parties. Point that provision as to offering of town plots dealt with something preliminary to the drawing of lease - that conditions were conditions of sale at auction.

Not so - S.14 "the building conditions to be inserted in the lease. Followed by special covenants to be inserted in lease". Submit "special" there used to distinguish it from usual covenants which are provided for in Part VII as implied covenants.

S.3 of Ordinance. Submit a careful distinction made between covenants and conditions. Base my argument on fact that remission of covenants which Court cannot do is vested in Governor.

Governor not empowered to extend time for performing covenants - that power given to Court by S.83.

On other hand under SS.(3) Governor is given power to extend time for performance of any condition in a lease.

Extending time for performance of condition is what trial Judge did in making his order. Submit he had no power to do so, and that power to do that is reserved to the Governor.

Notice given such as contemplated by S.83. True we did, but submit we did thereby make an election as to whether to treat stipulation as a condition or a covenant. Notice was given out of an abundance of caution. But submit cannot alter nature of grant. Submit Crown cannot elect.

Pleadings were in alternative and notice given to enable matter to be dealt with in alternative.

Argument that lease cannot come to an end for breach of condition because lessee would then be liable to fine.

In case such as this Crown would be foolish to seek to have tenant fined, but in suitable case Crown might have resort to S.169. Recently case in Kitale where that section used on termination of licences by notice.

Mesne profits - S.157 - Court to declare title extinguished. Court could still be required to declare title extinguished in case of expiry of term. Submit title does not continue until Court declares it to be extinguished. Lease does not go on until Court makes an order under S.157.

Last point - O.2, r.3.

Submit inclusion of claim for damages for trespass would not under that rule amount to a misjoinder - see para.(c) of rule.

Submit that the trespass which arises from lessee holding over could reasonably come within that para. - "a wrong to premises claimed" - e.g. a trespass.

Close.

P. S.83 - detached - "principles of English law". If Conv. 1881 is not meant, what is meant by those words which is not covered by doctrines of Equity.

Sherrin:

One principle - where a breach of condition contrived by landlord, at common law he was not allowed to take advantage of breach. Coke's Commentaries on Littleton's Tenures p.206(b). Unable to find that work here in library.

Submit legislature merely intended to adopt English law without considering in detail what that law consisted of.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

Relief against forfeiture for non-payment of rent - principle of law - Common Law Procedure Act - Binds Crown - In re Brain - Held Court could not relieve because 6 months period had elapsed.

Statutory provision for relief from forfeiture for failure to insure. Can't say if that applies to Crown. Dealt with in Crown Lands Ordinance I think.

Think it is Crown Lands Act, 1845.

(P. Power given to Commissioners under that Act).

Yes.

Gledhill does not wish to reply on Barrow v Isaac.

C.A.V.

A.G. FORBES,
J.A.
25.2.58.

5.3.58. Bench and Bar as before.

P. Ct. wishes to hear argument on cross-appeal.

Gledhill:

Position clearly set out in cross-appeal itself.

Q. of mesne profits has been argued and I submitted that Judge right.

My instructions are that rent has been paid - only Shs.200/- a year.

Claim was for £833 per month. It was a claim which was unsuccessful in toto.

Fazal Dhirani and anor. v Abdul Mohamed Ismail Ganji, 13 E.A.C.A. 69 at pp.70 and 71.

All I'm submitting is that costs should follow the event. Trial Judge rather brushed the matter of costs on one side. Ordered each party to bear its own costs on claim for damages and mesne profits.

Refer Jiwan Singh v Ragnath Jeram, 12 E.A. C.A. 21 at pp.22, 31 and 32.

Costs of issue go to party who succeeds on it.

Claim involved claim for Crown for some £11,000.

Issues separate.

(a) forfeiture.

(b) damages for trespass.

At common law action for forfeiture could not be joined with action for mesne profits.

(C.J. Difficult for Taxing Master to separate costs. Would not proportionate order be the better order?).

That could be done, but submit the Bill should be taxed separately. Claim is for a liquidated amount.

General rule in England has been to award costs on separate issues. In Scotland, proportionate costs awarded.

Jiwan Singh's case - costs awarded separately on separate issues - p.32.

Valuers were called.

(Sherrin - Would not agree valuers gave evidence solely with regard to mesne profits).

Does not affect my argument. These were entirely separate issues.

Do not really object to proportionate order.

2nd point - Costs on advocate and client basis. If I am successful on appeal, then I submit order for costs on Solicitor and client costs is obviously wrong.

If relief against forfeiture granted, relief may be granted on terms which may include costs.

In the Court of Appeal for Eastern Africa

No.11

Judge's Notes

(c) Forbes, J.A. continued

Gardner & Co. Ltd. v Cone, (1928) Ch.955 at p.968.

Solicitor and client costs generally only awarded in special circumstances - fraud or scandalous conduct of case - some moral blame on unsuccessful party - or where it is a case of granting relief on such terms as appear just. Latter does not arise if appeal succeeds.

If Court holds relief can be granted, question of discretion arises. Judge has not considered matter as did Judge in Gardner case. No reasons given. Court may not wish to interfere. If I am unsuccessful Judge wrong.

Sherrin:

Submit appellant cannot succeed wholly on both claim for mesne profits or damages. If £10 paid, should get judgment and will give credit for it.

(P. Any damage if quantum of mesne profits is amount of rent).

Appellant could seek to recover rents paid. Claim has not failed - only has been much reduced. Am not asking for costs but oppose costs being awarded to respondent. Have not failed entirely on that issue. Agree there was argument on mesne profits or damages. Do not know that it increased costs.

I may have failed in fact but not in law - have failed on quantum only.

Costs on Solicitor and client basis - I agree that if I'm successful and no relief is granted it would be proper to alter order on costs to normal order for party and party costs.

If relief granted -

(Gledhill: If I'm successful I do not ask for order as to Solicitor and clients costs to be changed).

Submit on 1st issue it was not obligatory on Judge to award any costs on that issue. Judge did not appear to attach much importance of

issue of mesne profits - issue appears an unimportant one.

(P. Any view as to proportionate order against costs of separate issue).

No view to express. Very minor issue.

Gledhill:

Only wish to say claim for £11,000 not a minor one.

Difference between £10 and £11,000 substantial.

Crown substantially failed on that issue.

C.A.V.

A.G. FORBES
J.A.
5.3.58.

No.12

J U D G M E N T

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO. 76 of 1957.

- Between -

THE COMMISSIONERS OF LANDS — Appellant

- and -

SHEIKH MOHAMED BASHIR — Respondent

(Appeal from a judgment of the Supreme Court of Kenya at Nairobi (Mr.Justice Rudd) dated 4th March, 1957.

- in -

Civil Case No. 958 of 1955

- Between -

The Commissioners of Lands — Plaintiff

- and -

Sheikh Mohamed Bashir — Defendant)

JUDGMENT of O'CONNOR P.

By a document dated the 8th January, 1953,

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958.
continued

entitled a Grant and made under the Registration of Title Ordinance (Cap.160 of the Laws of Kenya) the Governor and Commander-in-Chief of the Colony and Protectorate of Kenya on behalf of Her Most Gracious Majesty Queen Elizabeth the Second granted to the respondent a town plot in Nairobi, more particularly described in the Grant, to hold for the term of 99 years from the 1st September,1952, subject to the payment of the progressive rent therein mentioned. The Grant was expressed to be "subject also to the provisions of the Crown Lands Ordinance (Chapter 155) and the following special Conditions :-

SPECIAL CONDITIONS

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."

There followed stipulations (expressed to be further "special Conditions") providing that the building should not be erected until plans had been approved by the Local Authority and the Commissioner of Lands; and that the Grantee should connect the drainage and sewage system from the town systems; 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. Further stipulations, also called "Special Condition", provided that the Governor should have the 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.

This document was signed and sealed by the Acting Commissioner of Lands by Order of the Governor. It was not executed by the Grantee.

It will be observed:

(1) that this is an unilateral document not executed by the grantee;

(2) that it is expressed to grant land for a term of years subject to a rent and special conditions;

(3) that the word "covenant" is nowhere used in it; it does not contain any express covenants by the grantee (or lessee) or any proviso for re-entry by the grantor for breach of covenant or condition;

(4) that it purports to be issued under the Registration of Titles Ordinance; but is expressed also to be subject to the provisions of the Crown Lands Ordinance.

In fact, this Grant is in the form (B.1 in the First Schedule) to the Registration of Titles Ordinance in which grants for terms of years, have, since 1919, when that Ordinance came into operation, been required, by section 21 of that Ordinance, to be issued. By section 2 "grant" is defined to include a lease made by or on behalf of the Crown. By section 33 the Registrar may refuse to register any instrument which is not in substance in conformity with the forms annexed to the Ordinance. The effect seems to be that from and after the commencement of the Registration of Titles Ordinance, a Crown lease of land subject to the Ordinance, could only be issued in the form of an unilateral Grant subject to a rent and Special Conditions. Prior to 1919, leases of Crown Lands were issued under the Crown Lands Ordinance in force at the time and were Crown leases inter partes with express lessee's covenants and proviso for re-entry for non-payment of rent or breach of covenant. This will be referred to again.

