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31, 1960

IN THE PRIVY COUNCIL

No. 15 of 1959

ON APPEAL FROM THE COURT OF APPEAL  
FOR EASTERN AFRICA AT NAIROBI.

B E T W E E N

REGINALD ERNEST VERE DENNING  
(Defendant)

Appellant

- and -

1. DAVID GEOFFREY EDWARDES  
2. DAPHNE ELIZABETH NAOMI  
EDWARDES (Plaintiffs)

Respondents

UNIVERSITY OF LONDON  
W.C.1.  
- 7 FEB 1961  
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INSTITUTE OF ADVANCED  
LEGAL STUDIES

80972

CASE FOR THE APPELLANT

RECORD

- 1. This is an appeal from a Judgment and Order of the Court of Appeal for Eastern Africa dated the 22nd November, 1958, allowing an appeal from a Ruling of the Supreme Court of Kenya dated the 14th March, 1958, on an issue relating to the admissibility of evidence, and setting aside a Judgment and Decree of the same date, founded upon the said Ruling, whereby the Supreme Court dismissed a claim for Specific Performance of an Agreement for the sale of land, and ordering that the suit should proceed. pp.51-72.  
p. 72.  
pp.16-18.
- 20 2. The Agreement in question relates to land situate in the Highlands of Kenya and held under a Crown lease registered under the Crown Lands Ordinance, Cap. 155. The main issues which arise for determination on this appeal are as to the proper construction of certain statutory provisions and their application to this Agreement. The principal statutory provisions which have to be considered are the following: pp.18, 19.
- 30 (i) The Indian Transfer of Property Act, 1882, Section 55 (6) (b) which gives the buyer of immoveable property a charge on the property for the amount of any part of the purchase-price paid in anticipation of delivery.

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- (ii) The Crown Lands Ordinance, Section 127 (2) which provides inter alia that no evidence of a charge upon registered land shall be receivable unless created by an instrument in writing and the instrument has been registered.
- (iii) The Crown Lands Ordinance, Section 88, which inter alia requires the written consent of the Governor to transactions concerning land situate in the Highlands and renders certain instruments void unless their terms and conditions have received the consent of the Governor. 10
- pp. 1-5. 3. The suit was commenced by a plaint in the Supreme Court dated the 1st May, 1957. By the said plaint the Respondents (hereinafter called the Plaintiffs) inter alia alleged an Agreement in writing dated the 17th April, 1954, whereby the Appellant (hereinafter called the Defendant) agreed to sell to the Plaintiffs a portion of his farm, containing an area of 180 acres more or less, for the sum of Shs. 200,000/-. After setting out a number of allegations, the Plaintiffs claimed relief under 6 heads (some of them alternative) including Specific Performance. 20
- p. 5. The Defendant filed a Defence and Counterclaim dated the 27th June, 1957, and the Plaintiffs pp. 6-9. filed a Reply and Defence to Counterclaim dated pp.10-11. the 13th July, 1957. 30
- p.13, l.11. 4. On the 24th January, 1958, the Supreme Court p.17, l.14. (Pelly Murphy J.) held, on a Preliminary Objection by the Defendant, that all the Plaintiffs' claims, save only that for Specific Performance, were unsustainable in law.
- p.13. 5. The hearing on the claim for Specific Performance was opened on the 14th February, 1958. The first-named Plaintiff gave evidence as follows:-
- "I entered into a written Agreement at end of 1954 to purchase portion of Mr. Denning's farm at Naivasha, Marked for identification "(1)". This is the Agreement." 40
- p.14, l.1. 6. At that stage, counsel for the Defendant

objected to the Agreement being put in evidence, on the ground that it was an unregistered instrument, i.e. it had not been registered as required by the Crown Lands Ordinance. On the basis of that objection, it was submitted that the suit, being founded upon the Agreement, must fail.

p.14, 1,24.

10 7. The objection to the admissibility of the Agreement was based upon the provisions of the Indian Transfer of Property Act, 1882, Section 55 (6) (b) and the Crown Lands Ordinance, Cap.155, Section 127, having regard to the terms of the Agreement. It was contended that the Agreement gave rise to a charge in favour of the Plaintiffs, because there had been part-payment of the purchase-price; that an instrument giving rise to such a charge upon land registered under the Crown Lands Ordinance must be registered; and that such an instrument, if not registered, cannot be received in evidence.

p.14, 11.  
i-32.

20 8. The Agreement by clause 2 thereof provided as follows:-

p.76, 1.21.

