

P.C. 1950
IN THE PRIVY COUNCIL

31/1950 *K...*
No.15 of 1959

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

B E T W E E N:-

REGINAID ERNEST VERE DENNING
(Defendant) Appellant

- and -

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

RECORD OF PROCEEDINGS

GOODMAN, DERRICK & CO.,
30, Bouverie Street,
London, S.W.1.

Solicitors for the Appellant.

FIELD ROSCOE & CO.,
52, Bedford Square,
London, W.C.1.

Solicitors for the Respondents.

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

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1. DAVID GEOFFREY EDWARDES
2. DAPHNE ELIZABETH NAOMI EDWARDES

(Plaintiffs) Respondents

50971

RECORD OF PROCEEDINGS

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UNIVERSITY OF LONDON
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LEGAL STUDIES

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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 EDUARDES
2. DAPHNE ELIZABETH NAOMI
EDUARDES (Plaintiffs) Respondents

10

RECORD OF PROCEEDINGS

No. 1.

PLAINT

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI
CIVIL CASE NO.528 of 1957

DAVID GEOFFREY EDUARDES and
DAPHNE ELIZABETH NAOMI EDUARDES Plaintiffs

versus

REGINALD ERNEST VERE DENNING Defendant

20

In the Supreme
Court of Kenya
at Nairobi

No. 1.

Plaint.

1st May, 1957.

1. The first named Plaintiff is a farmer and resides in the Naivasha District of the Colony of Kenya. The second named Plaintiff is his wife. Their address for the purpose of this suit is care of Messrs. Ennion & Macdougall, Advocates, Sadler House, P.O. Box 2827, Nairobi.

2. The Defendant is a farmer and resides at Tara Farm (L.R. No.416/2) in the Naivasha District aforesaid which is also his address for service.

30

3. By an agreement in writing dated the 17th April 1954 to which the Plaintiffs will refer at the trial for the full terms thereof, the Defendant agreed to sell to the Plaintiffs for the sum of Shs.200,000/- a portion of his said farm containing an area of 180 acres more or less and having a frontage of 645 yards to Lake Naivasha or thereabouts together with the riparian land appurtenant thereto estimated to comprise an area of 67½ acres or thereabouts.

In the Supreme
Court of Kenya
at Nairobi.

No. 1.

Plaint.

1st May, 1957
- continued.

4. The said appurtenant riparian land is that land lying between the portion of the said farm, the subject of the said agreement for sale, and the line of the water's edge of the said lake as described in an Undertaking by the Crown dated the 28th March 1932 and relative Indemnity by the Riparian Proprietors and others, dated the 19th December 1931 copies whereof are registered in the Crown Lands Registry at Nairobi in Volume B 1 Folio 399/32.

10

5. It was a term of the said agreement that the Defendant should with all convenient speed cause the said land to be surveyed and a Deed Plan issued in respect thereof by the Survey Department of the said Colony and that the sale was to be completed within 28 days of the delivery of the relevant Deed Plan to the Plaintiffs' advocates.

6. In or about the month of November 1955 the Defendant caused a survey of the said land to be made, but the same was not in accordance with the said agreement in that:-

20

- (i) the non-riparian land so surveyed had a frontage of 619 yards only to Lake Naivasha;
- (ii) the area of the said land was $147\frac{1}{2}$ acres only; and
- (iii) the said riparian land appurtenant thereto was based on a frontage of 619 yards and $147\frac{1}{2}$ acres only instead of 645 yards or thereabouts and 180 acres more or less respectively as agreed aforesaid.

30

7. The Plaintiffs are and have been at all times willing and ready to complete the purchase in the terms of the said agreement but by reason of the matters hereinbefore set out are unable to do so.

8. By reason of the premises, the Plaintiffs claim to have specific performance of the said agreement and that the Defendant be ordered:-

- (i) To cause a survey to be made of the said land, having a frontage of 645 yards to Lake Naivasha or thereabouts and an area of 180 acres more or less;
- (ii) To cause a Deed Plan of the said land to be issued;

40

(iii) To cause the boundaries of the said riparian land appurtenant thereto to be surveyed and demarcated in accordance with the frontage and area of the said land as aforesaid;

(iv) thereafter to execute a proper conveyance of the said land to the Plaintiffs accordingly

In the Supreme Court of Kenya at Nairobi.

No. 1.

Plaint.

1st May, 1957

- continued.

10 9. Alternatively, Clause 1 of the said written agreement does not contain or correctly embody the agreement made between the parties that the Defendant would sell to the Plaintiffs for the said price a portion of his said farm of the area and frontage, together with the said riparian land appurtenant thereto, respectively stated in paragraph 3 herein, as mentioned in the particulars hereunder, and the Plaintiffs and the Defendant signed the same under a mutual mistake of fact, in the belief that it embodied the agreement aforesaid.

PARTICULARS

20 Clause 1 of the said agreement describes the South East boundary of the said land as running in part along the edge of the lucerne crop, existing at the date of the said agreement which was situated 75 feet from the wall of the big windmill belonging to the Defendant (Vendor). The said crop and windmill are situated on the said riparian land appurtenant to the said land, and not on non-riparian land belonging to the Vendor, and it was never agreed between the
30 parties that either the said frontage or the said area should be limited or reduced by the description of the said boundary aforesaid, either as surveyed or at all.

10. The Plaintiffs therefore claim, alternatively, to have the said written agreement rectified so as to embody the agreement actually made as aforesaid or to have it treated as being so rectified and to have specific performance of the same as hereinbefore mentioned.

40 11. In the further alternative, the Plaintiffs were induced to enter into the said agreement to purchase the said land for the sum of Shs.200,000/- by reason of the Defendant's false representation that the South Eastern boundary of the said land, as described in the said agreement, provided a

In the Supreme
Court of Kenya
at Nairobi.

No. 1.
Plaint.
1st May, 1957
- continued.

frontage and area of the said land of 645 yards to Lake Naivasha or thereabouts and 180 acres more or less, respectively.

12. The Defendant made the said representation to the Plaintiffs' Advocate, Mr. Ennion, in or about the month of April, 1954, fraudulently either well knowing that the same was false or recklessly and not caring whether the same was false or true and with intent to induce the Plaintiffs to pay Shs.200,000/- for a piece of land of a frontage and area, respectively, less than they had intended or agreed to buy, whereby the Plaintiffs have suffered damage as mentioned in the particulars hereunder:-

10

PARTICULARS

Value of land as represented	Shs.200,000/-
Value of land as surveyed	<u>Shs.113,888/70</u>
Damage, being difference in value	<u>Shs. 36,111/30</u>

13. In pursuance of the said agreement the Plaintiffs paid to the Defendant Shs.180,000/- on account of the said purchase price and on the 1st February 1955 entered into possession of the said land and the riparian land appurtenant thereto, before the same had been surveyed as aforesaid, and constructed a house and buildings thereon including sheds for the drying of lucerne.