On the 16th November, 1955, the appellant (plaintiff) filed a plaint in the Supreme Court of Kenya averring that the respondent (defendant) had failed to comply with Condition No.1 of the Special Conditions under the Grant in that he

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958.

continued

had erected no buildings on the land by the 1st September, 1955. The appellant claimed possession of the land for breach of this condition and mesne profits at £833. per mensem from the date of the plaint until delivery of possession. In the alternative, if Special Condition No.1 should be held to be a covenant and not a condition, then (a notice having been served upon the respondent under section 83 of the Crown Lands Ordinance) the appellant claimed a declaration that the Lease should be forfeited and he claimed damages for breach of covenant.

Section 83 of the Crown Lands Ordinance is as follows :-

> "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 express or implied by virtue of this 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 Commission 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."

It will be observed that this section applies (apart from non-payment of rent or royalties) to breaches 'of the lessee's covenants'. The respondent, by his Defence, dated the 5th November, 1956, contended that the Grant was for all purposes to be construed as a lease for a term of 99 years and that the "special conditions" were, and were to be construed as, covenants. The respondent admitted that he had erected no buildings on the land by 1st September, 1955, but said that he had been prevented from doing so by reason of breach

of covenant by the Grantor and/or circumstances beyond the respondent's control particulars of which he set out in his Defence. He also pleaded a waiver by the appellant of the special condition or covenant and denied the appellant's right to possession. Alternatively, the respondent prayed that he might be relieved from forfeiture under section 83 of the Crown Lands Ordinance upon such terms as might appear just.

The suit came on for hearing before the Supreme Court of Kenya and judgment was given on the 4th March, 1957.

By his judgment the learned trial Judge held :

(1) In English law, the breach of a condition imports a right of re-entry against the lessee. Under section III of the Indian Transfer of Property Act, which applies to ordinary leases in Kenya, the breach of a condition does not give rise to a forfeiture, unless there is an express proviso for re-entry; but, as the Indian Transfer of Property Act did not, by virtue of the Indian Crown Grants Act, 1895, apply to Crown Grants in British India, it does not apply to Crown Grants in Kenya.

(2) Under the law of England, a covenant by a lessee differs from a condition in that, on breach of a mere covenant, the lessor is not entitled to claim a forfeiture; there must be a specific proviso for re-entry.

(3) The "special conditions" in the Crown Lease in question were covenants within the meaning of section 83 of the Crown Lands Ordinance (Cap.155) and, applying that section, the Court had power to relieve against forfeiture for breach of them on such terms as might be just, and that the principles by which the Court should be guided in granting such relief were the principles of English law as set out in section 14 of the Conveyancing Act, 1881, and the doctrines of equity. In reaching this conclusion the learned trial Judge referred to a practice which had grown up for over a generation and had been accepted by the Department of

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958.

continued

Lands and the Supreme Court of the Colony and this Court whereby special conditions in Crown Leases had been construed as covenants within the meaning of section 83 of the Crown Lands Ordinance.

The decision of this Court to which the learned trial Judge referred, and by which he felt himself bound was the case of Hassanali R. Dedhar v. The Special Commissioner and Acting Commissioner of Lands Civil Appeal No.8 of 1956 E.A.C.A. This will be referred to later.

The learned Judge was of opinion 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 of the Crown Lands Ordinance or the Conveyancing Act in England. He however, found it unnecessary to decide that point, as he held that section 83 of the Crown Lands Ordinance applied and the Court was not bound to consider whether or not relief should be granted on the principles of equity alone.

The learned Judge further held that the allegations by the Respondent that the Crown had, by reason of the conduct of its officials, waived the building condition in the Grant or was estopped from claiming the benefit of it were not established; but that for the reasons already mentioned, the Court had under section 83 of the Crown Lands Ordinance, power to relieve against forfeiture for breach of that condition, and that this was a case in which such relief should be granted on suitable terms to be decided after hearing the parties.

In case he should, on appeal, be held to be wrong in granting relief, the learned trial Judge dealt briefly with the claims by the Commissioner for mesne profits or, alternatively, for breach of covenant. He considered that the claim for mesne profits was governed by Section 2 of the Civil Procedure Ordinance, that the Commissioner's claim was excessive, that in the circumstances of the case the Respondent could not make any profit at all from the building until it was erected: certainly he could not make more than the rent reserved by the Government. The learned Judge held that, similarly, the Commissioner had not proved

damages by reason of the Respondent's breach of contract in excess of the rent reserved.

The learned Judge gave the Commissioner the costs of the suit as regards the claim for forfeiture and relief from forfeiture as between Advocate and client, and ordered each party to bear its own costs on the issues of damages and mesne profits.

Subsequently, the terms upon which relief against forfeiture should be granted were worked out and embodied in a decree dated 2nd May, 1957.

The appellant now appeals to this Court against the whole of the decision of the learned trial Judge, except in so far as it relates to costs. There is a cross-appeal by the respondent against the order of the learned Judge directing the respondent to bear his own costs on the two issues of mesne profits and damages, and against the award of costs on an Advocate and client basis on the other issues. There is also an application by the appellant to adduce further evidence bearing upon the question whether or not it would be just to grant relief and tending to show that the respondent is no longer financially able to build a hotel.

The appeal first came on for hearing on 30th January, 1958 before a Bench of three Judges. At a certain stage in the argument of learned Counsel for the appellant it appeared that he was asking the Court not to follow the previous decision of this Court in Hassanali Dedhar's case (supra) on the ground that the Court had decided Hassanali Dedhar's case per incuriam, in that it was never put to the Court in that case that the English Conveyancing Act, 1881, did not bind the Crown and that, therefore, the Court could not, in the case of a Crown Grant be guided by, or exercise powers of relief exercisable by a court in England under, section 14 (2) of that Act. After argument, and following the dictum in Joseph Kabui v. Reg. (1954) 21 E.A.C.A. 260,261 to the effect that where Counsel decides to ask this Court to depart from one of its own previous decisions, application should ordinarily be made for a Bench of five or more judges to be assembled, the appeal was adjourned for a Bench of five judges to be convened. However, it proved impossible to convene a Bench of five

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958.

continued

Judges (or even, owing to illness, to assemble the original Bench of three judges) and, since a full Court of Appeal has no greater powers than a division of the Court (Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All E.R. 293), it was decided to hear the appeal de novo with a Bench of three Judges, two of whom had been members of the first Bench. It was decided to hear argument first on the questions of law raised in the appeal as, upon the decision of those would rest the question of whether or not it was necessary to consider the application to adduce further evidence.

The first and most substantial ground of appeal alleges that the trial Judge had no jurisdiction to make the order appealed against.

Mr. Sherrin, of Crown Counsel, for the appellant, submitted that the Grant (which, though termed a Grant is in effect a lease) came to an end, for breach of the building condition, on the filing of the plaint in the suit, and that the Supreme Court had no power to revive the Grant. This argument he subsequently modified, having regard to Dendy v Evans (1910) 1 K.B. 263, and said that though the issue and service of the plaint operated as a final election by the Grantor to determine the Grant, since an order for possession had not been made in the suit and relief had been granted, the effect was that the Grant was to be treated as continuing. He contended, however, that the Court below had been wrong in granting relief. He argued that section 83 of the Crown Lands Ordinance did not apply because that section applies to breaches of "the lessee's covenants", whereas the building stipulation in the Grant was a condition and not a covenant; moreover, even if the building stipulation was a covenant and section 83 applied, the principles of English law by which the Court must, under that section, be guided in granting relief included the principle that the Crown is not bound by a statute unless named expressly or by necessary implication or unless it is apparent that the beneficient purpose of the Act must be wholly frustrated unless the Crown is bound (Province of Bombay v. Municipal Corporation of Bombay (1947) A.C. 58 (P.C.)): that none of these considerations applied to the Conveyancing Act of 1881, and that, accordingly, that Act did

not bind the Crown and the Court could not, in granting relief, exercise the powers or be guided by the principles set out in section 14 of that Act. Mr. Sherrin conceded that, under section 83 of the Crown Lands Ordinance, the Court could relieve against forfeiture for breach of a lessee's covenant in a Crown Lease according to the doctrines of equity, but said that relief on those grounds would be confined to cases of non-payment of money, fraud, accident or surprise and that nothing of that nature arose here. He pointed to various provisions of the Crown Lands Ordinance as supporting the contention that a distinction was drawn by the draftsman and the legislature between "condition" and "covenant" and argued that, although what was in form was a condition occurring in an agreement inter partes, might be construed as a covenant if the intention of the parties so demanded, that principle could not be applied to an unilateral Grant in a statutory form: the legislature must be taken to have been aware of the difference between a covenant and a condition and to have given those words their correct meanings.

Mr. Sherrin further submitted that in Hassanali Dedhar's case (supra) the question of whether the relevant provision was a condition or a covenant was never raised or argued: in fact it was conceded by both parties in that case that the Court had power to grant relief under section 83 of the Crown Lands Ordinance.