"The purchase price of the said land shall be the sum of Shillings two hundred thousand and the same shall be paid as under:-

- (a) the sum of Shillings eight thousand on the signing hereof and the Vendor hereby acknowledges the due receipt thereof.
- 30 (b) the sum of Shillings One hundred and seventy two thousand without interest on or before the Thirtieth day of April One thousand nine hundred and fifty four, and
- (c) The sum of Shillings Twenty thousand without interest the balance thereof on the delivery by the Vendor to the Purchasers of a proper legal Assignment to the Purchasers of the said premises"

40 The material parts of the Indian Transfer of Property Act, 1882, are as follows :-

"Of sales of immoveable property

.....

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55. Rights and liabilities of buyer and seller.

In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

.....

(6) The buyer is entitled - 10

.....

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid to the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree of rescission." 20

The Crown Lands Ordinance, Section 127, so far as material, provides as follows :-

"127. No evidence shall be receivable in any Civil Court :- 30

(1) of the sale, lease, or other transfer inter-vivos of land registered under this Part, unless such sale, lease or other transfer is effected by an instrument in writing and such instrument has been registered under this Part.

(2) of a lien, mortgage or charge (otherwise than such as may arise or be created in favour of the Crown or the Government under or by virtue of any Ordinance or 40

other enactment) of or upon such land unless the mortgage or charge is created by an instrument in writing, and the instrument has been registered under this Part".

10 The said Section 127 is in Part XII of the Ordinance. It is not disputed that the land to which the Agreement relates falls within the description of "land registered under this Part"; nor is it disputed that the Agreement had not been registered under Part XII of the Ordinance.

9. On the 14th March, 1958, the learned trial judge gave a Ruling whereby he upheld the Defendant's objection to the admission of the Agreement. His reasons sufficiently appear from the following passages in the said Ruling:- pp.16-18.

20 "It is common ground that the land in question forms part of a larger parcel of land registered under Part XII of the Crown Lands Ordinance. In my judgment the provisions of that Ordinance relating to the registration of transactions in land govern, and exclusively govern, the registration of the document with which we are here concerned. The agreement has not been registered under that Ordinance. p.17, l.24.

30 It is not disputed that in fact part of the purchase money was paid in pursuance of Clause 2 of the agreement. That being so, it is in my judgment clear that, by virtue of the provisions of section 55 (6) (b) of the Indian Transfer of Property Act, 1882, the purchaser thereupon became entitled to a charge on the property, and the agreement, in addition to being an agreement for sale, evidences the creation of that charge.

40 Section 127 (2) of the Crown Lands Ordinance provides that no evidence shall be receivable in any civil court of a charge upon land registered thereunder unless the instrument creating the charge has been registered."

The learned judge expressed the opinion that the decision of the Privy Council in Dayal Singh v. Indar Singh L.R. 53 I.A. 214 completely governs the case. p.18. l.12.

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- p.18, l.27. Accordingly, the learned judge gave Judgment dismissing the Plaintiffs' claim with costs, and a Decree upon the said Judgment was duly entered.
- pp.19-20.
- pp.51-70. 10. In the Court of Appeal (O'Connor, P., Briggs V.-P. and Forbes J.A.) the principal Judgment was delivered by the learned President.
- pp.57-59. In that Judgment the relevant provisions of the Crown Lands Ordinance are set out.
- p.64, l.18. 11. The learned President held that the Agreement was not excluded by the provisions of the Crown Lands Ordinance, Section 127. He said - 10
- p.64, l.14. "The Agreement in this case was not tendered as evidence of a charge. No charge was sought to be proved, and the existence or otherwise of a charge was irrelevant to any issue in the suit."

The learned President drew attention to certain differences between the wording of the statutory provisions considered in Dayal Singh's case and that of the relevant provisions of the Crown Lands Ordinance. 20

- pp.65-68. 12. The learned President also considered an argument put forward on behalf of the Plaintiffs based upon the provisions of Section 88 of the Crown Lands Ordinance, the material parts of which read as follows:-

"88(1). No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with the possession of any land which is situate in the Highlands, or any right, title or interest whether vested or contingent, in or over any such land to any other person, nor, except with the written consent of the Governor shall any person acquire any right, title or interest in any such land for or on behalf of any person or any company registered under the Companies Ordinance; nor shall any person enter 30 40

into any agreement for any of the transactions referred to in this sub-section without the written consent of the Governor; .....

10 (3) Any instrument, in so far as it purports to effect any of the transactions referred to in sub-section (1) of this section shall be void unless the terms and conditions of such transactions have received the consent of the Governor which shall be endorsed on the instrument: "

20 The Agreement in question in this suit bore no endorsement of the Governor's consent. The Plaintiffs' argument was that the Agreement, in so far as it purports to effect a charge over land in the Highlands, is void by reason of the provisions of Section 88 (3), and therefore it does not require to be registered and is not rendered inadmissible by Section 127, read together with Section 129 (e) of the Crown Lands Ordinance. The last-mentioned provision (which is set out in the Judgment of the learned President) provides inter alia that Section 127 shall not apply to a document not itself creating an interest in land but merely creating a right to obtain another document which will, when executed, create such an interest. This argument was accepted by the learned President, who expressly held that the Agreement is an instrument which "purports" to effect a charge, within the meaning of Section 88 (3) of the Ordinance.

p.59.

p.68, 1.2.  
p.68, 1.3.

