

*Privy Council Appeal No. 8 of 1930.*

**The Commissioner for Local Government Lands and Settlement** - *Appellant*

*v.*

**Abdulhusein Kaderbhai** - - - - - *Respondent*

**Abdulhusein Kaderbhai** - - - - - *Appellant*

*v.*

**The Commissioner for Local Government Lands and Settlement** - *Respondent*

*Consolidated Appeals.*

FROM

HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

---

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 27TH FEBRUARY, 1931.

---

*Present at the Hearing :*

LORD BLANESBURGH.

LORD ATKIN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD ATKIN.]

---

This is an appeal from an order of the Court of Appeal for Eastern Africa, varying an order of the Supreme Court of Kenya, which dismissed a motion by the applicant Abdulhusein Kaderbhai for a mandamus addressed to the appellant, the Commissioner for Local Government Lands and Settlement in Kenya. The Commissioner had given notice of an auction sale of town plots at Mombasa at which Europeans only were to be allowed to bid and purchase. The notice contained the further special condition that during the terms of the grant the grantee should not permit the dwelling-house or outbuildings which had to be erected upon it to be used as a place of residence for any Asiatic or African not a domestic servant employed by him. The applicant, who is an Indian subject of His Majesty resident in

Mombasa on the 10th August, 1928, by notice of motion dated the 9th August, moved the Court for a mandamus commanding the Commissioner to allow the applicant to bid for and purchase at the auction sale of the plots on Mombasa Island, notified to be held on the 11th August, and also commanding the respondent to cancel or annul the condition No. 5 of the special conditions, being the condition above referred to, restricting the use of the dwelling-house. The learned Judge before whom the application came *ex parte* made an order postponing the sale and ordered that "a notice to show cause do issue to the respondent upon the above-mentioned motion for a mandamus" returnable in a month. Eventually, in December, counsel for the applicant and the Commissioner were heard on that order, and the learned Judge dismissed the motion. On appeal to the Court of Appeal for East Africa the Court allowed the appeal as to the right to bid and purchase, but dismissed it as to the restrictive condition. The decree reads: "It is ordered that the appeal be allowed . . . to the extent that the rule in regard to the first prayer is made absolute, viz. the appellant is allowed to bid for and purchase certain Crown land proposed to be sold by auction in Mombasa Island." No objection appears to have been taken at any time to the form of the proceedings, counsel for the Commissioner in the Supreme Court stating that he was instructed not to take any technical points, but to argue the case on its merits. Their Lordships will proceed, therefore, to dispose of the legal question involved, and will reserve any comments on the procedure.

The disposal of Crown lands in Kenya is regulated by the Crown Lands Ordinance, No. 12 of 1915. The case made by the applicant is that under the provisions of the ordinance the Commissioner is bound to permit all members of the public or, alternatively, all subjects of the Crown to bid and purchase at an auction of town plots, and is equally bound not to insert in the lease of any such plots restrictive conditions adversely affecting the Asiatic or African population of Kenya, at any rate, to such an extent as to make a purchase by them of no practical value. The case of the Commissioner is that the terms of the ordinance do not prevent him from imposing the restrictions of which complaint is made. It is desirable to point out that the Courts are concerned only with the bare question of law, viz., the powers of the Commissioner under the ordinance. Questions of policy, or, in other words, how the legal powers shall be exercised, are not matters for the legal tribunal, but have to be determined by the appropriate constitutional authority. Approaching thus the construction of the ordinance it is found that it is divided into twelve parts. Those with which this controversy is concerned are Part II, Administration; Part III, Disposal of Land within Townships; Part IV, Disposal of Agricultural Land. By section 6, the first section falling under Part II, the Governor is given power to grant lease or otherwise alienate on His Majesty's behalf, any Crown lands for any purpose and

on any terms and conditions as he may think fit. He is, further, given power to remit covenants and conditions, extend the time for performing conditions and accept the surrender of any lease or licence.

By section 8 the Governor is to appoint a Commissioner of Lands "who shall have charge of the administration of this ordinance." Section 10 confers on the Commissioner power to do any acts which may be done by the Governor; but as it contains a proviso excluding from the operation of the section the powers conferred, *inter alia*, by section 6, we must look elsewhere for powers given to the Commissioner to dispose of any Crown lands. These are to be found in Parts III and IV. Part III is headed Disposal of Land within Township (1) Offering of Town Plots :—

" 15. The Commissioner of Lands may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the manner hereinafter prescribed.

" 16. Leases of town plots may be granted for any term not exceeding ninety-nine years.

" 17. Before any town plot is disposed of under the next succeeding section the Commissioner of Lands shall determine :—

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

" 18. Leases of town plots shall, unless the Governor shall otherwise order, in any particular case or cases, be sold by auction.

