

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF THE GAMBIA

B E T W E E N :

ALHAJI MALANG KANTEH (Plaintiff) Appellant

- and -

- 1. THE ATTORNEY GENERAL
- 2. OUSMAN MOMADOU WADDA
- 10 3. GABRIEL GEORGE
- 4. ALKALI JARJU (Defendants) Respondents

C A S E FOR THE APPELLANT

Record

- 1. This is an appeal by Special Leave of the Judicial Committee from a Judgment of the Gambia Court of Appeal (Dove-Edwin, P., Livesey Luke, J.A., and Harding, J.A.) dated the 11th day of July, 1972, which allowed an appeal from a Judgment of the Supreme Court of the Gambia (Brown-Marke, J.) dated the 16th day of December, 1971, which set aside a sale to the 4th Respondent by the Sheriff of leasehold property situated at Serrekunda in the Kombo St. Mary Division of the Gambia. p.53
pp.45-52
pp.23-42
- 20 2. The Appellant commenced his action by writ dated 22nd September, 1969, claiming "to set aside a purported sale of his property situated at Serrekunda, K.S.M.D., Gambia, by the Sheriff to Alkali Jarju, the 4th Defendant, on the 20th September, 1969." In his Statement of Claim, he pleaded as follows:- pp.2-3
- 30 "1. The Plaintiff is a Businessman and p.4

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carries on his business at Number 2 Russell Street, Bathurst, Gambia.

2. By written agreements dated the 18th days of January, 1969, and 18th February, 1969, the 2nd Defendant agreed to sell to the Plaintiff his leasehold property situated at Serrakunda, Kombo St. Mary Division of the Gambia, bearing Registration No. C.9/69 for the sum of £580.4.6 which the Plaintiff paid the 2nd Defendant.

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3. That after the receipt of the said sum of £580.4.6 the 2nd Defendant refused to execute an assignment prepared by A.M.Drameh in favour of the Plaintiff.

4. Thereupon the Plaintiff sued the 2nd Defendant for specific performance of the said agreement and the Chief Justice in Civil Suit No. 83/69 gave judgment in favour of the Plaintiff on 31st July, 1969, by which the Chief Justice ordered specific performance of the said agreement.

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5. That on the 11th August, 1969, the 2nd Defendant and the Plaintiff executed an assignment of the said property by the Plaintiff. The deed was duly executed, registered and numbered 104/69 (Vol.32 C.D.).

6. That the 2nd Defendant also owed the 3rd Defendant who brought an action in the Supreme Court and judgment was entered in the 3rd Defendant's favour for the amount claimed plus costs whereby the 3rd Defendant issued a writ of Fi.Fa. against the moveable and immoveable properties of the 2nd Defendant and caused the property already sold to the Plaintiff to be attached and sold to the 4th Defendant for £675 or thereabout on 20th September, 1969, at Serrekunda K.S.M.D. Gambia.

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7. That there was no sale as the property had by then passed to the Plaintiff who has been the owner since 11th August, 1969.

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AND THE PLAINTIFF CLAIMS that the sale by the Sheriff be set aside."

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p.5

3. The 1st Defendant, in a Defence dated November, 1969, denied that the property involved was already sold as alleged in paragraph 6 of the Statement of Claim and also denied paragraph 7.

4. The 3rd Defendant, in a Defence dated 21st November, 1969, averred that the judgment referred to in paragraph 4 of the Statement of Claim was void. Like the 1st Defendant, he denied that the property was already sold and denied paragraph 7 of the Statement of Claim. He also averred as follows:-

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"The Third Defendant will at the trial of this Suit refer to Suit No. 84/1969 between the third respondent and the second respondent and the affidavits filed therein, and also to the affidavit of the third Defendant filed in reply to a motion in this Suit and dated the 25th day of September, 1969, and show that the order for specific performance obtained by the Plaintiff was made two months after a writ of Fieri Facias issued against the same property."

p.6
11.27-36

5. In evidence, the Plaintiff explained the transactions between him and the 2nd Defendant, Wadda. He testified that in January, 1969, the 2nd Defendant borrowed £240 from him promising to repay it within two days. He was unable to repay and instead gave him on the 18th January, 1969, a document (Ex.A) which stated as follows:-

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"I, Ousman Mamadou Wadda took two hundred and forty pounds cash (£240) from Alhaji Malang Kanteh. And if I failed to pay two hundred and forty pounds (£240) cash on 24th of January 1969, he is allowed to take my compound situated at Serakunda Kombo at value of four hundred and fifty pounds (£450). He may refund the change to me from the value of the compound.

p.54

Bearers signature
Bathurst 18th January, 1969.
(Sgd) Ousman M. Wadda "

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Later in February, the 2nd Defendant was in financial trouble with one Sugufara and it was agreed that the Plaintiff should pay the 2nd Defendant's debt to Sugufara amounting to £340.4.6 and in return for that sum and the sum already owing under Ex.A (i.e.£240), the 2nd Defendant would convey to the Plaintiff his property situated at Serakunda referred to in Ex.A.

