

31, 1960

IN THE PRIVY COUNCIL

No. 15 of 1959

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

UNIVERSITY OF LONDON  
W.C.1.

- 7 555 1961

INSTITUTE OF ADVANCED  
LEGAL STUDIES

REGINALD ERNEST VERE DENNING

Appellant

- and -

DAVID GEOFFREY EDWARDES and

DAPHNE ELIZABETH NAOMI EDWARDES

Respondents

30373

CASE ON BEHALF OF THE RESPONDENTS.

Record

10      1. This is an appeal from a Judgment and Order of the Court of Appeal for Eastern Africa dated the 22nd November 1958 setting aside the Judgment and Decree of the Supreme Court of Kenya (Pelly Murphy J.) dated the 14th March 1958 and the 26th May 1958 respectively, and remitting the original suit for trial to the Supreme Court of Kenya.

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20      2. The suit giving rise to the appeal was brought by the Respondents as Plaintiffs (hereinafter referred to as "Respondents") against the Appellant as Defendant (hereinafter referred to as "Appellant") for specific performance of an Agreement in writing dated the 17th April, 1954, made between the Respondents and the Appellant.

The Appellant raised a preliminary objection to the admissibility of the Agreement in evidence. The Trial Court upheld the objection and, accordingly, dismissed the claim of the Respondents with costs.

The Court of Appeal set aside the Ruling and Judgment of the Trial Court and remitted the Suit for trial to the Trial Court.

30      3. The sole question for determination in this appeal is a pure question of law, namely, whether the Agreement is admissible in evidence.

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4. The relevant statutory provisions are set out in the Appendix hereto.

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5. In April 1954 the Respondents entered into an Agreement in writing with the Appellant to purchase a portion of the Appellant's farm at Naivasha at a price of Shs. 200,000/-.

Clause 1 of the Agreement contains a description of the portion of land which the Respondents agreed to purchase, and which the Appellant agreed to sell. 10

Clause 2 recites the price and the manner for payment. Shs. 8,000/- was paid as a deposit and the sum of Shs. 172,000/- was duly paid by the Respondents to the Appellant at the beginning of May 1954, bringing the total payments made up to Shs. 180,000/- leaving a balance of Shs. 20,000/- to be paid on completion.

Clause 3 of the Agreement deals with formal possession of the property agreed to be purchased. The Respondents went into actual possession of the property on the 1st February 1955, and, on taking actual possession, the Respondents constructed a permanent dwellinghouse and other improvements on that portion of land which they had agreed to purchase. The value of such improvements is in the region of £5,000. 20

Clause 8 of the Agreement provides that the Appellant (Vendor) should cause a survey to be made of the premises and deed plans to be issued by the Survey Department of the Colony of Kenya. At the period in question it was inevitable that there should be some delay between the signing of the Agreement and the completion of a survey, owing to the shortage of qualified surveyors in the Colony, and the Appellant was not in fact able to have a survey made until November 1955. It was because it was realised that there would be a delay before the survey could be completed and completion take place that the Agreement provided that possession should be given to the Respondents before completion. 30

6. The riparian land referred to in the Agreement and in the Pleadings is the land lying between the line of the waters edge of Lake Naivasha as described in an undertaking by the Crown dated the 28th March 1932 and 40

10 the present waters edge of the Lake. The line referred to in the undertaking by the Crown was the line of the Lake's edge as at 1906. Since 1906 the Lake has receded considerably uncovering very fertile land. This land, i.e. the land lying between the line of the Lake as at 1906 and the present line of the water of the Lake, being known as riparian land, is vested in the Crown and it is not possible to obtain individual ownership of this land. In 1932, however, the Crown, by the undertaking referred to, agreed that it would bring no proceedings against occupiers of land adjoining the Lake who used the riparian land for agricultural purposes.

7. Clause 1 of the Agreement refers to "the south-east boundary running in part along the edge of the present lucerne crop which is 75 feet from the wall of the big windmill belonging to the Vendor". The windmill referred to is, however, situated on the riparian land and not on what may be termed the "non-riparian" land.

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20 8. Following the survey referred to above prolonged negotiations took place between the parties and their respective Advocates in an endeavour to reach agreement. Nevertheless the Appellant refused to make any concessions towards a settlement and it became necessary to take action on behalf of the Respondents to enforce the terms of the Agreement.

30 9. The Plaintiff shows that the survey which was caused to be made by the Appellant resulted in the acreage of the portion of the land agreed to be purchased by the Respondents being  $147\frac{1}{2}$  acres and not 180 acres as provided in the Agreement.

10. The Respondents instituted

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#### THE PRESENT SUIT

against the Appellant on the 1st May 1957.