Mr. Sherrin also submitted that Hassanali Dedhar's case was not a binding authority on the question of whether the Court should be guided by the principles set out in section 14 of the Conveyancing Act, 1881, because it was never considered in that case whether the Conveyancing Act, 1881, bound the Crown. He contended that Hassanali Dedhar's case was decided per incuriam and need not be allowed. He relied on Young v. Bristol Aeroplane Co. (1946) A.C. 163. He also submitted that the principle of stare decisis should not be applied where the result would be to curtail the prerogative of the Crown.

Mr. Gledhill, for the Respondent, dealt first with the question of whether Hassanali Dedhar's case was binding on this Court. He submitted that it was: that that case was a previous

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958

continued

decision of this Court to the effect that the Supreme Court had, under section 83, of the Crown Lands Ordinance, power to grant relief, on such terms as might appear just, against forfeiture of a Crown Grant for failure to perform a building stipulation contained in it, and that, in exercising that power, the Court should be guided by the principles indicated in section 14 of the Conveyancing Act, 1881, and should exercise a wide discretion as laid down by Lord Loreburn in Hyam v Rose (1912) A.C.623 at p.631. Mr.Gledhill submitted that the Court in deciding Hassanali Dedhar's case had not acted per incuriam. He relied on Morelle Ltd. v. Wakeling (1955) 1 All E.R. 708 for the proposition that as a general rule, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned and that there was a difference between forgetfulness of these and forgetfulness of a doctrine of the common law.

Mr. Gledhill contended that it was rightly held in Hassanali Dedhar's case that the principles of English law by which the Court was to be guided in granting relief against forfeiture were those set out in section 14 of the Conveyancing Act, 1881. He stressed the words in the first part of section 83 "subject to relief upon such terms as may appear just" and argued that the last three lines of the section were in the nature of a proviso and should not be taken to control the main provision of the section and imply into it a restricted meaning of which there was no trace, or be treated as if it were an independent enacting clause instead of being dependent on the main enactment. He relied on West Derby Union v. Metropolitan Life Assurance Society (1897) A.C. 647, 651, 652, 657; and Rex v. Dibdin (1910) P.57, 125.

Mr. Gledhill agreed, however, that Hassanali Dedhar's case was not an authority on the question of whether section 83 of the Crown Lands Ordinance applied to relief against breach of conditions as well as breach of covenants, because it had been conceded by both parties in that case that it did so apply and the point had never been raised.

Mr.Gledhill referred to the passage in the judgment of the learned trial Judge which relates to the practice which had grown up of treating conditions as covenants and relieving under section 83, against forfeiture for breach of both, and submitted that weight should be given to the practice. He said that forfeiture of a Crown lease was, under section 83 a creature of statute and the date of it was the date declared by the Court and not the date of the filing of the Plaint. He submitted that under Section 83 there was no difference in legal effect between a covenant and a condition. He argued that references to covenants could be construed as referring to conditions and vice versa and relied upon Haynes v. Cummings 143 E.R. 1191; Bastin v. Bidwell (1881) 18 Ch. 238, 246; and Brookes v. Drysdale (1877) 3 C.P.D.52.

He argued that the Crown itself had considered that the stipulations in the Grant were covenants and that section 83 applied to them, as it had served a notice under that section. He submitted that, generally speaking, in Part VII of the Crown Lands Ordinance, the word "covenant" relates to stipulations in leases and "condition" to stipulations in licences, and referred to sections 76, 77 and 79. He contended that sections 14, 16 and 17 of the Crown Lands Ordinance were purely procedural and applied to the preliminaries to be gone through before town lots were sold. He suggested that "conditions" in those sections was used merely in the sense of conditions of sale. He argued that prior to the enactment of the Registration of Titles Ordinance, Crown leases were issued containing lessee's covenants to which section 83 applied, and that it could not have been the intention of the legislature in 1919, when the Registration of Titles Ordinance came into force, by merely enacting an unilateral form in which stipulations were expressed to be "conditions" and not "covenants", to take away from lessees the right to relief against forfeiture which they had previously enjoyed: he pointed to the preamble to the Registration of Titles Ordinance to show that it was merely intended to be a conveyancing measure and should not be taken to have repealed by implication the right of a lessee under a Crown lease to relief against forfeiture. Mr. Gledhill argued that even if a

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958. continued

distinction was to be drawn between a breach of condition and a breach of covenant, a breach of condition only rendered the lease voidable at the option of the lessor and the lessor had not avoided it: the lessor had said that he was going to the Court to ask the Court to determine it for a breach of covenant.

In dealing with the first ground of appeal it will be convenient to consider first what is the law applicable. I agree with the conclusion of the learned trial judge that the provision relating to forfeiture in section III of the Indian Transfer of Property Act did not apply to a Crown lease or Crown Grant in Kenya. The Indian Crown Grants Act was passed in 1895 for the purpose of removing doubts and expressly declared that the Indian Transfer of Property Act, 1882, should not apply or be deemed ever to have applied to Crown lands in British India. The Indian Transfer of Property Act was applied to Kenya by Article II of the East African Order in Council, 1897. The learned Judge took the view that as the Transfer of Property Act did not then apply to Crown land in British India, it would not apply to Crown land in Kenya. This may well be right. Moreover, as the Crown is not named in the Act, there is no necessary implication that it must apply to the Crown nor would its purpose be wholly frustrated if it did not so apply Province of Bombay v. Municipal Corporation of Bombay (supra). On general principles, therefore, the act would not in 1897, have applied to Crown land in Kenya. But in my opinion, even if section 111 of the Indian Transfer of Property Act had ever applied to Crown land in Kenya, it would have been 'replaced by other provision in lieu thereof by Ordinances for the time being in force in the Colony',within the meaning of Article 4 (2) of the Kenya Colony Order in Council, 1921. The Crown Lands Ordinance, 1902, in section 18, specifically dealt with forfeiture of Crown leases for breach of lessee's covenants, and subsequent Crown Land Ordinances contained similar provisions. In my opinion, by virtue of Article 4 (2) of the Kenya Colony Order in Council, 1921, the law applicable to the present case is the English common law and doctrines of equity save in so far as the same have been modified, amended or replaced by other provisions in lieu thereof under the Crown Lands Ordinance (Cap.155) and the Registration of Titles Ordinance (Cap.160).

The most important issue in this case is whether or not Supreme Court had power under section 83 of the Crown Lands Ordinance to relieve against forfeiture of the Respondent's Grant for breach of the building stipulation contained therein.

Section 83 is expressed to apply to breaches of lessee's covenants in leases.

I am satisfied that the Grant to the respondent though termed a grant is in law a lease. It is within the definition of "lease" given in Foa's Landlord and Tenant 7th Edition at page 6 which is based on 2 Blackstone's Commentaries at p.317. "Grant" by section 2 of the Registration of Titles Ordinance, is defined to include a lease.

It is necessary next to consider whether the building stipulation in the respondent's grant is a "covenant" or a condition. At common law, a condition is a qualification annexed to an estate, whereby the latter shall either be created (condition precedent), enlarged, or defeated (condition subsequent), upon its performance or breach. The main distinction between a condition subsequent for the cesser of the term of a lease upon the happening of a certain event and a lessee's covenant is that (subject to any right of relief from forfeiture given to the lessee) upon breach of a condition the lessor may re-enter, because the estate of the lessee is determined; whereas a breach of covenant only gives him the right to recover damages (or to obtain an injunction) unless the right to re-enter is expressly reserved to him by the lease. Foa Landlord and Tenant 7th Edition, pages 311, 312.

As already mentioned, the respondent's Grant is drawn in the statutory form B.1 in the First Schedule to the Registration of Titles Ordinance which is, since the coming into force of that Ordinance in 1919, the only form in which Grants of Crown land for a term of years can be issued. (Section 21 of the Registration of Titles Ordinance). There is another form (B.2) for Crown grants in fee. As already mentioned, the Grant in this case is expressed to grant the land to the respondent to hold for a term of 99 years subject to the payment of the

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958

continued

rent reserved 'and subject also the provisions of the Crown Lands Ordinance (Chapter 155) and the following Special Conditions'. Thenfollows a heading "Special Conditions" of which the building stipulation is the first. Is this a condition or a covenant? It is expressed in the Grant to be a condition. It appears in a unilateral document framed according to a statutory form contained in a Schedule to the Registration of Titles Ordinance. Words of art in a statute are prima facie to be taken in their technical sense. "When the legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears" per Lord Wensleydale in Burton v. Revell 16 M. and W. 307, cited with approval by Lord Esher M.R. in The Queen v. The Commissioners of Income Tax (1889) 22 Q.B.D. 296, 309 (C.A.). The words "condition" and "covenant" in leases are terms of art, I think that when the Legislature enacted the statutory form B.1. in the Registration of Titles Ordinance, it must, prima facie, be taken to have used "condition" in its technical sense, particularly as the Grant is an unilateral document not intended to be executed by the grantee. No doubt, an unilateral document e.g. a deed poll, could contain a covenant expressed to be made with someone not a party to the document, enforceable at the instance of that party Chelsea and Walham Green Building Society v. Armstrong (1951) 1 Ch. 8 53. But the Form in which the Grant in this case is drawn does not contain an express covenant by the grantor or grantee. It is a grant subject to conditions and, in my view, it must be taken to have been the intention of the Legislature in enacting section 21 and Form B.1 that in future Crown grants for terms of years should be granted subject to conditions. I do not think that cases such as Hayne v Cummings and Brookes v. Drysdale (supra) have any application to an unilateral grant in a statutory form. The documents considered in those cases were documents inter partes. The stipulations contained in them were construed as covenants because it was necessary so to construe them in order to give effect to the intention of the parties. In my view, the ratio decidendi of those cases cannot properly be applied to the construction of a document in a statutory form which is not inter partes.