20

14. Since the said land was surveyed as aforesaid the Defendant has continued to claim 32½ acres of the said land with a frontage of 26 yards and the corresponding riparian land appurtenant thereto and on numerous occasions since the month of April 1956 has trespassed upon the Plaintiffs land and has deprived the Plaintiffs of the use of a cattle dip situate thereon and has erected thereon a fence which passes through the Plaintiffs' said drying sheds whereby the Plaintiffs have suffered damage.

30

15. Further the Defendant has cut lucerne growing on the Plaintiffs' said land and has converted the same to his own use, whereby the Plaintiffs have been deprived of the same and have suffered damage as mentioned in the particulars hereunder:

40

PARTICULARS OF SPECIAL DAMAGEIn the Supreme
Court of Kenya
at Nairobi

Loss of grazing at Shs.1/50 per acre per month on 32½ acres (continuing)	Shs. 780/-
Loss of Lucerne at Shs.100/- per acre per month for 12 months (continuing)	1200/-
Loss of use of cattle dip at Shs.10/- per week	<u>780/-</u>
	<u>Shs. 2760/-</u>

No. 1.

Plaint.

1st May, 1957
-- continued.

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16. The Defendant continues to claim the said land hereinbefore mentioned and intends unless restrained from so doing, to continue and repeat the wrongful acts of trespass and conversion above complained of.

Wherefore the Plaintiffs claim :-

1. Specific performance as mentioned in paragraph 8 herein.
2. Alternatively, rectification of the said agreement and specific performance thereof as mentioned in paragraph 10 herein.
3. Alternatively, Shs.36,111/30 damages and interest thereon at Court Rates under paragraph 12 herein.
4. General damages under paragraph 14 herein, and interest thereon at Court Rates.
5. Shs.2760/- damages and interest thereon at Court Rates under paragraph 15 herein.
6. An injunction to restrain the Defendant or his servants or agents from entering upon the Plaintiffs said land and cutting lucerne or other growing crops or timber thereon and removing the same or any of them.
7. Costs of this suit.
8. Such further and other relief as may be just.

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30

DATED at Nairobi this 1st day of May, 1957.

Sgd. S.R. WOLLEN.
ENNION & MACDOUGALL,
Advocates for the Plaintiffs.

Filed by:
Ennion & Macdougall,
Advocates,
Sadler House,
Nairobi.

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In the Supreme
Court of Kenya
at Nairobi.

DEFENCE AND COUNTERCLAIM

No. 2.
Defence and
Counterclaim.
27th June, 1957.

1. Each and every averment of the Plaintiff is denied save as is herein expressly admitted.
2. The Defendant admits paragraphs 1 and 2 of the Plaintiff save that his address for service for the purpose of this case is care of Messrs. Cumming and Miller, Advocates, Rhokatan House, P.O. Box 607, Nairobi.
3. The Defendant admits paragraphs 3, 4 and 5 of the Plaintiff. 10
4. As regards paragraph 6 of the Plaintiff, the Defendant admits:-
 - (a) That in pursuance of the Agreement dated the 17th April, 1954, referred to in paragraph 3 of the Plaintiff, he caused a survey to be made of that part of his land at Naivasha described in Clause 1 of the said Agreement as :-

"ALL THAT piece or parcel of land having a frontage of Six hundred and forty five yards to Lake Naivasha or thereabouts (the South East boundary running in part along the edge of the present lucerne crop which is Seventy five feet from the wall of the big windmill belonging to the Vendor) and containing an area of One hundred and eighty acres more or less TOGETHER with the riparian land appurtenant thereto estimated to comprise an area of Sixty seven and one half acres or thereabouts" 20 30

And
 - (b) That the said survey disclosed that the area of the piece or parcel of land so described was 147½ acres only and not 180 acres more or less as stated.
5. Otherwise the Defendant denies paragraph 6 of the Plaintiff and maintains that apart from what is herein admitted the land surveyed is accurately described in Clause 1 of the Agreement as above quoted. In particular the Defendant maintains that the said land (referred to in the Plaintiff as 40

In the Supreme
Court of Kenya
at Nairobi.

No. 2.

Defence and
Counterclaim.

27th June, 1957
- continued.

10 the "non riparian land") has a frontage of 645 yards or thereabouts to Lake Naivasha as stated in the said Clause 1 and that the riparian land appurtenant thereto has an area of $67\frac{1}{2}$ acres or thereabouts as estimated therein. Further the Defendant maintains that it was never within the contemplation of the parties to the Agreement of the 17th April, 1954, that any riparian land other than or in excess of that described in the said Agreement as having an area of $67\frac{1}{2}$ acres and based on a frontage of 645 yards of Lake Naivasha should be acquired by the Plaintiffs from the Defendant.

20 6. Further as regards paragraph 6 of the Plaintiff the Defendant maintains that prior to the 17th April, 1954, the first named Plaintiff was well aware of the boundaries and extent of the land which the Plaintiffs had agreed to purchase, which boundaries are correctly named in the aforesaid Agreement of the 17th April, 1954, and the Defendant avers that the said boundaries so named constituted the only essential description of the said land for the purpose of giving effect to same. The Defendant further maintains that if there has been a misdescription of the non-riparian land in the said Agreement by estimating its area at "180 acres more or less" such misdescription is due to no fault on the part of the Defendant who on being asked for an estimate merely stated that he believed
30 the land in question "was anything from 150 - 200 acres".

7. The Defendant denies paragraph 7 of the Plaintiff and maintains that the Plaintiffs have consistently attempted to induce him, the Defendant to alter the boundaries of the non-riparian land which formed the essential basis of the Agreement of the 17th April, 1954, with a view to obtaining from the Defendant more valuable riparian land than that to which they were entitled by agreement or otherwise.

40 8. Further as regards paragraph 7 of the Plaintiff the Defendant repeats paragraph 7 hereof and avers that he, the Defendant (though denying any legal obligation to do so) has always been prepared, in consideration of the aforesaid admitted misdescription to transfer to the Plaintiffs more or his other non-riparian land by way of compensation.

9. With reference to paragraph 8 of the Plaintiff

In the Supreme Court of Kenya at Nairobi.

No. 2.

Defence and Counterclaim.

27th June, 1957
- continued.

the Defendant repeats paragraphs 4, 5, 6 and 7 hereof and pleads that in the circumstances the Plaintiffs are not entitled to an order for specific performance of the Agreement of the 17th April, 1954, in the terms claimed by them therein or any other order which would give to the Plaintiffs any more than 67½ acres of valuable riparian land as stipulated for in the said Agreement or any order which would materially vary the boundaries of the non-riparian land as described therein,

10

ALTERNATIVELY

the Defendant pleads that any such orders would result in great hardship to him, the Defendant and should not in the circumstances be made.