" 19. The place and time of sale shall be notified in the *Gazette* not less than four weeks or more than three months prior to the day of sale, and the notice shall state :—

- (a) The number of plots and the situation and area of each plot ;
- (b) The upset price at which the lease of each plot will be sold ;
- (c) The amount of survey fees and the cost of the deeds for each plot ;
- (d) The term of the lease and the rent payable in respect of each plot ;  
and
- (e) The building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot :

" Provided, however, that the lease of any plot may be withdrawn from sale by the Commissioner of Lands at any time prior to the same being offered for sale.

" 20. The auctioneer shall, before the commencement of the sale, read the terms and conditions of the sale, and all persons bidding at the sale shall be bound by the terms and conditions so read."

With these provisions it is necessary to compare the corresponding sections of Part IV, Disposal of Agricultural Land (1) Offering of Land for Agricultural Purposes :—

" 25. The Commissioner of Lands may cause land available for leasing for agricultural purposes to be surveyed and divided into farms which shall not, except with the consent of the Governor, exceed five thousand acres, or except with the consent of the Secretary of State, exceed seven thousand five hundred acres.

" 26. Leases of farms shall, unless the Governor shall otherwise order in any particular case or cases, be sold by auction.

" 27. When land available for leasing for agricultural purposes shall have been surveyed and divided into farms and it is proposed that leases thereof shall be sold by auction, the Commissioner of Lands shall give notice in the *Gazette* of the place and time which shall not be within three months of the date of the publication of such notice at which leases in respect of such farms will be offered for sale by auction.

" Such notice shall state :—

- (a) The situation of the farms and the approximate area of each farm and the time when and place where the plan of each farm may be seen ;
- (b) The upset price at which the lease of each farm will be sold ;
- (c) Whether persons other than Europeans will be permitted to bid for the lease of the farms ;
- (d) Any special covenant or condition to be inserted in any lease to be granted ;
- (e) The annual rent to be paid for each farm for the first period of the lease, as hereinafter defined : and
- (f) The survey fees and the cost of the deeds to be paid in respect of each farm :

" Provided, however, that the Commissioner of Lands may withdraw any lease from sale at any time before the same is offered for sale.

" (4) COVENANT AS TO OCCUPATION.

" 39. There shall by virtue of this ordinance be implied in every lease granted under this part to a European a covenant that he shall not without the consent of the Governor in Council appoint or allow a non-European to be manager or otherwise to occupy or be in control of the land leased."

The contention of the applicant which has found favour with the Court of Appeal, is that the provision in section 18 that leases of town plots shall be sold by auction, involves that in the absence of express and unequivocal words, the sale cannot be restricted to a particular section of the community. Sheridan A.C.J., thought that the ordinance itself indicated that no restriction was to be placed on the bidding. He referred to the absence in section 19 of any requirement that notice should be given of such a restriction as compared with section 27 (c) relating to the notice in sales of agricultural land, and attached importance to the words of section 20 : " all persons bidding at the sale." Guthrie-Smith, A.C.J., thought that the Commissioner would be violating his duty as a trustee for the Government by restricting the class of purchasers. He thought that such a limitation tended to reduce the price, since it cut out a class of potential bidders. Muir Mackenzie, J., considered that on a comparison of the sections regulating the sale of town plots with the sections regulating the sales of agricultural land, as there was a mandatory provision in section 27 (c), that the Commissioner should state whether persons other than Europeans will be allowed to bid and no such provision in section 17, it must be taken that express power to restrict was given as to agricultural land and was not given as to town plots.

After careful consideration of the judgments in the Court of Appeal their Lordships find themselves unable to agree with the

decision. *Prima facie* the Crown and the servants of the Crown exercising the right of disposing of Crown property, have at least the rights of private owners of making the disposition in any way that appears to them to be best in the interests of the Crown. The servants of the Crown, if given disposing power by statute, must comply with the terms of the statute, but within those terms their duty is to act honestly in what they conceive to be the ultimate interests of the Crown or of the public. In such disposition unless it is expressly given by statute there does not exist, and never has existed, any legal right of any particular member of the public to take part. Sales or leases, if permitted to be by private treaty, are regulated by the duty which the servant of the Crown owes to his superior, but owes to no individual member of the public. If the statutory duty of the Crown servant is to sell by auction, that duty must, no doubt, be observed. Their Lordships would agree that such a duty imposed by statute would ordinarily involve a duty to sell by public auction; but if there is no further express provision there would seem to be no reason for further limiting the discretion of the officer as to the terms and conditions of the public auction which he shall decide to hold. If there can be restriction of user there seems no objection to limiting the bidders to those capable of the restricted user. If plots are reserved for dwellings for the industrial classes it might well be expedient to restrict bidding to members of that class. In the very case in question bidding is to be limited, apparently without objection, to persons who have not already purchased a plot, and if to them why not, if thought desirable, to persons who had not already purchased a similar plot at a previous sale? Township plots include land for commercial purposes, and there would appear to be no reason why in appropriate cases the user should not be restricted to the building of wharves, warehouses or factories, or why the bidding should not reasonably be restricted to approved intending wharfingers, warehousemen or factory owners. If the words, sell by auction, therefore, stood alone, there seems to their Lordships no reason why there should not be imposed a restriction as to the bidders. If any restriction be allowed the question whether the restriction should be based on racial distinctions is obviously not one of law, but of policy. Their Lordships cannot entertain the view that to restrict bidding is necessarily to sell at a disadvantage. In respect of residential plots in particular the very opposite result may be attained.