The Grant is expressed to be subject to the provisions of the Crown Lands Ordinance (Cap.155). If the word "covenant" were found to be used indiscriminately in that Ordinance to denote stipulations in leases or other documents contemplated by that Ordinance whether, in strictness such stipulations were covenants or conditions, that would support the contention of the respondent that "covenants" in section 83 may be taken to include a building stipulation. But this does not appear to be so. The Crown Lands Ordinance (Cap.155) clearly contemplates, as did earlier Crown Lands Ordinances, that leases of Crown lands will be inter partes and contain Lessor's and Lessee's covenants. Apart from "agreements" relating to land, three forms of document of title to Crown land seem to be contemplated under that Ordinance, that is to say, a conveyance, a lease and a licence. (See sections 4 and 7). Generally speaking, the word "covenants" seems to be used to refer to undertakings in leases, and "conditions" to stipulations in licences, e.g. "covenants, agreements, or conditions contained in any lease agreement or licence" in section 3 (ii) and see sections 45, 77, 79 and 84. But this is not invariable. The word "condition" is used in various senses. For instance, section 3 (iii) speaks of "the conditions contained in any agreement, lease or licence", and sections 14,16 and 24 (d) refer to conditions and covenants to be inserted in leases. The word "conditions" in the phrase "any terms and conditions as he may think fit" in section 3 (i) and in the phrase "upon such terms and conditions as he shall think fit" in section 3 (iii) and "upon such conditions as may be specified" in section 63 seems to denote any form of stipulation. "Conditions" in the phrase "conditions of sale" e.g. in sections 17 and 25, has its usual technical meaning.

On the other hand, the word 'covenant' seems to be used throughout the Crown Lands Ordinance to denote undertakings in leases by the lessor or by lessees, e.g. in section 14 (d), 16 (e), 21 (1), 36, heading of 37 and First Schedule, 38, 76, 77 and 79.

I think it significant that a building stipulation in a lease is always, so far as I can ascertain, throughout the Crown Lands Ordinance, referred to as a "building condition" and not as a

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958 continued

"building covenant" or a "covenant"e.g. in sections 14, 16 and 21. In fact, in sections 14 and 16 "building conditions" are contrasted with "special covenants". Section 14 provides that the Commissioner shall, before any town plot is auctioned, determine "(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 16 provides that the notice of sale shall state "(e) the building conditions and the special covenants, if any, to be inserted in the lease ....".

A building stipulation such as that in the respondent's Grant is expressed to be a "condition" in both Ordinances, the Crown Lands Ordinance and the Registration of Title Ordinance. According to the language used, it is not a "covenant" under either Ordinance.

As already mentioned, Mr.Gledhill argued that prior to the enactment of the Registration of Titles Ordinance in 1919, Crown leases were issued containing building and other stipulations all in the form of lessee's covenants; that relief against them could be, and was, given by the Court under Section 83 of the Crown Lands Ordinance, and that it could not have been the intention of the Legislature by enacting a form in the Registration of Titles Ordinance (which was merely an Ordinance to provide for transfers of land by registration of titles) to take away from lessees important rights to relief which they had hitherto enjoyed. There is no evidence before the Court as to the exact form of lease ordinarily issued under the Crown Lands Ordinance. In my opinion, if the language of a statute such as the Registration of Titles Ordinance is plain effect would have to be given to it, even if in some respects its results were unforeseen. Apart from that principle,there might be force in Mr.Gledhill's argument with regard to covenants properly so called under the Crown Lands Ordinance e.g. covenants implied under Section 77 or "special covenants" inserted in leases under section 14 (c). These would properly have been inserted in leases under that Ordinance as lessee's covenants and section 83 would in terms apply to them. It is unnecessary to decide the effect on them of the enactment of Form B.1. But section 14 of the Crown Lands Ordinance clearly indicates that building conditions are on a

different footing to special covenants, and are intended to be inserted as conditions in leases under the Crown Lands Ordinance. If so drawn, they would not fall within section 83. If drawn as lessee's covenants, they might be treated by a Court as falling within section 83, but a lease drawn in that form would be contrary to the intention of the Crown Lands Ordinance. Accordingly, the enactment by the Registration of Titles Ordinance of Form B.1. could not, as regards building conditions, take away from lessees under the Crown Lands Ordinance rights to relief under Section 83, because they never had such rights in leases properly drawn under that Ordinance.

In my opinion a building condition in a lease drawn in the Form B.1 in the Schedule to the Registration of Titles Ordinance does not fall within the phrase "lessee's covenants" in section 83 of the Crown Lands Ordinance. I do not feel constrained by Hassanali Dedhar's case (supra) to hold that it does, because the point was never raised in Dedhar's case, which proceeded on the assumption, conceded by both parties, (wrongly I now think) 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 in forgetfulness of the inconsistent statutory provision contained in Form B.1 of the First Schedule to the Registration of Titles Ordinance. Morelle Ltd. v. Wakelin (1955) 1 All E.R. 708: Young v. Bristol Aeroplane Co. (supra)

I do not think that the fact mentioned by the learned trial Judge, that a practice has grown up in the Lands Department of treating building conditions in Crown leases as lessee's covenants under section 83 ought to influence my decision. As their Lordships of the Privy Council said in Commissioner of Stamps Straits Settlements v. Oei Tjong Swan (1933) A.C. 378 at page 391.

> "It may well be that those who had at first to administer the Ordinance were not aware that it gave them the power to tax movable property out of the Colony..... But the fact that the potency of the weapon confided to them was not fully realised by those

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958

continued

who wielded it cannot control the interpretation of the Ordinance now that its true scope has to be judicially ascertained".

Similarly I do not think that an erroneous practice in the Lands Department can control the true interpretation of section 83 of the Crown Lands Ordinance.

The learned trial Judge mentions that the Supreme Court of Kenya has granted relief under section 83 from forfeiture for breach of special conditions in Crown Grants and that its right to do so has never been questioned. If the point has never been raised before the Supreme Court, it is difficult to treat their decisions as authoritative upon it.

In my opinion, the first Ground of Appeal must be decided in favour of the Appellant. 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) of the respondent's Grant for breach of the building condition contained in it. The learned 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 are not, I think, statutes of general application within the meaning of the Article. The doctrines of equity will not help the respondent unless he has shown that he was entitled to relief upon one of the grounds upon which equity was wont to relieve apart from statutory provisions. "Except in the case of non-payment of rent, and failure to insure, and except in rare cases of accident and surprise, no relief against forfeiture could be given until the Conveyancing Act 1881, came into force". Woodfall 25th edition p.1005. The learned Judge considered that there were features in this case which might justify relief from forfeiture under the doctrines of equity irrespective of the statutory provisions of section 83 of the Crown Lands Ordinance or the Conveyancing Act, 1881. He did not decide the point. This is not a case of non-payment of rent or failure to insure and I am unable to see how, on the evidence as

recorded, either accident or surprise could be said to exist.

As I have held that the decree of the learned Judge purporting to grant relief against forfeiture under section 83 of the Crown Lands Ordinance was made without jurisdiction, it is unnecessary to consider the second, third and fourth grounds of appeal.