10. The Defendant denies paragraph 9 of the Plaint and each and every particular therein contained.

11. The Defendant denies that the Plaintiffs are entitled to the relief claimed in paragraph 10 of the Plaint.

12. The Defendant denies paragraphs 11 and 12 of the Plaint and repeats that the non-riparian land as surveyed which he has always been willing and ready to transfer to the Plaintiffs has a frontage of 645 yards to Lake Naivasha.

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13. The Defendant admits the payment referred to in paragraph 13 of the Plaint. He claims that in addition to occupying the land agreed to be transferred, the Plaintiffs have also trespassed upon and occupies other land the property of the Defendant and have thereon unlawfully erected certain buildings which they still maintain.

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14. As regards paragraph 14 of the Plaint the Defendant repeats the foregoing paragraphs of this Defence and denies that he has trespassed on any land belonging to the Plaintiffs.

15. The Defendant denies paragraph 15 of the Plaint.

16. The Defendant denies paragraph 16 of the Plaint and repeats paragraph 13 of this Defence.

17. In the premises the Defendant counterclaims as follows :-

40

COUNTERCLAIM:

In the Supreme
Court of Kenya
at Nairobi.

No. 2.

Defence and
Counterclaim.

27th June, 1957
- continued.

- 10 (a) An Order for the rectification of the said Agreement of the 17th April, 1954, so as to make it conform with the real understanding as between the Defendant and the First named Plaintiff by eliminating the words "and containing an area of 180 acres more or less" and further An Order that the Plaintiffs should accept a transfer of the land so described in the Agreement so rec-
tified;

ALTERNATIVELY

- 20 (b) An Order that the Defendant be permitted to perform his part of the Agreement of the 17th April, 1954, by transferring to the Plaintiffs 180 acres more or less of his, the Defendant's non-riparian land (including in such land the 147½ acres of land disclosed by the Survey referred to in paragraph 4 hereof) situate in the Naivasha District with a frontage of 645 yards or thereabouts to Lake Naivasha (with such consequential adjustments as may be necessary to describe the boundaries thereof) together with the riparian land appurtenant thereto estimated at 67½ acres or there-
abouts.

WHEREFORE the Defendant prays:-

- 30 (a) That the several reliefs prayed by the Plaintiffs be refused and that their suit be dismissed with costs;

And

- (b) That an order be made in favour of the Defendant in terms of paragraph 17(a) or alternatively 17(b) hereof with costs;

And

- (c) Such further or other relief as to this Honourable Court may seem just.

DATED this 27th day of June, 1957.

J. O'BRIEN KELLY

Advocate for the Defendant.

40 Drawn by:-
Mr. J. O'Brien Kelly,
Advocate,
Nairobi.

In the Supreme
Court of Kenya
at Nairobi.

No. 2.

Defence and
Counterclaim.

27th June, 1957
- continued.

Filed by:-

Messrs. Cumming & Miller,
Advocates,
Rhokatan House,
York Street,
P.O. Box 607,
NAIROBI.

We consent to the De-
fence and Counterclaim
herein being filed out
of time.

FNNION & MACDOUGALL

Advocates for the
Plaintiffs.

No. 3.

Reply and
Defence to
Counterclaim.

13th July, 1957.

No. 3.

REPLY AND DEFENCE TO COUNTERCLAIM

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REPLY

1. The Plaintiffs join issue with the Defendant upon his Defence, save in so far as the same consists of admissions.
2. The Plaintiffs deny that the description of the said land, as contained in Clause 1 of the said agreement, is fully or accurately set out in paragraph 4(a) of the Defence, and in particular omits reference to the delineation and description in the sketch plan annexed to the said agreement. 20
3. The Plaintiffs admit that the parties did not contemplate that the Plaintiffs should acquire an area of land other than or in excess of that described in the said agreement and in the said sketch plan, but they deny that the said land as surveyed has a frontage of 645 yards or thereabouts to Lake Naivasha or that the said riparian land appurtenant thereto has an area of $67\frac{1}{2}$ acres or thereabouts, and they repeat paragraph 6 of the Plaint. 30
4. The Plaintiffs deny that they have attempted to induce the Defendant to alter the boundaries of the said non-riparian land so as to obtain from him more valuable riparian land than that to which they are entitled, as alleged in paragraph 7 of the Defence or at all. The Plaintiffs repeat paragraph 7 of the Plaint and say that they have requested the Defendant to execute a transfer to them of land having a frontage and acreage respectively, in accordance with the said agreement, but the Defendant has refused and still refuses to do so. 40

5. The Plaintiffs deny that they have trespassed upon or occupied or erected buildings on other land, the property of the Defendant, as alleged in paragraph 13 of the Defence, or at all.

In the Supreme Court of Kenya at Nairobi.

AS TO THE COUNTERCLAIM

No. 3.

Reply and Defence to Counterclaim.

13th July, 1957

- continued.

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6. The Plaintiffs deny that the elimination of the words set out in paragraph 17(a) would cause the said agreement to conform with the real understanding between the Defendant and the 1st named Plaintiff, as alleged. The Plaintiffs say that there was no mistake of fact, mutual or at all, concerning the said area of 180 acres more or less, and they deny that there are any grounds for rectification of the said agreement, save those set out in paragraph 9 of the Plaint and in the particulars thereunder, or that the Defendant is entitled to any of the reliefs claimed in paragraph 17(a) of the Counterclaim.

20

7. The Plaintiffs say further that the Defendant is estopped from denying that the area agreed upon in respect of the non-riparian land was 180 acres more or less.

30

8. The Plaintiffs will accept performance of the said agreement by the Defendant upon the terms mentioned in paragraph 17(b) of the Counterclaim, provided that the said acreage and frontage respectively accord with the area and frontage described and delineated in the said sketch plan annexed to and forming part of the said agreement, and does not include other of the Defendant's non-riparian land to the north or further side of the road of access shown on the said sketch plan as running between Plots A and D.

WHEREFORE the Plaintiffs pray that the Defendant's Counterclaim may be dismissed with costs and that they may be granted the relief claimed in the Plaint.

DATED this 13th day of July, 1957.

40

(Sgd.) ENNION & MACDOUGALL
Advocates for the Plaintiffs.

Filed by:-

To:-

Messrs. Ennion & MacDougall,
Advocates,
Sadler House, Nairobi.

Messrs. Cumming &
Miller,
Advocates, Nairobi.

In the Supreme
Court of Kenya
at Nairobi.

No. 4.

RULING

No. 4.