40 11. The Plaintiff contains a number of claims in the alternative. On preliminary objections taken in the Court of first instance by the Appellant all of the Respondents' claims, save that for simple specific performance, were dismissed on technical grounds. The present proceedings are concerned only with the claim for specific performance and not with any of the alternative claims in the Plaintiff.

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- p. 12      12. When the suit for specific performance was proceeded with, the Agreement, upon which the suit for specific performance was founded, was tendered in evidence. At this stage the Advocate for the Appellant objected to the Agreement being put in evidence on the grounds which are the subject matter of this Appeal.
- p. 6      13. The Appellant filed his Defence and Counterclaim on the 27th June 1957.
- p. 10      14. The Respondents filed their Reply and Defence as to the Counterclaim on the 13th July 1957.      10
- p. 16      15. The Trial Court delivered its Ruling and Judgment on the 14th March 1958.
16. The Trial Court held that the Agreement was not receivable in evidence in that by virtue of Section 55 of the Indian Transfer of Property Act it evidenced the creation of a charge and was therefore excluded from Section 129(e) of the Crown Lands Ordinance and caught by Section 127 of that Ordinance.
17. The ratio decedendi of the Judgment of the Trial Court is contained in the following passage :-      20
- p.17, l.17      "At the resumed hearing, when the Plaintiffs sought to adduce evidence of the written agreement in support of the claim for specific performance, Mr. Khanna for the defendant objected to the admission in evidence of that document on the grounds that it has not been registered as required by the Crown Lands Ordinance.
- 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.      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      40

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.

10 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.

20 Mr. Wollen for the Plaintiffs has pointed to the provisions of sections 137, 138 and 139 of the Crown Lands Ordinance as precluding, in the circumstances of this case, the registration of the agreement under that Ordinance and he has urged that the provisions of the Registration of Documents Ordinance, and particularly those of Section 17 thereof, should be applied to this case. I cannot accede to this proposition as I am of opinion that the terms of the two Ordinances make it abundantly clear that only the former applies.

In my opinion the decision in Dayal Singh v. Inder Singh (1925-26) 53 L.R. Indian Appeals, 214 completely govern this case. I am strengthened in that view by the Judgment of de Lestang J. in Ebrahimji Gulamhussein Anjarwalla and others v. Sheik Fazal Elahi (Civil Case No. 99 of 1948, unreported).

30 In my Judgment I am precluded from receiving in evidence the agreement of the 17th April, 1954.

Mr. Khanna's objection is upheld."

18. The Trial Court accordingly dismissed the Respondents claim with costs.

A decree in accordance with the Judgment was made on the 26th May 1958. p. 19

19. The Respondents appealed from the decision of the Trial Court given on the 14th March 1958 to the Court of Appeal for Eastern Africa. p. 23

40 20. The Court of Appeal delivered Judgment on the 10th November 1958, setting aside the ruling of the Trial Court that the Agreement is inadmissible, and, p. 51

Record

accordingly remitted the suit for trial by the Trial Court.

21. The Court of Appeal held that -

1. Under the Laws of Kenya evidence of the transactions specified in Section 127 of the Crown Lands Ordinance, i.e. of the sale, lease or other transfer and of a lien mortgage charge etc. of land registered under that Ordinance is not admissible unless such transaction is effected or created by an instrument in writing which is registered under the provisions of the Ordinance;

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2. The Agreement is not evidence of a "sale" under Section 127(1) of the Crown Lands Ordinance and is accordingly not registrable;

3. No charge was sought to be proved, and the existence or otherwise of a charge was irrelevant to any issue in the suit;

4. The Agreement was not excluded by Section 127(2) of the Crown Lands Ordinance;

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5. The Crown Lands Ordinance is essentially different from the Indian Registration Act; and therefore the ruling in Dayal Singh v. Inder Singh 1925 L.R. 53 I.A. 214 is inapplicable to the present case;

6. The Agreement is a document precisely within the terms of Section 129(e) of the Crown Lands Ordinance.

22. An Order setting aside the Decree of the Trial Court was made on the 22nd November 1958.

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23. The Appellant obtained leave to appeal to Her Majesty in Council on the 22nd April 1959.

24. The Respondents humbly submit that the Appeal be dismissed with costs throughout for the following

R E A S O N

BECAUSE the Judgment of the Court of Appeal is correct in law for the reasons given therein.

S.P. KHAMBATTA.

H. LESTER.

A P P E N D I X

THE INDIAN TRANSFER OF PROPERTY ACT 1882.

SECTION 54.

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

10 Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value of less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

20 A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

SECTION 55.

In the absence of a contract to the contrary the buyer and the seller of immovable 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:

(Sub-sections 1 - 5 are not relevant)

30 (6) The buyer is entitled -

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(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 by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the 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 for its rescission.

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THE CROWN LANDS ORDINANCE (CAP. 155) OF THE LAWS OF KENYA 1958.