It is now necessary to consider the effect and the effective date of the forfeiture. The effect of forfeiture for breach of a condition is, as already stated, that the lessor may re-enter because the estate of the lessee is determined (Foa 7th edition p.311): or rather is voidable at the option of the lessor, who must, in order to take advantage of the breach, do some unequivocal act notified to the lessee, indicating his intention to avail himself of the option given to him. The service upon the lessee in possession of a writ in ejectment is sufficient, and actual or constructive entry is not required, the lease being determined by service of the writ, and as from that time. Foa pp. 316 and 642; Elliott v. Boynton (1924) 1 Ch. 236, 246 (C.A.); Jones v. Carter 15 M. & W. 718; Serjeant v. Nash Field & Co. (1903) 2 K.B. 304 (C.A.); Woodfall 25th edition p. 991 Woolwich Equitable Building Society v. Preston (1938) Ch.129; Commissioner of Works v. Hull (1922) 1 K.B. 295; Hill & Redman 11th Edition p.432; Moore v. Ullcoats Mining Co. (1908) 1 Ch. 575; Wheeler v. Hitchings (1919) 121 L.T. 636. It is difficult to reconcile the cases just mentioned with some of the dicta in Dendy v. Evans (supra). In that case Cozens Hardy M.R. said, at p.267, that it was clear that the old rule of the Court of Chancery centuries ago was inconsistent with the view that the mere issue of the writ without more terminated the interest of the lessee, and he indicated that the lease was only terminated if the lessor got judgment for ejection. The learned author of the 7th edition of Foa's Landlord and Tenant in note(s) on p.642 suggests that these dicta in Dendy's case should probably be construed with strict reference to the facts of that case. If there is a conflict between Dendy's case and Elliott v. Boynton (supra). I prefer to follow Elliott v. Boynton on this point. It is a later decision of the Court of

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958

continued

Appeal and consistent with a long line of authority. I think that the true position is that the issue by the lessor of a writ for ejectment when a condition has been broken puts an end to the lease as from the date of the issue of the writ, subject to the lease being revived if a court of equity grants relief against the forfeiture in the action. In my view, the building condition in the respondent's grant having been breached, the Grant came to an end from the date of the filing of the Plaint, that is the 16th of November, 1955, and, since the learned Judge's order purporting to grant relief under section 83 of the Crown Lands Ordinance was made without jurisdiction, the Grant has not been revived. There should have been a declaration under section 157 of the Crown Lands Ordinance that the Grant had been forfeited as from the 16th November, 1955, and possession should have been ordered to be given to the appellant either forthwith or on or before a day named by the Court, with mesne profits from the date of the plaint until delivery of possession to the Plaintiff.

With regard to the fifth and sixth Grounds of Appeal, the claim in the plaint was for mesne profits at the rate of £833 per mensem. This is the amount which an expert witness for the Crown estimated that the Crown lost by being kept out of a very valuable piece of property. Mr.Sherrin argued that mesne profits were the damages which the lessor had suffered by reason of the lessee wrongfully retaining possession of the land, and that they should not be calculated by reference to the rent or to the definition in section 2 of the Civil Procedure Ordinance. He relied on Elliott v. Boynton (supra); Clifton Securities Ltd. v. Huntley (1948) 2 All E.R. 283; and Heptulla Brothers v. J.J. Thakore trading as London Photographic Arts Civil Appeal No. 23 of 1957 (E.A.C.A.). He argued that the definition of mesne profits in section 2 of the Civil Procedure Ordinance applied only to the phrase mesne profits when it appeared "in this Ordinance" and in the absence of repugnancy in the subject or context, and that the definition could not apply to the expression mesne profits when appearing in a plaint, and that there was repugnancy. I am unable to accept this argument. The claim for mesne profits could only be joined with a claim for possession of the land by virtue of Order II

r.3 (a) of the Civil Procedure Rules. This is a rule made under the Civil Procedure Ordinance and the definition of "mesne profits" in that Ordinance must apply to it. Either the plaintiff claimed "mesne profits" according to that definition or he was not entitled to claim mesne profits in this suit at all. I think that he must be bound by what he claimed. The learned Judge found that the respondent could not make any profit from the building until it was erected and that the amount of mesne profits recoverable could not exceed the amount of the rent. I think the judgment cannot be for more than this amount.

It is unnecessary to deal with the 7th and 8th grounds of Appeal or with the alternative claim in the plaint. These would only need to be dealt with if I had held that the building condition was a covenant. I should, perhaps, mention that the fact that the appellant out of abundance of caution, served a notice under section 83 of the Crown Lands Ordinance did not, in my view, indicate that he thought that section 83 applied, or prevent him claiming or recovering possession on the basis that it did not.

Having found that section 83 of the Crown Lands Ordinance does not apply to the breach of the building condition in the Respondent's grant, it is not necessary to decide the question of whether or not, in giving relief against forfeiture for breach of lessee's covenants under section 83, a court should be guided by the principles of English law set out in section 14 of the Conveyancing Act, 1881. However, as the question has been fully argued and may arise in future if a court is asked to relieve against forfeiture for breach of a lessee's covenant, e.g. a covenant contained in a Crown lease executed before 1919, perhaps I should state my opinion on it.

Section 83 says that when the notice required by the section has been served and an action has been commenced in the Supreme Court for recovery of the premises and the facts have been proved, "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 the Crown Lands Ordinance, 1902, the section ended there. The Supreme Court had, therefore, power to grant

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958

continued

relief upon such terms as might appear just without any qualification. By section 66 of the Crown Lands Ordinance 1915, the section was re-enacted with the addition of a further short paragraph. This still remains part of section 83 and reads:-

> "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."

Hitherto it has been assumed (and it was so held in Hassanali Dedhar's case (supra)) that the principles of English law by which the Court was to be guided in granting relief were the principles set out in section 14 (2) of the Conveyancing Act, 1881, that is to say that the court might grant or refuse relief, as the court having regard to the proceedings and conduct of the parties under the foregoing provisions of section 14 and to all the other circumstances thought fit and might grant relief on terms as set out in the sub-section. But it has now been contended for the appellant that, as the Conveyancing Act, 1881, does not bind the Crown in England, those principles are inapplicable here. The result of this would be that the Court could not relieve against forfeiture for breach of a lessee's covenant except in cases where relief could be granted apart from the Conveyancing Act, 1881, i.e. relief for non-payment of rent, failure to insure, and rare cases of accident or surprise. The question is how are the words 'the principles of English law' to be construed. In this context they are far from plain. I am unable to believe that it was the intention of the Legislature in 1915 to continue to empower the Court in the main enacting part of the section to give relief on such terms as might appear just and then, by an additional paragraph in this form, so to restrict the Court's powers as to prevent it doing justice. All the above mentioned cases in which relief could be granted apart from the Conveyancing Act 1881, (except perhaps failure to insure) could be relieved against under the "doctrines of equity" without invoking any of the "principles of English law", so that the interpretation contended for would give no meaning to the words "the principles of English law". And, as the doctrines of equity would apply in any event, without the 1915 addition to the section, that addition, if

construed as the Crown contends, would have been unnecessary. Moreover, such a restriction as is suggested would be repugnant to the main enacting part of the section the object of which clearly is to permit relief upon such terms as may appear just. I have no doubt that the intention was to direct that the Supreme Court in granting relief against forfeiture for breach of lessee's covenants in Crown Leases should be guided by the principles of English law as between subject and subject and the doctrines of equity, and that if the Legislature had intended to exclude the operation of section 14(2) of the Conveyancing Act, 1881, (which was the main provision of English law covering relief against forfeiture for breach of covenants in leases, though not, it is true, in Crown leases) they would have said so in plain terms. To give effect to the Crown's contention would, in my view, be to offend against various canons of construction of statutes. It would be to defeat the manifest object of the Legislature, to render certain words in the section nugatory, and to permit the 1915 addition, which though not in form a proviso, is somewhat similar to a proviso, to control the main enacting part of the section. I would, therefore, reject this contention.

I would allow the appeal, set aside the Decree dated the 2nd May, 1957, and substitute therefore a declaration that the title of the Defendant to the land described in the Plaint as L.R. No.209/4279 has been extinguished as from the 16th day of November, 1955, and an order that possession of the said land be given by the defendant to the plaintiff on or before such date as the Court (that is to say the Supreme Court) sees fit to name after hearing the parties, with mesne profits at the rate of Shs.200/- per annum. This is the amount of the rent and the amount admitted by the respondent to be payable as mesne profits. If, as this Court is informed, the rent has already been paid, credit should be given for such payments against the amount of the mesne profits decreed.

As I have held that there is no power to grant relief against forfeiture of the building condition additional evidence tending to show that it would be unreasonable to do so is unnecessary and the application to adduce such evidence should be refused

In the Court of Appeal for Eastern Africa

No.12

Judgment

24th March, 1958 continued

As to costs, the plaintiff has succeeded substantially but has lost on the question of the quantum of mesne profits. I think that the plaintiff should have four fifths of the costs of the suit as between party and party, to be taxed. The appellant should also have four fifths of the costs of the appeal as between party and party to be taxed. Cinema Press Ltd. v. Pictures & Pleasures Ltd. (1945) 1 K.B. 356, 364.

DATED this 24th day of March, 1958, at NAIROBI.

Sgd. K.K. O'CONNOR

PRESIDENT.

JUDGMENT OF SINCLAIR C.J.

I agree and have nothing to add.

Sgd. R.O. SINCLAIR.

CHIEF JUSTICE.

JUDGMENT OF FORBES J.A.

I also agree.

Sgd. A.G. FORBES.

JUSTICE OF APPEAL.

NAIROBI.

24th March 1958.

No.13

ORDER

In the Court of Appeal for Eastern Africa

No.13

Order

24th March, 1958.

IN HER MAJESTY'S COURT OF APPEAL
FOR EASTERN AFRICA
AT NAIROBI

CIVIL APPEAL No.76 of 1957.