10.1.58. Appearances as before

Ruling.

10th January,
1958.

The Defendant filed a "Notice of Preliminary Objections" whereby he intimated that he intended to argue:-

(1) That the Plaintiffs be put to their election as to which of the claims (set forth in the Plaint) they would proceed on:

(2) That the several claims are not sufficient in point of law as pleaded, and should be struck out: 10

(3) That the claim for specific performances is unsustainable for lack of due compliance with statutes affecting land. Mr. Khanna for the Defendant did not seriously press the first of these arguments and I do not consider that it has any merits. I decline to order the Plaintiffs to exercise an option.

As to the second "preliminary objection" Mr. Khanna invited the Court to consider certain matters as issues of law which should now be framed and disposed of under the provisions of O. XIV r 2. To this course Mr. Wollen for the Plaintiffs, at the conclusion of Mr. Khanna's detailed submissions that the Plaintiffs' claims were not maintainable in law, objected that these propositions of law should have been pleaded. In support of this contention Mr. Wollen quoted O.XIV r 1(2) which provides that "material propositions are those propositions of law which a Defendant must allege to constitute a defence" and he relied on the terms of O. VI r 5 as making it mandatory for the Defendant to plead such propositions. 20 30

It is well settled that, as a general rule, pleadings should contain facts and not law. O. VI r 27 makes it abundantly clear that points of law need not be pleaded. O. VI r 5 provides that matters which show an action not to be maintainable must be pleaded. This, of course, refers to facts on which a legal claim or defence is to be based. In the instant case, however, Mr. Khanna argues that, on the facts alleged by the Plaintiffs, they are not in law entitled to any of the remedies for which they ask. 40

I am satisfied that it is proper for me in this case to try the issues of law raised by the Defendant and to try them at this stage under the provisions of O. XIV r 2 as I am of opinion that the case, or some part of it, may be disposed of on those issues of law only.

In the Supreme Court of Kenya at Nairobi.

No. 4.

Ruling.

10th January, 1958

- continued.

Mr. Khanna has intimated that he reserves his argument on the third of his "preliminary objections".

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J. Pelly Murphy, J.

24.1.58.

24th January, 1958.

Ruling delivered. Case to be fixed for hearing (? 3 days) at earliest date possible.

J. Pelly Murphy, J.

Wollen - Plaintiffs.

Khanna D.N. Defendant.

By Consent. Hearing fixed for 12, 13 and 14 March, 1958. 10.30. Case to be heard by Judge Pelly Murphy.

20

H.F. Hamel,
Dy. Registrar.

No. 5.

No. 5.

JUDGE'S NOTES OF ARGUMENT.

Judge's Notes of Argument.

14.2.58. Call Over.

14th February, 1958.

Khanna. No appearance for Ennion & MacDougall. Part heard to stay in the list.

J. Chambers.
Dy. Registrar.

Wollen for Plaintiffs.

30 Khanna for Defendant.

Wollen calls Plaintiff - to deal with Agreement.

P.W.l. David Geoffrey Edwardes Sworn:-

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.

In the Supreme Court of Kenya at Nairobi.

No. 5.

Judge's Notes or Argument.

14th February, 1958

- continued.

Khanna objects to Agreement being put in evidence.

Khanna: refers to Clause 2 of Agreement. Plaint paragraph 13 Plaintiffs paid Shs. 180,000/- Agreement bears no endorsement of registration against the title - it is therefore an unregistered instrument. It was originally stamped with 1/-.

11.2.58. 20/- penalty stamp. £6 stamp (S.35 Stamp Ordinance) i.e. on a charge.

On 1st May '57 Agreement was not stamped as a charge.

Lack of Registration makes Agreement inadmissible in evidence. S.55(6) Transfer of Property Act 1882. S.35 of Stamp Ordinance (Cap.259). S.36 (1) (2) (3) Stamp Ordinance (Cap. 259). S.37 Stamp Ordinance (Cap. 259) S.39 Stamp Ordinance. Court can now accept Agreement as being properly stamped. Schedule to Stamp Ordinance Item 5. Schedule to Stamp Ordinance Item 40. Once a charge is created (whether by Act of Party or operation of law) it must be registered. S.124 Crown Lands Ordinance (Cap. 155). S.126 Crown Lands Ordinance S.127 (2) Crown Lands Ordinance S.129 (e) Crown Lands Ordinance.

The Agreement excluded from admission in evidence because it is unregistered the suit being founded upon it, the suit must fail.

Dyal Singh v Inder Singh 1925-26 L.R.Indian Appeals. Vol. 53 page 214. Futteh Chund Sahoo v Leelumber Singh Doss 20 Eng. Reports Page 734. Absolute prohibition. Ebrahimji Gulamhussein Anjarwalla and Others v Sheikh Fazel Elahi Civil Case No. 99 of 1948 de Lestang, J.

Wollen: Transfer of Property Act (Mulla) page 304, Act 2 of 1927 Indian Registration Amendment Act. This followed Privy Council decision in Dayal Singh v Inder Singh. S.17 Indian Registration Act (as quoted at page 218 of Dayal Singh's case). Cf S.4 proviso (e) Cap. 161 - proviso (g) Cap. 161 - Registration of Documents Ordinance - S.17 of Cap. 161 - Cf S.49 of Indian Registration Act - very different language. Part XII Crown Lands Ordinance (Cap.155) S.126. S.129(e) is similar to S.4 proviso (e) Cap.161. S.137 (1) (2) S.138 (1) (2) S.139. This is a divided portion of land. Attached to

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this Agreement is a sketch plan. I would distinguish Civil Case 99/48 because there is nothing in that case to show that the land there was a divided portion. This document should not and could not be registered under Crown Lands Ordinance, but should have been registered under the Registration of Documents Ordinance (Cap.161). Sec. 17 of Cap. 161. S.17 gives discretion. This is a case where discretion should be exercised. Pleadings admit agreement - paragraph 3 of Defence admits agreement.

10

But see:-

Sanjib Chandra Sangal v Santosh Kumar Lahiri Vol 49 Calcutta Reports p.507 at p.514. X Kenya Law Reports page 142 Mollo v Lalchand Ranchand - But Court should exercise discretion given under Section 17 Registration of Documents Ordinance. Section 139 Cap.155 refers to written particulars.

12.30 p.m. Adjournment to 2.30 p.m.

J. Pelly Murphy, J.

20 2.30 p.m. Resumed.

Appearance as before.

Khanna: Commissioner of Stamps (Straits Settlements) v Oei Tjong Swan and Others (1933) A.C. 378. Examination of the Ordinance itself at pages 388,389. What is the intention derived from the words used in the enactment. Section 127 forbids the Court from receiving in evidence. Registration of Documents Ordinance has no relevance. It does not apply to land which comes within the provisions of Crown Lands Ordinance. Section 4 (8) of Cap. 161. Section 124 of Crown Lands Ordinance Section 125.