40 13. The argument based upon Section 88 of the Crown Lands Ordinance was put forward on behalf of the Plaintiffs for the first time in the Court of Appeal. The Defendant submitted that the point on this Section could not be taken at that stage because it had not been taken at first instance and it depended upon evidence. This submission was rejected by the learned President.

p.65, 1.24.

pp.65-66.

14. As regards the effect of Section 88, it was argued on behalf of the Defendant that the Agreement as a whole was void under the provisions of sub-section (1) because the prior consent of the Governor had not been obtained. The learned President took the view that Section 88 (1) does

p.66, 1.37.

RECORD

p.66, 1.35. not require that the consent of the Governor must be obtained before the agreement is entered into; he also held that the Agreement in question in this suit was not an agreement to sell land without the consent of the Governor, in view of the provisions of clause 4 thereof, which reads as follows:-

"4. The purchase and sale hereby effected is expressly made subject to the consent thereto of the Land Control Board and the Governor of the said Colony. In the event of such consents being refused then this Agreement shall become null and void and any payment made by the Purchasers shall thereupon be refunded to them but without interest. "

The learned President therefore rejected the Defendant's counter-argument based upon Section 88 (1) of the Ordinance.

p.57, 1.10. 15. With regard to the requirement of the Governor's consent, referred to in clause 4 of the Agreement, the Court of Appeal were informed from the Bar that the consent of the Governor had been obtained since the Agreement was signed. The consent was not endorsed on the Agreement tendered in evidence, however, and the learned President expressed the view that the words "which shall be endorsed on the instrument" in Section 88 (3) of the Crown Lands Ordinance are mandatory, and that the endorsement, and that only, is the evidence which the Ordinance requires of the fact that consent has been obtained.

pp.70-72. 16. A concurring Judgment was delivered by Briggs V.-P.; Forbes J.A. agreed.

pp.72-73. The Court of Appeal allowed the appeal with costs and ordered that the suit should proceed and further ordered that the costs of the suit already paid by the Plaintiffs to the Defendant should be repaid and all costs in the suit be dealt with by the Judge at the trial of the action.

pp.73-74. 17. Final leave to appeal to the Privy Council was granted on the 22nd April, 1959.

18. The Plaintiff humbly submits that the



Judgment and Order of the Court of Appeal should be set aside and that the Judgment and Decree of the Supreme Court should be restored and that this Appeal should be allowed with Costs for the following, amongst other,

R E A S O N S

1. BECAUSE the Agreement dated the 17th April, 1954, relates to land registered under Part XII of the Crown Lands Ordinance, acknowledges the undisputed fact that part of the purchase-money was paid, and is not registered.
2. BECAUSE by the provisions of the Indian Transfer of Property Act, 1882, Section 55 sub-section (6) (b) a charge by operation of law arises upon the basis of the said Agreement and the same not having been registered it is not admissible in evidence owing to the provisions of Section 127, sub-section (2) of the Crown Lands Ordinance.
3. BECAUSE the said Agreement is not admissible in evidence and the claim for Specific Performance, being founded upon it, must fail.
4. BECAUSE the Ruling of the Supreme Court dated the 14th March, 1958, is right for the reasons therein stated and other good and sufficient reasons.
5. BECAUSE the Plaintiffs were not entitled to rely upon the provisions of Section 88, sub-section (3) of the Crown Lands Ordinance by reason of their not having raised the point at first instance.
6. BECAUSE the said Agreement, although giving rise to a charge, owing to the provisions of the Indian Transfer of Property Act, 1882, Section 55, sub-section (6) (b), does not "purport" to effect a charge within the meaning of Section 88, sub-section (3) of the Crown Lands Ordinance.

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7. BECAUSE the said Agreement is void under the provisions of Section 88 of the Crown Lands Ordinance by reason of the fact that the prior consent in writing of the Governor was not obtained.
8. BECAUSE the said Agreement is void under the provisions of Section 88 of the Crown Lands Ordinance by reason of the fact that it does not bear any endorsement of the consent of the Governor. 10
9. BECAUSE the Court of Appeal misconstrued the relevant provisions of the Crown Lands Ordinance, in particular Section 127 and Section 88, and is wrong.

RALPH MILLNER

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CASE FOR THE APPELLANT

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