BETWEEN

THE COMMISSIONER OF LANDS ... APPELLANT

AND

SHEIKH MOHAMED BASHIR ... RESPONDENT

(Appeal from a judgment of the Supreme Court of Kenya at Nairobi (Mr.Justice Rudd) dated 4th March, 1957.

in

Civil Case No. 958 of 1955

Between

The Commissioner of Lands ... Plaintiff

and

Sheikh Mohamed Bashir ... Defendant)

IN COURT This 24th day of March, 1958

Before the Honourable the President (Sir Kenneth O'Connor)
the Honourable Sir Ronald Sinclair, Chief Justice of Kenya
and the Honourable Mr.Justice Forbes, a Justice of Appeal.

ORDER

This Appeal coming on for hearing on the 30th day of January, the 24th and 25th days of February and the 5th day of March, 1958 AND UPON HEARING H.G.Sherrin, Esq., and

In the Court of Appeal for Eastern Africa

No.13

Order

24th March, 1958. continued

D.S.Davies, Esq., of Counsel for the Appellant and J.Gledhill, Esq., and Swaraj Singh, Esq., of Counsel for the Respondent, it was ordered that the Appeal do stand for judgment and upon the same coming for judgment on the 24th day of March, 1958, IT IS ORDERED that the Appeal be and is hereby allowed and that the decree of the Supreme Court of Kenya dated the 2nd May, 1957, be and is hereby set aside and there be substituted therefor a declaration that the title of the Respondent to the land described in the Plaint as L.R. No.209/4279 has been extinguished as from the 16th day of November, 1955, and an order that possession of the said land be given by the Respondent to the Appellant on or before such date as the Supreme Court sees fit to name after hearing the parties with mesne profits at the rate of Shs.200/- a year, and that the Respondent do pay to the Appellant four fifths of the costs of the suit to be taxed as between party and party AND IT IS FURTHER ORDERED that the costs of this appeal be taxed and four fifths of such taxed costs be paid by the Respondent to the Appellant.

GIVEN under my hand and the seal of the Court at Nairobi, the 24th day of March,1958.

F. HARLAND
REGISTRAR.

ISSUED at Nairobi this 21st day of April, 1958.

No.14

Order Granting Conditional Leave to Appeal

22nd April 1958

No.14

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

CIVIL APPLICATION NO.1 of 1958.

In the matter of an intended appeal to Her Majesty in Council

Between

SHEIKH MOHAMED BASHIR ... APPLICANT

and

THE COMMISSIONER OF LANDS ... RESPONDENT

(Intended appeal from a judgment of Her

In the Court of Appeal for Eastern Africa

No.14

Order Granting Conditional Leave to Appeal

22nd April 1958 continued

Majesty's Court of Appeal for Eastern Africa at Nairobi dated 24th March 1958 in

Civil Appeal No.76 of 1957

Between

The Commissioner of Lands ... Appellant

and

Sheikh Mohamed Bashir ... Respondent)

In Chambers this 22nd day of April, 1958.

Before the Honourable Mr.Justice Forbes, a Justice of Appeal.

O R D E R

UPON application made to this Court by Mr. J. Gledhill Counsel for the above named Applicant on the 14th day of April, 1958, for conditional leave to appeal to Her Majesty in Council as a matter of right under sub-section (a) of Section 3 of the East African (Appeals to Privy Council) Order in Council 1951 AND UPON HEARING Counsel for the Applicant and for the Respondent THIS COURT DOTH ORDER that the Applicant do have leave to appeal as a matter of right to Her Majesty in Council from the judgment above mentioned subject to the following conditions :-

(1) THAT the Applicant do within 45 days from the date hereof enter into good and sufficient security to the satisfaction of the Registrar of this Court in the sum of Shillings Ten Thousand (a) for the due prosecution of the Appeal (b) for the payment of all costs becoming payable to the Respondent in the event of (i) the Applicant not obtaining an order granting final leave to appeal or (ii) the appeal being dismissed for non-prosecution or (iii) the Privy Council ordering the Applicant to pay the Respondent's costs of the Appeal.

(2) THAT the Applicant shall apply as

In the Court of Appeal for Eastern Africa

No.14

Order Granting Conditional Leave to Appeal

22nd April 1958 continued

soon as practicable to the Registrar of this Court for an appointment to settle the record and the Registrar shall thereupon settle the record with all convenient speed, and that the said record shall be prepared and shall be certified as ready within 45 days from the date of signing hereof.

(3) THAT the Registrar, when settling the record shall state whether the Applicant or the Registrar undertakes to prepare the same and if the Registrar undertakes to prepare the same he shall do so accordingly, or if, so having undertaken he finds he cannot do or complete it, he shall pass on the same to the Applicant in such time as not to prejudice the Applicant in the matter of the preparation of the record within 45 days from the date of signing hereof.

(4) THAT if the record is prepared by the Applicant the Registrar of this Court shall at the time of the settling of the record state the minimum time required by him for examination and verification of the record, and shall later examine and verify the same so as not to prejudice the Applicant in the matter of the preparation of the record within the said 45 days.

(5) THAT the Registrar of this Court shall certify (if such be the case) that the record (other than the part of the record pertaining to final leave) is or was ready within the said period of 45 days.

(6) THAT the Applicant shall have liberty to apply for extension of times aforesaid for just cause.

(7) THAT the Applicant shall lodge his application for final leave to appeal within fourteen days from the date of the Registrar's certificate above mentioned

(8) THAT the Applicant if so required by the Registrar of this Court, shall engage to the

satisfaction of the said Registrar, to pay for a typewritten copy of the record (if prepared by the Registrar) or for its verification by the Registrar, and for the costs of postage payable on transmission of the typewritten copy of the record officially to England, and shall if so required deposit in Court the estimated amount of such charges.

In the Court of Appeal for Eastern Africa

No.14

Order Granting Conditional Leave to Appeal

22nd April 1958 continued

AND IT IS FURTHER ORDERED that the declaration of this Court that the title of the Applicant to L.R. No.209/4279 has been extinguished as from the 16th day of November, 1955, and the order of this Court that possession of the said land be given by the Applicant to the Respondent on or before such date as the Court (that is to say, the Supreme Court) sees fit to name after hearing the parties, with mesne profits at the rate of Shs. 200/- a year be stayed pending the decision of the intended appeal to the Privy Council.

AND IT IS ALSO ORDERED that the costs of and incidental to this appeal be costs in the intended appeal.

GIVEN under my hand and the Seal of the Court at Nairobi, this 22nd day of April, 1958.

F. HARLAND

REGISTRAR.

ISSUED this 23rd day of April, 1958.

In the Court of Appeal for Eastern Africa

No.15

Order rescinding Conditional Leave to Appeal

27th October 1958.

No.15

ORDER RESCINDING CONDITIONAL LEAVE TO APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

CIVIL APPLICATION NO.1 OF 1958.

In the matter of an intended appeal to Her Majesty in Council

Between

SHEIKH MOHAMED BASHIR APPLICANT

and

THE COMMISSIONER OF LANDS RESPONDENT

(Intended appeal from a judgment of Her Majesty's Court of Appeal for Eastern Africa at Nairobi dated 24th March 1958 in

Civil Appeal No.76 of 1957

Between

The Commissioner of Lands APPELLANT

and

Sheikh Mohamed Bashir RESPONDENT

In Court this 27th day of Oct. 1958.

Before the Honourable the President (Sir Kenneth O'Connor)
the Honourable the Vice-President (Mr.Justice Briggs)
and the Honourable Sir Owen Corrie, a Justice of Appeal

O R D E R

UPON THE ADJOURNED HEARING of an Application made to this Court by Mr.J.Gledhill, of Counsel for the above named Applicant on the 18th day of June, 1958, for final leave to Appeal to Her Majesty in Council AND UPON an

In the Court of Appeal for Eastern Africa

No.15

Order rescinding Conditional Leave to Appeal

27th October 1958. continued

application made on the 29th day of September, 1958, by Crown Counsel on behalf of the above named Respondent for orders that

(i) The Order of this Court made on 22nd April, 1958, granting conditional leave to the above named Applicant to appeal to Her Majesty in Council be rescinded.

(ii) The stay of extinguishment of title and delivery of possession imposed by this Court by its Order of April 22nd, 1958, be removed

(iii) The Applicant do pay the costs of this Application

(iv) The sum of shillings ten thousand (Shs. 10,000/-) deposited in Court by the Applicant as security for the costs of the intended appeal do remain in Court pending payment of all costs payable by him in respect of the intended appeal.

AND UPON the said applications having been heard and determined by the Honourable Mr.Justice Gould, a Justice of Appeal on the 2nd day of October, 1958, and upon the Applicant applying to have the said applications determined by the full Court pursuant to Rule 19(6) of the Eastern Africa Court of Appeal Rules, 1954.

AND UPON READING the Affidavit of Sheikh Mohamed Bashir sworn on the 22nd day of October, 1958, in support of the Applicant's application and the Affidavits of Diarmaid William Conroy sworn on the 29th day of September, 1958, and of Herbert Fred Hamel sworn on the 25th day of January, 1958, in support of the Respondent's application

AND UPON HEARING J.Gledhill Esquire and S.C. Gautama, Esquire, of Counsel for the Applicant and J.F.Marnan, Esquire, of Her Majesty's Counsel and J.S.Rumbold, Esquire of Counsel for the Respondent THIS COURT DOTH ORDER :-

1. THAT the Applicant's application for final leave to Appeal be dismissed with costs.

2. THAT the Order of this Court made on the

In the Court of Appeal for Eastern Africa

No.15

Order rescinding Conditional Leave to Appeal

27th October 1958 continued

22nd day of April, 1958, granting the applicant conditional leave to appeal to Her Majesty in Council be rescinded.