A document to this effect was prepared between the Plaintiff, the 2nd Defendant and Sugufara (Ex.B) and witnessed by Alhaji A.M. Drammeh, a Barrister and Solicitor. The document, dated 25th February, 1969 reads as follows:-

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"Received the sum of £340.4.6 from Alhaj Malang Kanteh 4 New Street, Bathurst being full and final settlement of account between O.M. Wadda and I relating to promissory note dated 20th January, 1969, the subject matter of the proceedings in the Supreme Court due to be purchased on 27/2/69.

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In return for this Mr. Wadda hereby agree to sell his property at Serekunda to me for this sum plus what he owe me, i.e. £340.4.6 plus £240.

(Sgd) Sufugara his

X
Mark

Witness: Agree with the above
Alhaji A.M. Drameh (Sgd) O.M.Wadda 25/2/69
Solicitor,
2 Cameron Street,
Bathurst

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"

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6. The said Barrister and Solicitor, Alhaji Drammeh, gave evidence confirming the transaction. He testified further that on the 25th February, 1969, he and the Plaintiff went to Sugufara's shop at 3 Anglesea Street, Bathurst and continued:

p.17 l.24
p.18 l.20

"At this shop the plaintiff paid Sugufara in the presence and with the consent of 2nd Defendant the sum of £340.4.6 being the full and final settlement between 2nd defendant and Sugufara. 2nd Defendant had in addition to this debt deposited his

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10 "lease for his property at Serrakunda to Sugufara and Sugufara was holding the lease at the time we visited 2 Russell Street and at the time he was receiving the money from plaintiff. Sugufara went with the lease to Russell Street 2nd Defendant agreed at that moment that in exchange for the money plaintiff paid to Sugufara, with his consent was to hand over the lease to plaintiff and that the sale would be effective subject to the usual consent of the Ministry of Lands, that is to say, 2nd Defendant sold there and then the lease of property at Serrakunda to plaintiff subject to consent from the Ministry. I made it clear to all the parties that it was important for us to obtain the consent and 2nd defendant agreed that I should take necessary action to write to the Ministry. I then prepared B, 2nd defendant signed it and I witnessed it. Sugufara also signed in Arabic and affixed his mark. The money passed and the lease was handed over to plaintiff and we dispassed. I wrote exhibit J addressed to the Lands Officer. Exhibit K is the reply to my letter. I accordingly prepared Exhibit E and asked 2nd defendant to sign it. He refused to do so and I had to file a motion in the Supreme Court which was granted and 2nd defendant then signed exhibit E and executed."

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7. The lease referred to was put in evidence as Ex. C. The letter Ex.J. is a letter from Mr. Drammeh to the Lands Officer dated 28th February, 1969, requesting permission for the assignment of the lease from the 2nd Defendant to the Plaintiff. The reply, Ex.K., is dated 9th April, 1969, and in it, the necessary permission is granted and the letter also requests that the Deed of Assignment be submitted to the Registry Office. The Deed of Assignment, Ex.E., is dated 11th August, 1969.

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8. Both the Plaintiff and Mr. Drammeh gave evidence that before the 2nd Defendant agreed to sign the Deed of Assignment, it was necessary to bring proceedings to compel him to do so. This was in fact Civil Suit No. 83/69, in which Bridges, C.J., on the 31st July, 1969, gave Judgment for the Plaintiff against the 2nd Defendant for the specific