30

First question to decide is:- Is this land governed and exclusively governed by provisions of the Crown Lands Ordinance. Section 139 Legislature's Policy - no indefinitely defined area can be registered and no unregistered documents can be received in evidence.

Defence - Paragraph 3 does not admit registered agreement.

40 Questions of admissibility of evidence should not be pleaded.

Section 17 of Registration of Documents does not apply.

Section 55(4) Transfer of Property Act. (1902) 30

In the Supreme Court of Kenya at Nairobi.

No. 5.

Judge's Notes of Argument.

14th February, 1958

- continued.

In the Supreme Court of Kenya at Nairobi.

Indian Appeal - Webb v McPherson. C.A.V.

J. Pelly Murphy, J.

14.3.58.

No. 5.

Appearances as before.

Judge's Notes of Argument.

I read Ruling.

J. Pelly Murphy, J.

14th February, 1958

Khanna: Plaintiffs' claim should be dismissed with costs.

- continued.

Wollen: Agrees but - Defendant's counterclaim should be dismissed with costs.

Khanna: Court is not seized of counterclaim. Counterclaim has not been opened.

10

No. 6.

No. 6.

Ruling.

RULING

14th March, 1958.

By an agreement in writing dated 17th April, 1954, the Defendant agreed to sell to the Plaintiffs for Shs.200,000/- a portion of his farm known as Tara Farm, Naivasha.

The agreement in question is in a form which is, I imagine, in common use by conveyancers in this Colony. Clause 1 contains the agreement for sale and purchase of the land described therein. Clause 2 is in the following terms :-

20

"2. 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.

(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 five and

30

(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

Clause 8 provides that the Vendor shall cause the land to be surveyed and deed plans issued by the Survey Department of the Colony.

In the Supreme Court of Kenya at Nairobi.

In pursuance of the agreement a survey of the land was made at the instance of the Defendant, but the Plaintiffs claimed that the parcel of land therein delineated did not correspond in matters of acreage and frontage with the land described in the agreement.

No. 6.

Ruling.

14th March,
1958

- continued.

10 By their plaint the Plaintiffs claim specific performance of that agreement and the further relief set out in paragraph 8 of the plaint. There were alternative claims set out in the plaint but, on the 24th January, 1958, I ruled that all the claims save that for specific performance were unsustainable in law.

20 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 ground that it has not been registered as required by the Crown Lands Ordinance.

30 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.

40 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.

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.

In the Supreme
Court of Kenya
at Nairobi.

No. 6.

Ruling.

14th March,
1958
- continued.

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.

10

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

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

20

Mr. Khanna's objection is upheld.

Sd. J. Pelly Murphy,
JUDGE.

NAIROBI.
14th March, 1958.

No. 7.

Judgment.

14th March,
1958.

No. 7.

JUDGMENT

Having come to the conclusion expressed by me in the Ruling I have just made, and the Plaintiff's claim being founded on the Agreement which I have excluded from evidence I dismiss the Plaintiffs' claim with costs.

30

In my opinion I am not seized of the Defendant's counterclaim at the present time and I make no Order as to it.

J. Pelly Murphy, J.

No. 8.

ARGUMENT ON COSTS AND STAY OF EXECUTION.

Khanna: Applies for costs on higher scale. Action involving 5 claims. Difficult question of construction of Agreement. Plans. Claim for rectification. Claim for fraudulent misrepresentation. Even though decided on points of law, all complicated facts had to be studied and prepared.

10 Wollen: Opposes. Case decided not on merits, technical point of law. Failure to register not Plaintiffs' fault - Plan. Plaintiffs have suffered.

Khanna: Facts had to be gone into.

Order: I refuse to order costs on higher scale.

J. Pelly Murphy, J.

Wollen: Applies for stay of execution as to costs. Applies for Order to preserve Status Quo of parties, pending Appeal.

In the Supreme Court of Kenya at Nairobi.

No. 8.

Argument on costs and Stay of Execution.

14th March, 1958.

No. 9.

ORDER.

20 As to an Order to preserve Status Quo, I am of opinion that I have no jurisdiction to make such an Order in these proceedings, and I decline to do so. I also decline to order stay of execution as to costs.

J. Pelly Murphy, J.

No. 9.

Order.

14th March, 1958.

No. 10.

DECREE.

30 Claim for:- (i) Specific Performance of an Agreement in writing dated the 17th day of April, 1954, made between the Plaintiffs and the Defendant in the manner set out in the schedule hereunto annexed and marked "A";

(ii) Alternatively rectification

No.10.

Decree.

14th March, 1958.

In the Supreme
Court of Kenya
at Nairobi.

No.10.

Decree.

14th March,
1958.

- continued.

of the said agreement in the manner set out in the
Schedule hereunto annexed and marked "B" and speci-
fic performance thereof as rectified;

(iii) Alternatively Shs. 36,111/30
damages and interest at Court rates;

(iv) General Damages and interest at
Court rates;

(v) Shs.2,760/- damages and inter-
est at Court rates for loss of grazing, lucerne
and use of a cattle dip;

(vi) An injunction to restrain the
Defendant or his servants or agents from entering
upon portion of the Plaintiffs' land comprising
32½ acres and cutting lucerne or other growing
crops or timber thereon and removing the same or
any of them;

(vii) Costs of the suit;

(viii) Such further and other relief
as may be just.

THIS SUIT coming on the 7th, 8th and 10th
day of January, 1958, and on the 12th day of March,
1958 for hearing and on the 14th day of March, 1958,
for judgment before the Honourable Mr. Justice
Pelly Murphy in the presence of Counsel for the
Plaintiffs and Counsel for the Defendant

IT IS ORDERED

1. That the Plaintiffs' claims be dismissed;

2. That the Plaintiffs do pay to the Defendant
the taxed costs of this suit down to and includ-
ing this Decree as taxed and certified by the
Registrar of this Court.

AND UPON the oral application of Counsel for
the Plaintiffs AND UPON HEARING Counsel for the
Plaintiffs and Counsel for the Defendant THIS
COURT DOTH ORDER that the application for stay of
execution as to costs and an order to preserve the
status quo of the parties pending appeal be refused.

GIVEN under my hand and the Seal of the Court
at Nairobi, this 14th day of March, 1958.

ISSUED this 26th day of May, 1958.

BY THE COURT

Sgd. J. Chambers,
REGISTRAR

SUPREME COURT OF KENYA.

10

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30

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SCHEDULE "A"

In the Supreme
Court of Kenya
at Nairobi.

No.10.

Decree

14th March,
1958.