3. THAT the stay on extinguishment of title and delivery of possession imposed by this Court by its said Order of 22nd April,1958, be removed.

4. THAT the Applicant do pay the costs of the Respondent's applications before Mr.Justice Gould and before this Court.

5. THAT the sum of Shillings ten thousand (Shs. 10,000/-) deposited in Court by the Applicant as security for the costs of the intended appeal do remain in Court pending payment of all costs payable by him in respect of the intended appeal.

6. THAT a certificate for two Counsel for the Respondent be granted.

GIVEN under my hand and the Seal of the Court at Nairobi the 27th day of October, 1958.

F. HARLAND
REGISTRAR.

In the Privy Council.

No.16

Order Granting Special Leave to Appeal.

11th March 1959.

No.16

ORDER GRANTING SPECIAL LEAVE TO APPEAL

AT THE COURT AT BUCKINGHAM PALACE

The 11th day of March, 1959

Present

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
LORD MILLS
MR.SECRETARY SOAMES
MR. HARE
CHANCELLOR OF THE DUCHY OF LANCASTER

WHEREAS there was this day read at the Board a Report from the Judicial Committee of

No.16

Order Granting Special Leave to Appeal

11th March 1959 continued

the Privy Council dated the 2nd day of March 1959 in the words following, viz. :-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Sheikh Mohamed Bashir in the matter of an Appeal from the Court of Appeal for Eastern Africa between the Petitioner and The Commissioner of Lands Respondent setting forth (amongst other matters): that by a grant No. I.R. 9210 dated the 8th January 1953 the Governor of Kenya on behalf of Your Majesty granted the Petitioner for a term of 99 years a certain piece of land in Nairobi upon terms inter alia that he build a hotel thereon: that on the 29th September 1955 the Respondent served on the Petitioner a notice under Section 83 of the Crown Lands Ordinance 1915 alleging a breach of covenant by the Petitioner in that he had failed to perform the condition requiring him to erect a hotel: that on the 16th November 1955 the Respondent filed a Plaint in the Supreme Court of Kenya alleging the aforesaid breach and claiming possession of the land and mesne profits alternatively a declaration that the Lease be forfeited and damages awarded for breach of covenants: that on the 4th March 1957 the Court delivered Judgment ordering that possession be given to the Respondent subject to relief on terms which were fixed by the Court by an Order dated the 2nd May 1957: that the Respondent appealed to the Court of Appeal which Court on the 24th March 1958 delivered Judgment declaring the Petitioner's lease to have been forfeited as from the 16th November 1955 i.e. the date the Plaint had been filed and making consequent Orders for possession payment of mesne profits and costs: that on the 22nd April 1958 the Court of Appeal granted the Petitioner leave to appeal as a matter of right to Your Majesty in Council from the said Judgment of the Court of Appeal on conditions which were duly fulfilled: that on the 18th June 1958 the Petitioner's advocate filed an application

In the Privy Council

No.16

Order Granting Special Leave to Appeal

11th March 1959 continued

for final leave to appeal and the hearing thereof was adjourned sine die upon the said advocate applying for an adjournment: that on the 27th October 1958 the Court of Appeal confirmed the Orders made by a Judge in Chambers on the 2nd October 1958 refusing to grant final leave to appeal and ordering the rescission of the Order granting conditional leave to appeal: And humbly praying Your Majesty in Council to grant him special leave to appeal against the two Judgments of the Court of Appeal for Eastern Africa the first dated the 24th March 1958 allowing the Respondent's Appeal from part of the Judgment of the Supreme Court dated the 4th March 1957 and the aforesaid Order dated the 2nd May 1957 and the second dated the 27th October 1958 respectively and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Court of Appeal for Eastern Africa dated the 24th day of March 1958:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor or Officer administering the Government of Kenya for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

OTHER DOCUMENTS

Other Documents

No.17

No.17

LETTER, COMMISSIONER OF LANDS to SHEIKH M. BASHIR

Letter, Commissioner of Lands to Sheikh M.Bashir

18th September, 1952.

42492/11/20 18th September, 1952.

S.M.Bashir Esq.,
P.O. Box 1512,
Nairobi.

Sir,

NAIROBI - CITY SQUARE HOTEL SITE "A"

I have the honour to inform you that your tender for the above plot has been accepted and that the Government is prepared to offer you a grant of the above mentioned unsurveyed plot shown edged red on the attached plan subject to your formal written acceptance of the following conditions and to the payment of charges prescribed hereunder :-

AREA:	1.15 acres (approximately)
TERM:	99 years from the 1st September 1952.
STAND PREMIUM:	Sh.20,000/-
ANNUAL RENTAL:	First 10 years, Sh.200/- per annum. Next 15 years, Sh.6,000/- per annum Next 74 years, Sh.20,000/- per annum.
USER:	For hotel purposes only, the ground floor may be used for shops.
ROADS & DRAINS:	The cost of construction of roads and drains to serve this plot shall be payable by the grantee on demand.
GENERAL: (i)	The ordinary conditions applicable to Township Grants of this nature except as varied hereby shall apply to this grant.

Other Documents

No.17

Letter, Commissioner of Lands to Sheikh M.Bashir

18th September 1952. continued

(ii) This Letter of Allotment is subject to, and the grant will be made under the provisions of the Crown Lands Ordinance (Cap.155 of the Revised Edition of the Laws of Kenya) and title will be issued under the Registration of Titles Ordinance (Cap.160).

SPECIAL: (i) The Grantee shall erect complete for use and occupation within three years of the date of commencement of the term of the grant an hotel building of not less than six storeys in height and of a minimum value of £350,000, of a design, including block plans showing the position of the buildings, drawings and elevations, previously approved by the Commissioner of Lands and the Local Authority and shall maintain the same, including the external paintwork, in good and substantial repair and condition during the continuance of the term of the grant. The grantee will be required to conform with the City by-laws in all respects, and particular attention should be paid to the by-law relating to the maximum site coverage.

(ii) The Government or such person or authority as may be appointed for the purpose shall have the right to enter upon the plot and lay and have access to water mains, service pipes, telegraph or telephone wires and electric mains of all descriptions, whether overhead or underground, and the grantee shall not erect any building in such a way as to cover or interfere with any existing routes, main or service pipes or the telegraph and telephone wires and electric mains aforementioned.

(iii) The grantee shall not sell, transfer, sublease, charge or otherwise alienate or part with possession of the plot without the prior consent in writing of the Commissioner

of Lands and such consent will not be given if the building prescribed by Condition No.1 aforesaid has not been completed to the satisfaction of the Commissioner:

Provided nevertheless that the plot may with the prior consent in writing of the Commissioner of Lands be charged for the purpose of securing the repayment of any sum which the Commissioner may be satisfied is required by the grantee to enable him to fulfil his obligations under Condition No.1 aforesaid.

(iv) Any building erected shall conform to a building line decided upon by the Local Authority.

(v) The grantee shall be required to pay all rates, taxes, charges, duties, assessments or outgoings of whatsoever description as may be charged, assessed, levied, or imposed by any Government or local authority upon the land or the buildings erected thereon including any contribution or other sum paid by the Government in lieu thereof.

(vi) The entrance to the hotel building shall be set back to provide for the settling down of vehicular passengers within the plot. Similar provision for tradesmen's vehicles will also be required.

(vii) The grantee will be required to provide on the premises storage facilities for 24 hours' requirements of water supply to serve the premises.

2. The survey fees and the fees payable in respect of the preparation and registration of the title together with the stamp duty (which is approximately 2 per cent of the purchase price and rent) in respect of the grant must be paid within seven days of the demand therefor. Title will be issued as soon as conveniently possible.

3. I shall be glad to receive your acceptance

Other Documents

No.17

Letter, Commissioner of Lands to Sheikh M.Bashir

18th September 1952. continued

of the foregoing conditions. The fees payable are as below :-

	Sh.	Sh.
Stand Premium (25% on acceptance of tender)		20,000/-
Already paid	5,000/-	
Annual Rental from 1.9.52 to 31.12.52. ...	-	66/66
Already paid	200/-	-
Conveyancing fees ...	-	100/-
Registration fees ...	-	20/-
Stamp Duty, Survey fees, Roads and Drains, Sewers) not yet assessed.		
Sh.	5,200/-	20,186/66

4. As you have already forwarded your cheque for Sh.5,200/-, I shall be glad to receive your cheque for Sh.14,986/66 being the balance outstanding.

5. Before any building commences the beacons of the plot should be checked with the Director of Surveys.

I have the honour to be,
Sir,
Your obedient servant,
(Sgd.) A.E.PYNE.

for Special Commissioner and
Ag. Commissioner of Lands.