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- p.61 performance of the agreement for the sale of the property at Serrakunda. (Ex.F.) In the reasons for the judgment given on the 11th August, 1969,
- p.62 (Ex.G.), the Chief Justice recounted the history of the transaction between the Plaintiff, the 2nd Defendant and Sugufara and considered that Ex.B. was a memorandum which contained the necessary elements to enable the Court to grant specific performance.
- p.70 9. In the meantime, the 3rd Defendant had a claim against the 2nd Defendant. On 26th February, 1969, he commenced an action, Civil Suit No. 35/69 (Ex.M1) against the 2nd Defendant claiming the sum of £393.5.0 being the balance of money outstanding for goods supplied. On the 10th March, 1969, the 3rd Defendant's solicitor filed a motion (Ex.M2) supported by an Affidavit dated 12th March, 1969, (Ex.M3), asking that the leasehold property of the 2nd Defendant at Serrekunda "should be kept in custodia legis pending the determination of the suit" between him and the 2nd Defendant. The ground upon which this application was made was that the 2nd Defendant "proposes to mortgage or otherwise dispose of the said leasehold property and that such mortgage or disposal will defeat execution of any judgment" which the 3rd Defendant may have against the 2nd Defendant. On the same day, 12th March, 1969, the 3rd Defendant's solicitors wrote to the Lands Officer (Ex.L3) informing him of the said motion. The Lands Officer replied on the 1st April, 1969, saying that in the absence of a Court Order "We cannot interfere with dealings about the land." On the 25th March, 1969, (Ex.M6), Bridges, C.J. granted an interim order of attachment against the said property at Serrekunda.
- p.68 10. Neither the Plaintiff nor his Solicitor, Mr. Drammeh, knew of the proceedings between the 3rd Defendant and 2nd Defendant referred to above, and the learned trial judge so found in his judgment.
- p.69 11. When the Plaintiff did discover that an order of interim attachment was made, he issued an interpleader summons on the 18th April, 1969, (Ex.H.) claiming that the attachment be removed since the property was his. An Affidavit in reply
- pp.72-73
- p.41 1.48-
- p.42 1.3
- p.63

was filed by the 3rd Defendant (Ex.M5) and by his solicitor (Ex.L1), both dated 8th May, 1969. The said interpleader summons was not pursued.

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pp.66-67

10 12. On the 9th May, 1969, judgment was given in Suit No. 35 of 1969 for the 3rd Defendant against the 2nd Defendant for the sum of £372.5.6 and £13.5.10 costs. On the 22nd May, 1969, a writ of Fi.Fa. (Ex.M7) was issued to the Sheriff for the recovery of the said judgment debt. On 20th September, 1969, the said writ was executed against the 2nd Defendant's leasehold property at Serrekunda by sale by public auction. The property was sold to Alkali Jarju, the 4th Respondent herein, for £575. The Sheriff paid the said sum into Court.

pp.76-77

20 13. The Lands Officer (P.W.2) gave evidence that permission was granted by him for the assignment of the leasehold property at Serrekunda by the 2nd Defendant to the Plaintiff (See Ex.K and paragraph 7 above), but that he had never granted permission to any other person to assign that property. He also said that no Court Order was sent to him regarding the property. Alkali Jarju, the 4th Defendant, also testified that he had no permit from the Ministry to purchase the property from the Sheriff. The Deputy Sheriff (P.W.5) gave evidence that the property was sold under the writ of Fi Fa. He did not say that he had the Minister's approval to sell the property to the 4th Defendant.

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pp.21-22

30 14. Brown-Marke, J. delivered his Judgment in Supreme Court on the 16th December, 1971. He reviewed the evidence in meticulous detail and then held, it is submitted correctly, as follows:

pp.28-42

40 "According to the evidence the 2nd defendant approached the plaintiff for a loan of £240 and exhibit A was prepared. Exhibit B the next document was dated 25th February, 1969, under which the leasehold was to be sold for £580.4.6. The 2nd defendant had said that he agreed to part with the leasehold to plaintiff. I believe that 2nd defendant instructed Mr. Drameh to apply to the Ministry of Lands for necessary permission to assign the leasehold and I reject the denial of 2nd defendant and that he did so. Exhibit J is the request for permission and

p.40 l.34-
p.42 l.34

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"exhibit K the approval. I do not believe that Mr. Drameh concealed anything from 2nd defendant about the whole transaction. In exhibit L3 Mr. S.F. N'Jie in his letter to the Lands Officer that he intended to move the Court for an interim attachment and although in the reply the Lands Officer said that nothing could be done without a Court order no further action appeared to have been taken in that regard to inform the Lands Officer when the order was obtained. The Lands Officer in evidence said that no order of the Court was sent to him that nothing should be done to the property and that nobody raised an objection to the permission he gave 2nd Defendant further that he had no notice or order of any incumbrance on the property before or immediately after the assignment under Order II rules 1, 3 and 5, the plaintiff was not a party to the action between 2nd defendant and 3rd defendant which resulted in the interim attachment of the property and the plaintiff had said that he had no knowledge of the action at the time. An order for attachment shall not affect the rights of other parties.