- continued.
Schedule "A".

- 10 1. That the Defendant should cause a survey to be made of a farm being a portion of L.R.No.416/2 containing an area of 180 acres more or less and having a frontage of 645 yards to Lake Naivasha or thereabouts together with the riparian land appurtenant thereto estimate to comprise an area of $67\frac{1}{2}$ acres or thereabouts which portion the Defendant had agreed to sell to the Plaintiffs for the sum of Shs.200,000/-.
2. That the Defendant should cause a deed plan of the said land to be issued.
3. That the Defendant should cause the boundaries of the said riparian land appurtenant thereto to be surveyed and demarcated in accordance with the frontage and area of the said land as aforesaid.
- 20 4. That, thereafter, the Defendant should execute a proper Conveyance of the said land to the Plaintiffs accordingly.

(Intld.) J.C.

SCHEDULE "B"

Schedule "B".

30 By deleting from Clause 1 of the said agreement the description that the South East boundary of the said land runs in part along the edge of the lucerne crop, existing at the date of the said agreement which was situated 75 feet from the wall of the big windmill belonging to the Defendant (Vendor) as the said crop and windmill are situated on the said riparian land appurtenant to the said land, and not on non-riparian land belonging to the Vendor as the Plaintiffs and Defendant thought, as it was never the intention of the parties that either the said frontage or the said area should be limited or reduced by the description of the said boundary aforesaid, either as surveyed or at all.

(Intld.) J.C.

In the Supreme
Court of Kenya
at Nairobi.

No. 11.

NOTICE OF APPEAL

No.11.
Notice of
Appeal.
27th March,
1958.

TAKE NOTICE that DAVID GEOFREY EDWARDES and DAPHNE ELIZABETH EDWARDES, the Plaintiffs herein, being dissatisfied with the decision of the Honourable Mr. Justice Pelly Murphy given herein at Nairobi on the 14th day of March, 1958, intend to appeal to Her Majesty's Court of Appeal for Eastern Africa against the whole of the said decision.

10

DATED this 27th day of March, 1958.

Sgd. S.R. WOLLEN
ENNION & MACDOUGALL
(Advocates for the Appellants)

To the Registrar of the Supreme Court at Nairobi and to REGINALD ERNEST VERE DENNING whose address for service is c/o Messrs. D.N. & R.N. Khanna, Sheikh Building, Victoria Street, Nairobi.

The address for service for the Appellants is c/o Messrs. Ennion & Macdougall, Advocates, Sadler House, Sadler Street, Nairobi.

20

Note: A Respondent served with this notice is required within fourteen days after such service to file in these proceedings and serve on the Appellant a notice of his address for service for the purposes of the intended appeal, and within a further fourteen days to serve a copy thereof on every other respondent named in this notice who has filed notice of an address for service. In the event of non-compliance, the Appellant may proceed ex parte.

30

FILED the 27th day of March, 1958, at Nairobi.

Sgd. J. CHAMBERS,
Registrar.

No. 12.

MEMORANDUM OF APPEAL

In the Court
of Appeal for
Eastern Africa.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

No.12.

CIVIL APPEAL NO. 42 of 1958

Memorandum of
Appeal.

BETWEEN:- DAVID GEOFFREY EDWARDES and
DAPHNE ELIZABETH NAOMI EDWARDES
Appellants

26th May, 1958.

- and -

10 REGINALD ERNEST VERE DENNING Respondent

(Appeal from a ruling and judgment of Her Majesty's
Supreme Court of Kenya at Nairobi (Mr. Justice
Pelly Murphy) dated the 14th day of March, 1958,
in Civil Case No. 528 of 1957,

BETWEEN:- DAVID GEOFFREY EDWARDES and
DAPHNE ELIZABETH NAOMI EDWARDES
Plaintiffs

- and -

REGINALD ERNEST VERE DENNING Defendant)

20 David Geoffrey Edwardes and Daphne Elizabeth Naomi
Edwardes, the Appellants above named, appeal to
Her Majesty's Court of Appeal for Eastern Africa
against the whole of the decision above mentioned
on the following grounds, namely:-

1. The learned Judge erred in holding that he
was precluded from receiving in evidence the Agree-
ment in Writing dated the 17th April, 1954, and
made between the parties hereto in respect of the
rights in personam created by the said agreement as
30 distinct from the charge created by virtue of Sec-
tion 55(6)(b) of the Indian Transfer of Property
Act, 1882.

2. The learned Judge failed to appreciate that
Section 127(2) of the Crown Lands Ordinance (Chap-
ter 155) applies only to evidence relating, inter
alia, to a charge where an interest is created in
land, and not to evidence of rights in personam
arising out of an agreement for sale and that as no

In the Court
of Appeal for
Eastern Africa.

No.12.

Memorandum of
Appeal.

26th May, 1958
- continued.

evidence was adduced of a charge the said agree-
ment was admissible in evidence.

3. The learned Judge erred in holding that the
decision in DAYAL SINGH vs. INDER SINGH (1925 -
1926) 53 L.R. Indian Appeals p.214 governs this
case in that the decision of the said case was
founded on statute law applicable to India which
law differs from the provisions of the Crown Lands
Ordinance (Cap.155) and other laws applicable in
the Colony of Kenya.

10

4. In the alternative, the learned Judge erred
in holding that the provisions of the Crown Lands
Ordinance (Cap.155) exclude the application of the
provisions of the Registration of Documents Ordi-
nance (Cap.161) to the said agreement, particular-
ly having regard to the provisions of Sections
137, 138 and 139 of the Crown Lands Ordinance.

5. In the further alternative the learned Judge
failed to appreciate that as the Respondent (Ven-
dor) had failed to comply with the provisions of
Section 88 of the Crown Lands Ordinance the agree-
ment for sale in so far as it purports to effect a
charge is void and does not therefore require to
be registered.

20

6. The learned Judge erred in dismissing the
Plaintiffs claim for specific performance.

WHEREFORE the Appellants pray that this appeal
be allowed and that the Ruling and the Judgment of
the Supreme Court dated the 14th day of March, 1958,
be set aside and that the Appellants be allowed
their costs here and in the Court below.

30

DATED at Nairobi this 26th day of May, 1958.

Sgd. S.R. WOLLEN

ENNION & MACDOUGALL,

Advocates for the Appellants.

To the Honourable the Judges of Her Majesty's Court
of Appeal for Eastern Africa

And to Messrs. D.N. & R.N. Khanna,
Advocates for the Respondent,
Sheikh Building,
Nairobi.

40

In the Court
of Appeal for
Eastern Africa.

No.13.

President's
Notes.

1st July, 1958
- continued.

p.18. Written agreement tendered - objected to.
Objection upheld.