Copy to:

The Commissioner of Inland Revenue, Nairobi.
The Director of Surveys, Nairobi.
The Town Clerk, Nairobi.

No.18

Sheikh M. Bashir to Commissioner of Lands, 8th October 1952.

No.18

LETTER, SHEIKH M. BASHIR TO COMMISSIONER OF LANDS

S.M.BASHIR
P.O. BOX 1512
NAIROBI.

8th October, 1952.

The Special Commissioner and
Ag. Commissioner of Lands,
Nairobi.

Dear Sir,

NAIROBI - CITY SQUARE HOTEL SITE "A"

I thank you for your letter 42492/II/20 of the 18th September and regret that it could not be attended to earlier due to my absence in Saudi Arabia.

I agree to the conditions as laid down and am enclosing herewith my cheque No. N/L 171689 for Sh.14,986/66 being balance amount due.

I have inspected the survey beacons and should be glad to receive title deeds in due course.

Yours faithfully,

(Sgd.) S. M. Bashir.

No.19

Grant to Sheikh M.Bashir 8th January 1953.

No.19

GRANT TO SHEIKH M. BASHIR

COLONY AND PROTECTORATE OF KENYA

THE REGISTRATION OF TITLES ORDINANCE
(Chapter 160)

GRANT: Number I.R.9210
ANNUAL RENT: Progressive
TERM: 99 years from 1.9.1952.

KNOW ALL MEN BY THESE PRESENTS that in

Other Documents

No.19

Grant to Sheikh M.Bashir

8th January 1953. continued

consideration of the sum of Shillings twenty thousand by way of Stand Premium paid on or before the execution hereof the GOVERNOR AND COMMANDER-IN-CHIEF OF THE COLONY AND PROTECTORATE OF KENYA on behalf of HER MOST GRACIOUS MAJESTY QUEEN ELIZABETH THE SECOND under and by virtue of the powers vested in him hereby GRANTS unto SHEIKH MOHAMED BASHIR of Post Office Box Number 1512 Nairobi in the said Colony (hereinafter called "the Grantee") ALL that piece of land situate in Nairobi Municipality in the Nairobi District of the said Colony containing by measurement one decimal one six one acres or thereabouts that is to say Land Reference Number 209/4279 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed hereto and more particularly on Land Survey Plan Number 51700 deposited in the Survey Records Office at Nairobi TO HOLD for the term of ninety-nine years from the first day of September One thousand nine hundred and fifty two subject to the payment therefor of the annual rent of Shillings two hundred during the first ten years of the term that is to say until the first day of September One thousand nine hundred and sixty-two; the annual rent of Shillings Six thousand during the next following fifteen years of the term that is to say until the first day of September One thousand nine hundred and seventy-seven and the annual rent of Shillings Twenty thousand during the residuary seventy-four years of the term all of which rents shall be payable in advance on the first day of January in each year and subject also to the provisions of the Crown Lands Ordinance (Chapter 155) and the following Special Conditions (namely) :-

SPECIAL CONDITIONS.

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 paintwork) 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.

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.

3. The Grantee shall properly connect the drainage and sewage systems with any town systems when in the opinion of the Commissioner of Lands and the Local Authority the latter systems are so far completed as to enable the Grantee so to do.

4. The land and buildings shall be used for hotel purposes only except that shops may be constructed on the ground floor.

5. The Grantee shall not subdivide the land.

6. The buildings shall conform to a building line prescribed by the Local Authority.

7. The Grantee shall not sell transfer sublease or otherwise alienate or part with the possession of the land nor enter into any charge (other than with the consent of the Commissioner of Lands for the raising of a loan for building purposes) or agreement of sale in respect thereof until Special Condition Number 1 has been complied with.

8. The Grantee shall pay to the Commissioner of Lands on demand such sum as the Commissioner may estimate to be the proportionate cost of constructing all roads drains and sewers serving the land.

9. The Grantee shall pay such rates taxes charges duties assessments or outgoings of whatever description as may be imposed charged or assessed by any government or local authority upon the land or the buildings erected thereon including any contribution or other sum paid by the Governor in lieu thereof.

Other Documents

No.19

Grant to Sheikh M.Bashir

8th January 1953. continued.

10. The Governor or such person or authority as may be appointed for the purpose shall have the right to enter upon the land and lay and have access to water mains service pipes and drains telephone or telegraph wires and electric mains of all descriptions whether overhead or underground and the Grantee shall not erect any building in such a way as to cover or interfere with any existing alignments of main or service pipes or the telephone or telegraph wires and electric mains aforementioned.

11. The main entrance to the building shall be set back to provide for the setting down of vehicular passengers on the land and similar provision shall be made for tradesmen's vehicles.

12. The water supply system of the building shall include storage for at least twenty-four hours requirements.

IN WITNESS WHEREOF I, JOHN STEBENTON BALLENTINE, C.B.,C.I.E., The Acting Commissioner of Lands have by Order of the Governor hereunto set my hand and seal, this eighth day of January One thousand nine hundred and fifty-three in the presence of :-) Sgd. ?

Sd. ?
REGISTRAR OF TITLES

No.20

Notice of Breaches of Covenants.

29th September 1955.

No.20

NOTICE OF BREACHES OF COVENANTS

REGISTERED.

DEPARTMENT OF LANDS
P.O. BOX 89,
NAIROBI.

29th September, 1955.

NOTICE IS HEREBY GIVEN that breaches of the Lessee's covenants in a lease of land situated at Nairobi in the Colony of Kenya and known as Plot No.L.R.209/4279 dated the Eighth day of January, 1953, issued to Sheikh Mohamed Bashir

of P.O. Box 1512, Nairobi, and registered as L.R. No.9210 in the Crown Lands Registry at Nairobi, has been committed in that the Lessee has 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 also failed to pay such rates as have been assessed upon the land by the Nairobi City Council.

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) NOTICE IS HEREBY GIVEN to the said Sheikh Mohamed 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.

Sd. A. W. HORNER.

COMMISSIONER OF LANDS.

No.21

LETTER, ATTORNEY GENERAL TO SHAPLEY BARRET ALLIN & CO.

140/54/6/26.

Attorney General's Chambers, P.O.Box 112, NAIROBI.

Messrs.Shapley,Barret Allin & Co.,
NAIROBI.

Gentlemen,

L.R.No.209/4279 - HOTEL SITE "A" LUGARD AVENUE NAIROBI.

I think it may be useful if I set out my views as to the law applicable to this case. You will appreciate that they are only my personal views and that another Crown Counsel might feel it his duty to put forward other submissions to the Court.

Other Documents

No.21

Letter, Attorney General to Shapley Barret Allin & Co. 3rd November, 1955. continued

2. The Grant, is, in my opinion, so drawn that the obligations placed upon the grantee are conditions and not covenants. This view is confirmed by section 14 of the Crown Lands Ordinance which provides for (c) building conditions, and (d) special covenants.

3. Section 83 of the Ordinance does not apply to conditions but only to covenants. Accordingly, it is necessary to look elsewhere for the law to be applied. Section 42 of the Kenya Colony Order in Council laid down that Civil Jurisdiction should be exercised in accordance with the Indian Acts in force in the Colony on the 27th of June, 1921, and the substance of Common Law and Equity and the statutes of general application in force in England on the 12th day of August, 1897, so far as these had not been replaced by any Ordinance. The Indian Transfer Act was applied by the East Africa Order in Council, 1897, but was replaced so far as it related to Crown Lands by the Crown Lands Ordinance. The application of the Conveyancing Act, 1881, is prevented by that of the Indian Transfer Act, and if it ever applied it would have been replaced by the Crown Lands Ordinance. It follows, therefore, in my opinion, that there is no power in the Supreme Court of Kenya to grant relief from forfeiture for breach of condition except such as existed in England independent of statute. I believe that the present case is not one in which the Courts of Equity would have granted relief as it is not a case in which the right of forfeiture can be regarded as security for the payment of money. I believe therefore that Mr.Bashir's chances of obtaining relief from the forfeiture are negligible.

4. I would point out that if I am right that this is a case of breach of condition and not a breach of covenant, the plaintiff can, and indeed will claim mesne profits from the date of the breach. As the rent is nominal and the property of considerable value, this point is one of importance.

5. Lastly, I should add that I am confident that if Mr. Bashir decided to surrender the Lease at an early date I could persuade those concerned to sanction the waiver to any claim for mesne profits or costs.

I have the honour to be,
Gentlemen,
Your obedient servant,
Sgd. H.G.SHERRIN.
AG. SENIOR CROWN COUNSEL.

IN THE PRIVY COUNCIL No. 17 of 1959

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

SHEIKH MOHAMED BASHIR (Defendant) Appellant

- and -

THE COMMISSIONER OF LANDS
(Plaintiff) Respondent

RECORD OF PROCEEDINGS

T. L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.
Solicitors for the Appellant.

CHARLES RUSSELL & CO.,
37, Norfolk Street,
London, W.C.2.
Solicitors for the Respondent.