But in the present case the words of the ordinance construed as a whole appear to indicate that the words "sell by auction" in section 18 are not confined to selling without restriction, but do involve the power to sell by restricted auction. Their Lordships' examination of the clause relating to the sale of agricultural land, leads them to the opposite inference to that formed on the same clauses by the Court of Appeal. The only disposing power given under either part is by sections 18 and 26. The leases are to be sold by

auction. The empowering words are identical. *Prima facie*, they should convey the same power. But the nature of the power in respect of agricultural lands can be discovered from the provisions of section 27 as to notice, and from s. 27 (c) it is obvious that the Legislature contemplated that in the sale of which notice must be given, there was to be a power of restriction. If, therefore, power to sell by auction in section 26 gives a power of restricted auction what reason is there for assuming that the same words in section 18 give a different power? With great respect to those who have expressed a contrary opinion, the fallacy is in assuming that a clause as to notice has anything to do with granting or limiting a power of disposition which has to be found independently. The value of the notice clause is to call attention to the powers which are assumed to be given, and which can only be given, in the identical terms of sections 18 and 26.

The absence of the statutory necessity of notice of restriction on the sale of town plots seems to their Lordships to be without special significance. It is easy to conceive reasons why the Legislature made special provision for notice of an extension of the sale to non-Europeans in the case of agricultural land while omitting statutory provisions on the subject in the township areas. In the latter case notice as to the persons whose biddings would be accepted, might well be left, as in the former case it probably could safely have been left, to the discretion of a competent administrator of an auction sale. It is difficult to see how notice of a restriction could, in any case, be omitted.

If, as their Lordships have indicated, the Commissioner had the power to impose the general restriction as to bidding, it was not contended by counsel for the applicant that objection could be made to the restrictive condition as to user. Their Lordships entertain no doubt that the objection on this head fails.

It is not proper to part from the case without calling attention to the procedure in this case which it is not desirable should form a precedent. In respect of this sale fixed for a Saturday, the 11th August, by a notice of the 3rd July, the applicant, by a notice of motion dated on Thursday, moved the Court on Friday for a mandamus to the Commissioner. The necessary evidence of a demand and refusal was extraordinarily weak. The Court appears to have postponed the sale by an order made *ex parte*, a proceeding which nothing but extreme urgency would justify. The writ of mandamus which is a high prerogative writ, is of the greatest value in maintaining the law, but it is discretionary, and the granting of a rule in the circumstances seems to have conceded the applicant more than he was entitled to. The precise order asked for and made should in such cases be carefully defined. Their Lordships would have found it difficult to support an order which apparently commanded the Commissioner to allow the applicant to bid at a sale which had only been advertised subject to certain conditions. It would be wrong to prevent the Commissioner from withdrawing the sale altogether if he thought

that it was inexpedient to sell at present without such conditions. Their Lordships have been able to decide the point of law which concerned the litigants without paying special attention to forms ; but they must not be taken to approve the present proceedings as a precedent in any future attempt to decide similar questions.

For the reasons they have given they will humbly advise His Majesty that the appeal of the Commissioner be allowed and the order of the Court of Appeal, dated the 6th July, 1929, be set aside, and the order of the Supreme Court of Kenya, dated the 10th December, 1928, be restored, and that the cross-appeal of the applicant be dismissed. The applicant must pay the costs here and in the Court of Appeal.

In the Privy Council.

---

THE COMMISSIONER FOR LOCAL GOVERNMENT  
LANDS AND SETTLEMENT

v.

ABDULHUSEIN KADERBHAI.

ABDULHUSEIN KADERBHAI

v.

THE COMMISSIONER FOR LOCAL GOVERNMENT  
LANDS AND SETTLEMENT.

*(Consolidated Appeals.)*

---

DELIVERED BY LORD ATKIN.

Printed by

Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1931.