Sanjib Chandra Sangal v. Santosh, 49 Cal.507.

Moloo Bros. v. Lalchand. 10 K.L.R. 142.

Not pleaded that document void for want of
registration.

Nothing in Crown Lands Ordinance which deals
with S.54. "It does not of itself create any in-
terest in or a charge on such property".

S.55(6)(b) ib.

10

Dayal Singh v. Inder Singh. 53 I.A. 214.

p. 217, 218.

219.

Following this (June 1926) the law in India
was amended in 1927.

Hands in copy of Act II of 1927.

This Court not bound by Dayal Singh's case
because of the different effect of the Crown Lands
Ordinance.

Civil Case 99/48. Ebrahim G. Anjawala v.
Sheikh Fazal Elahi.

20

The property is Crown land and comes under
the Crown Lands Ordinance.

s.126. Similar to Indian Registration Act,
17(1)(b).

s.127 (1) doesn't apply.

(2) Agreement excluded under that sub-
section. Dayal Singh's case does not govern this
case.

Record, p.1, 2.

30

Grounds 1, 2 and 3.

s.129(e) similar to s.17 Indian Registration
Act, s.17(2) (5).

But this case is governed by the Crown Lands
Ordinance c.f.s. 127.

No evidence shall be receivable.

s.49 Indian Registration Act "No document
shall be received as evidence".

No evidence of a charge was sought to be adduced.

s.127 does not preclude evidence of an agreement of sale notwithstanding that it may under Section 55 Indian Transfer of Property Act create a charge.

Mulla.

Transfer of Property Act, 3rd Ed. 393. Commentary to s.59. Mortgages.

10 Registration.

Mortgage not registered cannot create charge, but is receivable for collateral purpose.

Varatha Pillai v. Jeeva Rathnanmal. 43 Mad. 244. 46 I.A. 285. 46 Mad. 435, 438, 444.

Fact that one part of document becomes invalid for registration need not make the rest invalid.

20 The rights between parties under this document are rights in personam and the Agreement is admissible in so far as it relates to rights in personam and would be admissible in a suit for specific performance: aliter if the money had been advanced as a loan.

(1879) 4 Cal. 83.

Deed indivisible. Not admitted. This document divisible.

(1) Agreement for sale which does not create any rights to the property.

(2) Rights created by s.55 are separable.

Ground 5.

30 Not taken in lower Court.

S.88.

If s.55 Indian Transfer of Property Act creates a charge which requires that the Agreement evidencing it shall be registered under s.127 Crown Lands Ordinance, then it is incumbent that the provisions of s.88 shall apply.

s.88(3)

Original agreement on the Court file.

In the Court
of Appeal for
Eastern Africa.

No.13.

President's
Notes.

1st July, 1958
- continued.

In the Court
of Appeal for
Eastern Africa.

No.13.

President's
Notes.

1st July, 1958
- continued.

Nothing endorsed; but the consent of the Governor has been obtained.

Consent to be endorsed applies only to the operative instrument and not to an agreement.

No consent obtained to the charge under s.55. s.88(3) "in so far as it purports to effect".

Ground 4.

Under s.137(1) this was not acceptable for registration. Sketch plan.

S.138(2).

10

S.139. Either you have a clear description of the land in the document or a deed plan signed by the Director of Surveys or you cannot register the document.

The necessary particulars do not exist. The whole difference arises on the particulars.

Impossible situation if judgment correct - Delays in surveys - Agreements for sale could not be made.

Cap. 161. s.4(c).

20

This document was not registrable under the Crown Lands Ordinance.

S.17.

S.127 Crown Lands Ordinance "registered under this Part". It could not be registered.

Decision that Judge should be overruled.

Adjourned 10.30 tomorrow.

1.7.58.

K.K.O'CONNOR, P.

2nd July, 1958.

2.7.58. Bench and Bar as before.

Wollen continues:

30

Bashir's case p.9.

Article 4(2) of the Kenya Order in Council 1921.

S.127(2) Lands Ordinance.

No evidence shall be received unless the charge is created by an instrument in writing.

The charge was not created by an instrument but by operation of law under the Indian Transfer of Property Act (if it was created).

In the Court
of Appeal for
Eastern Africa.

A charge may be created by virtue of the Crown or Government by operation of an enactment; but not in favour of the other party.

No.13.

President's
Notes.

Judge says "evidences the creation of a charge".

2nd July, 1958
- continued.

S.129(e) covers the matter.

10

The 1927 'Explanation' was an amendment of the corresponding Indian Legislation.

S.88(1).

Submit the instrument referred to in sub-section (3) does not include an agreement to effect the transaction.

Practice is that the agreement for sale is not endorsed.

Bashir's case.

20

Whether Indian Transfer of Property Act applies at all to Crown lands.

Indian Crown Grants Act, 1895.

S.2.

Limited to a Grant from the Crown.

Transfer of Property Act applies except in so far as the Crown Lands Ordinance applies.

S.54 of the Indian Transfer of Property Act "A contract for sale does not of itself create any interest or charge on such property".

Khanna:

30

The defence did not raise the issue that the agreement sued upon was not registered and was not void for want of registration. Defence did not admit that the agreement was registered.

If the Indian Transfer of Property Act applies, a charge by operation of law arises.

If no payment is made by way of earnest or part payment but the sale is on the basis of the whole purchase price being payable against a conveyance, that comes within exemption under 129(e)

In the Court
of Appeal for
Eastern Africa.

No.13.

President's
Notes.

2nd July, 1958
- continued.

of the Crown Lands Ordinance and that would be
outside s.55(6)(b) Transfer of Property Act and
s.127(2).

Textual variation between s.49 improper.

Commissioner of Stamps v O.T. Swen.

Kenya section stronger and wider:

Indian says "No document".

Kenya section says "No evidence".

A recital would be evidence. Not even pleadings
would be admissible. 10

"No evidence shall be receivable in any Court" is
addressed to the Court and limits the jurisdiction
of the Court.

Fateh Chaud Saboo v. Leelumber S. Doss, 20
E.R. 734. 735 to end.

It must be taken in any Court.

But legislature must have known of that
decision.

Mohamed Haji Abdulla v. Gela Manek (Agreement
had been registered). (1956) 23 E.A.C.A.342. 20

Amending Act in 1927 has not any force here
and without it the Act applies.

(1922) 49 Cal. 507.

p.514. "I cannot give effect to this contention
....." Objection as to lack of pleading was not
given effect to, the Court must give effect to it.

Moloo Bros. v. Lalchand Nanchand, 10 Kenya
L.R.142. Submit point does not have to be taken
on the pleadings. There was no admission of the
parcels and the case could not have been decreed
without looking at them. 30

Dhayal Singh's case is not less an authority
because it was ex parte.

de Lestang's ruling, Civil Case 99/48, "In
my view " If you say I paid earnest money
that is evidence of a charge. If you cannot give
evidence of a charge you cannot give evidence of
payment of earnest money.