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In the case Adjei vs. Chief Dabanka & Kwami Akowua reported in W.A.C.A. Vol.1 at page 63 onwards in consideration of a loan of £350 the plaintiff deposited with a predecessor of defendant by name Derkyi his document of title to certain leasehold property and at the same time by an informal document purported to grant to the said defendant his interest in the said premises. The principal conditions in the document were that the Plaintiff was to remain in possession but that the lease was to be the absolute property of Derkyi if the principal and interest were not paid within one year. The principal and interest were not paid within the time and Derkyi sold the property to the defendant Dabanka.

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On appeal it was held that the original transaction between plaintiff and Derkyi was not a native mortgage because the plaintiff was to remain in possession. The Court held

"it to be an equitable mortgage which the plaintiff was still entitled to redeem and order the sale to be set aside and the premises to be assigned to the plaintiff.

10 In the present case the leasehold property was properly assigned to the plaintiff and the deed of assignment executed by 2nd defendant. I am satisfied that he did not notify the plaintiff of the action between 3rd defendant and himself which culminated in the writ of fi.fa being executed neither did he obtain the permission from the Lands Officer to sell the property to 3rd defendant, nor has the Lands Officer any record of the sale to 3rd defendant. I do not agree with Mr. Opene that plaintiff slept on his rights until the fi.fa was issued. Plaintiff said he only knew of the transaction when he noticed the property being sold by the sheriff. It is the responsibility of an intending purchaser to ascertain that ? is no encumbrance on the land before purchasing it 2nd defendant in my view intended to make as much money on the leasehold at the expense of other parties. Even from his evidence he was well aware of all that transpired.

20 Mr. S.F. N'Jie argued that exhibit A disclosed no agreement but merely gave plaintiff option to purchase but exhibit E was executed by 2nd defendant which is a deed of assignment.

Mr. Mahoney argued that the vendor to 4th defendant who was the sheriff should have obtained the necessary consent. Be it so but that should not affect the rights of plaintiff if the vendor without plaintiffs knowledge offered the property for sale.

40 For the above reasons I hold that the plaintiff has proved his claim. Judgment is hereby given for the plaintiff. The purported sale to 4th defendant by the sheriff is set aside and I hold that the leasehold property was properly assigned to plaintiff by 2nd defendant."

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11.36-41

15. The learned trial judge awarded costs to the Plaintiff and ordered that the amount of £675 paid into Court (the proceeds of sale) be refunded to the 4th Defendant.

pp.43-44

16. The 3rd Defendant appealed to the Gambia Court of Appeal on the following grounds:-

- "(i) The trial Judge was wrong in law to hold that the leasehold property was properly assigned to the Plaintiff by the second defendant. 10
- (ii) The judgment cannot be supported having regard to the evidence.
- (iii) The trial judge was wrong in law when he failed to consider the effect of the Order for Interim attachment on a subsequent assignment of the same property."

pp.45-52

17. The Judgment of the Court of Appeal was delivered by Livesey Luke, J.A. on the 11th July, 1972. Having recited the history of the matter, he held: 20

pp.50-52

- (a) That on the face of it, Ex.B was a receipt given by one Sugufara to the plaintiff Kanteh; it was not given by the 2nd Defendant - Wadda - to the Plaintiff, i.e. the word "me" in the receipt referred to Sugufara and not to Kanteh.
- (b) That therefore, Ex.B. did not contain all the necessary ingredients as a sufficient memorandum to found an action for specific performance. 30
- (c) That the Chief Justice was misled into making the order for specific performance since the Order of Interim attachment was in force. It was therefore irregularly applied for and is invalid.
- (d) That therefore the order for specific performance should be set aside. 40

- (e) That the assignment "which was executed in pursuance of the Chief Justice's Order suffers the same fate, and it is hereby set aside."
- (f) That the sale by the Sheriff was a valid sale.

18. The Appellant respectfully submits that the Judgment of the Court of Appeal is wrong for several reasons, viz.

- 10 (a) There was no obligation upon the Plaintiff to proceed with the interpleader summons. In any event, the Plaintiff was not a party to the action between the 2nd and 3rd Defendants which resulted in the interim attachment order. The trial judge was right in holding that an order of attachment shall not affect the rights of other parties.
 - 20 (b) In deciding that the word "me" in Ex.B referred to Sugufara and not the Plaintiff, the Court of Appeal disregarded
 - (i) the history of the transactions between the parties;
 - (ii) the unchallenged evidence of the Plaintiff and Mr. Drammeh;
 - 30 (iii) the findings of the Chief Justice when he made the order for specific performance; and
 - (iv) the findings of fact made by the trial judge.
- It is respectfully submitted that there can be no doubt at all that the intention of the parties was that the 2nd Defendant should transfer his leasehold property at Serrekunda to the Plaintiff in return for the £240 already lent to him and the further £340.4.6 which 2nd Defendant owed Sugufara.
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It is submitted that the substitution of the word "Kanteh" for "me" in Ex.B is essential to give logic and coherence to the transaction between Kanteh, Wadda and Sugufara.