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

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Provided that nothing in this sub-section contained shall affect -

- (a) any such transactions made by or in favour of the Crown;
- (b) any gift of land by way of testamentary disposition.



(2) Applications for the consent of the Governor under the provisions of sub-section (1) of this section shall be made in the manner prescribed.

(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:

10        Provided that where the Governor refuses his consent and any money has been paid by either party in respect of any such transaction, such money shall be recoverable as a civil debt from the party to whom it has been paid.

(4) Nothing in this section contained shall be deemed to preclude any person, without the consent of the Governor, from -

(a) mortgaging any of his land to the Land and Agricultural Bank of Kenya;

20        (b) depositing his title deeds to any land by way of equitable mortgage or charge with any branch of Barclays Bank (Dominion, Colonial and Overseas), the National Bank of India, Limited; the Standard Bank of South Africa, Limited, or with any bank or body of persons, whether corporate or unincorporate, approved by the Governor in Council.

#### SECTION 126.

30        All transactions entered into, affecting or conferring or purporting to confer, declare, limit or extinguish any right, title, or interest, whether vested or contingent, to, in or over, land registered under this Part (other than a letting for one year only or for any term not exceeding one year) and all mutations of title by succession or otherwise shall be registered under this Part.

#### SECTION 127.

No evidence shall be receivable in any civil court:-

40        (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 (other than such as may arise or be created in favour of the Crown or the Government under or by virtue of any Ordinance or 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
- (3) Of a sale or other transfer inter vivos of a registered lien, mortgage or charge, unless such sale or other transfer is effected by an instrument in writing and such instrument has been registered under this Part:

Provided, however, that nothing hereinbefore contained shall apply to an equitable mortgage by deposit of documents of title provided that a memorandum of such equitable mortgage shall have been registered in the register. On the discharge of such equitable mortgage a memorandum of such discharge shall be registered in the register. Every memorandum shall be transmitted to the registry in duplicate and shall be in such form and there shall be paid on the registration thereof such fee as may be prescribed. 20

#### SECTION 129.

Nothing in the last two preceding sections shall apply to -

- (a) any composition deed; 30
- (b) any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of land registered under this Part; or
- (c) any debenture issued by such company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in land registered under this Part, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or 40

part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures; or

- (d) any endorsement upon or transfer of any debenture issued by any such company; or
- (e) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in land registered under this Part, but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or
- (f) a lease for one year only or for any term not exceeding one year.

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#### SECTION 137.

(1) A document other than a judgment, decree or order of a court, to which there is attached a map or plan which is not signed by a Government or licensed surveyor, and countersigned by the Director of Surveys, shall not be accepted for registration.

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(2) Whenever a registrar shall consider that in regard to any document presented for registration a description of the boundaries of any land, sufficiently clear and accurate to prevent confusion, cannot be obtained unless a plan is attached to the document, he may refuse to register the document until a plan of the land the subject of the document, signed by a Government or licensed surveyor and countersigned by the Director of Surveys, is attached to the document, and presented for registration therewith:

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Provided, however, that in the case of such refusal if the document is presented for registration together with a plan to the satisfaction of the registrar within such time as the registrar shall consider reasonable under the circumstances of the case the document shall be deemed to have been registered at the time of its entry in the day book:

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And provided further that an appeal shall lie against an order made by a registrar under this sub-

section to the Principal Registrar, and the Principal Registrar may reverse or alter such order, and if the order of the Principal Registrar directs the document to be registered, the registrar shall obey the same; but if the Principal Registrar confirms the order of the registrar his decision thereon shall be final.

SECTION 138.

(1) Every document produced for registration shall contain embodied therein, or in a schedule annexed thereto, an accurate and clear description of the property affected thereby, its boundaries, extent and situation, and either a reference to the volume and folio of the register in which such property has been previously registered, or a reference to the conveyance, lease or licence from the Crown or Government relating to the land affected by the transaction.

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(2) If such property consists of a divided portion of land, the property of the person alienating the same or any interest therein, such portion shall be clearly and accurately defined by its particular boundaries and extent, and accompanied by a plan signed by a Government or licensed surveyor and countersigned by the Director of Survey.

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(3) If such property consists of an undivided share in immovable property, the proportion which the same bears to the entire property shall be stated, and a description of such property shall be given as required by sub-section (1) of this section.

SECTION 139.

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No document which does not state the particulars required by the preceding section shall be admitted to registration except with the sanction of the Principal Registrar upon the necessary particulars being supplied by affidavit by the person producing the document for registration, and on such other terms as the Principal Registrar may think expedient.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL  
FOR EASTERN AFRICA

BETWEEN:

REGINALD ERNEST VERE DENNING  
(Defendant) Appellant

- and -

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

C A S E

ON BEHALF OF THE RESPONDENTS.

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