- (c) The Court of Appeal was clearly wrong in saying that the Chief Justice was misled in making the order of specific performance because of the order for interim attachment which he had made previously. The 2nd Defendant, Wadda, gave evidence to the effect that he told the Chief Justice during the proceedings for specific performance that the property was attached. He said:

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p.23 11.35-
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"On 9th April, 1969, the plaintiff went to me with an assignment to sign and I refused to sign it on account of the interim attachment I had received I was sued and brought to Court, I explained to the Chief Justice on 14th July, 1969, that the property was attached and for that reason I was unable to sign the assignment. The case however continued until 31st July, 1969, and I was asked to sign. The plaintiff had judgment."

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- (d) The Court of Appeal erred in impugning the validity of the order of specific performance made by Bridges, C.J. on 31st July, 1969. The said Order was not appealed against by Ousman Wadda and it is submitted constituted a final and binding Order as between the Plaintiff and Wadda upon the said transaction. The Court of Appeal had no power in other proceedings to set it aside.

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- (e) The Court of Appeal further erred in holding that the deed of assignment dated 11th August, 1969, (Ex.E) "suffers the same fate as the order for specific performance." It is

submitted that the assignment was a valid and lawful assignment which had been executed with the Minister's consent as required by law and is a valid assignment even without the order for specific performance.

(f) In deciding that the sale by the Sheriff to the 4th Defendant was valid, the Court of Appeal failed to take into account that the sale of the property by public auction was contrary to S.26 of Chapter 102 (Vol.5) of the Laws of Gambia which provides as follows:-

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"No lease under this Act or under any Ordinance repealed by this Act which contains a covenant, whether express or implied, by the lessee not to assign without the consent of the Minister shall be sold by or under the Orders of any Court in execution of a decree or otherwise howsoever, except to a purchaser approved by the Minister."

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The lease in question did contain an express covenant by the lessee not to assign (Ex.C, clause 7), and the evidence in the case showed that consent was given for the 2nd Defendant to assign to the Plaintiff, but that no consent was given for the Sheriff to sell to the 4th Defendant (see paragraph 13 above).

p.57 11.27-
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19. On the 16th May, 1973, an Order was made granting the Appellant Special Leave to Appeal to the Judicial Committee of the Privy Council.

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20. The Appellant respectfully submits that this appeal should be allowed with costs, that the judgment of the Gambia Court of Appeal dated 11th July, 1972, should be set aside and the Judgment of the Supreme Court of the Gambia dated 16th December, 1971, should be restored for the following amongst other

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1. BECAUSE the transactions between the Appellant, the 2nd Respondent and Sugufara as evidenced by Exhibits A and B clearly showed that the 2nd Respondent intended to convey his leasehold property at Serrekunda to the Appellant.
2. BECAUSE Ex.B was a memorandum which contained all the necessary ingredients to found an action for specific performance. 10
3. BECAUSE Bridges C.J. was right in so holding on 31st July, 1969.
4. BECAUSE the Court of Appeal was wrong in saying that the word "me" in Ex.B referred to Sugufara and not to the Appellant.
5. BECAUSE the Court of Appeal wrongly held that Bridges, C.J. was misled in making the Order for specific performance when there was an Order for interim attachment.
6. BECAUSE an Order of attachment does not affect the rights of other parties, and in any case Bridges, C.J., knew of its existence. 20
7. BECAUSE the Court of Appeal was wrong in impugning the validity of the Order for specific performance.
8. BECAUSE in any event the Deed of Assignment to the Appellant is valid even without the order for specific performance.
9. BECAUSE the Court of Appeal failed to take into account S.26 of Chapter 102 of the Laws of Gambia and wrongly held that the sale by the Sheriff was valid. 30
10. BECAUSE the trial judge was right for the reasons which he gives in paragraph 14 above and the Court of Appeal is wrong for the reasons given in paragraph 18 above.

EUGENE COTRAN

No. 12 of 1973

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE
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ALHAJI MALANG KANTEH
(Plaintiff) Appellant

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1. THE ATTORNEY GENERAL
 2. OUSMAN MOMADOU WADDA
 3. GABRIEL GEORGE
 4. ALKALI JARJU
(Defendants) Respondents
-
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