Not exempted from registration if not in favour of the Crown.

Charge springs up from the payment. Recital in the agreement of payment is evidence that the charge springs up by operation of law.

(Indian section says 'operate to create')

cf. s.127(2) (arise or be created must include charges created by operation of law).

In the Court
of Appeal for
Eastern Africa.

No.13.

President's
Notes.

2nd July, 1958
- continued.

10 As to 43 Mad.244. Special exemptions to Transfer of Property Act which do not apply to Kenya.

Mulla, 3rd Edn. p. 393.

Turns on proviso to s.49 and s.53A.

W. relied on 43 Mad. p. 246. This was a case outside the Registration Act.

No assistance.

20 p.251. The case turned on the provisions of s.123 of the Transfer of Property Act. There is nothing which prohibits the use of an unregistered instrument for another purpose. It does not oust it from evidence. It merely says that it is not a valid gift. Distinguishable on that ground W. relied on 46 Mad. 435.

There is no provision of the Indian Registration Act ousting the document from evidence.

p.443. 'The contention "

Wording of Indian Act different.

Where document severable part not required to be registered may be valid.

30 W. relied on 4 Calc. 83.

In conflict with last decision - irrelevant tho' better as the prohibition was total.

Point under s.88 not taken below. Not a point of pure law. Depends on evidence.

S.88(1) If the consent of the Governor is not endorsed, the agreement is void and the suit was rightly dismissed.

Practice cannot prevail -

Bashir's case, p.13.

40 If the true construction of s.88 is that there must

In the Court
of Appeal for
Eastern Africa.

No.13.

President's
Notes.

2nd July, 1958
- continued.

be a prior consent of the Governor, the fact that a practice has arisen contra cannot prevail.

The agreement cannot be concluded before the Governor's consent is obtained and cannot be specifically enforced.

The consent must be endorsed on the draft agreement.

If by giving evidence of the agreement you automatically give evidence of the charge, you cannot receive the agreement.

10

ss. 137, 138, 139.

This does not deal with the compulsion to register but with what would be required where registration under other sections is compulsory. Machinery. (1) Merely indicates what kind of maps will be accepted.

138. 'Mode of description' - machinery.

This does not say that if you cannot comply with those requirements you can avoid the obligation to register. You never have been able to enter into a conveyance until you can get a deed plan and register the agreement.

20

The agreement could have been registered before action brought.

Record p.22, lines 12-16.

Cap.161, s.4 proviso (g)

Registration of Documents Ordinance has nothing to do with the questions before you.

There is no title to the riparian land.

There cannot be a discretion in the Judge as to part only of the land. s.127(2) overrides s.17(2). As the riparian land is Crown land, the Crown Lands Ordinance would apply.

30

I agree that the riparian land would be under the Registration of Documents Ordinance.

Discretion exercised under s.17(2) would be valueless.

Bashir has no bearing on the present case, the only conclusions arrived at are

- (1) As between Crown and the subject: a Crown grant is not governed by the Transfer of Property Act.
- (2) S.111 of the Transfer of Property Act is displaced by s.83 of the Crown Lands Ordinance.

In the Court
of Appeal for
Eastern Africa.

No.13.

President's
Notes.

2nd July, 1958
- continued.

10 The Crown would not have a charge under s.55. Decision was correct.

Wollen in reply:

Adjourned to 2.30.

2.30 p.m. Bench and Bar as before.

Wollen replies:

Khanna referred to Sahoo's case 20 E.R. 734.

Amending legislation was introduced.

Dhayal Singh. p.218.

20 The Indian cases did establish a general principle that even if a document is inadmissible for one purpose it can be admitted for another.

4 Cal. 83. p.87. Decision rested on the fact that the Court found that the document was not divisible. If it had been they would have looked at a section of it.

s.49 said "No document".

Here we have "No evidence".

Khanna said the agreement could have been registered before the date of the trial.

30 Disagree because the whole issue was the parcels and the plan. This is not the plan which should be attached.

Khanna said that the Legislature do not want the Courts to be inundated with land disputes. There is nothing in the Crown Lands Ordinance to that effect.

S.55 can always be negatived by agreement.

Khanna said that the same Solicitor acting for both sides in the preparation of the Agreement.

In the Court
of Appeal for
Eastern Africa.

No.13.

President's
Notes.

2nd July, 1958
- continued.

8th August,
1958.

There was a letter from Ennion & MacDougall in which it was stated that they were acting for both parties at the time of the Agreement. That letter was written three years after and the partner was away sick and it was a misunderstanding.

The Solicitors were not acting for both parties.
C.A.V.

K.K.O'CONNOR.

2/7/58.

8/8/58. O'Connor P. and Gould J.A. One judgment read and matter adjourned for previous Bench to be assembled. (See Note below).

10

NOTE.

CIVIL APPEAL 42/58.

EDWARDES v. DENNING

This case was listed for judgment on 8.8.58 at 10.30 a.m. Briggs V-P and Forbes J.A. having gone on leave, I proposed to read the judgments. Gould J.A. was with me on the Bench, as he wished to attend for experience, having just arrived.

As soon as I had read the first judgment (mine) and before I had signed it Mr. Khanna (for the Respondent) rose and said that he objected to an order for costs being made as indicated in the judgment because the only point before the Judge on 14th March was the claim for specific performance, the other claims having by then been dismissed by a previous ruling which had not been included in the Record of Appeal. He said that he had asked for an opportunity to argue on costs. He also said that the judgment was not correct in assuming that there was a claim for damages outstanding when the objection was made to the admissibility of the Agreement. He said that Mr. Wollen had stated in opening that this Court would only be concerned with the claim for specific performance. He referred to the Decree (Rec.p.26) and said that claims in paragraphs (ii) to (vi) had been dealt with in the previous Ruling of the Judge and that these were never the subject of any appeal. He also referred to p.16 of the Record.

20

30

Mr. Wollen, for the Appellant, confirmed that the only point outstanding on 14/3 was the claim for specific performance. He apologised for not including the previous Ruling in the Record: it was

40

not included because it was not thought to be relevant.

Mr. Khanna then asked that the question of costs be reserved for further argument before the Court as originally constituted and that time for appealing should not run in the meantime.

Mr. Wollen agreed as regards the costs in the Supreme Court, but asked for the costs of the appeal.

20 Mr. Khanna asked for an opportunity for argument on costs and said that there must also be a proper consequential order made regarding the claims already dismissed.

20 In these circumstances, I did not proceed to sign my judgment or to read the judgments of the other two members of the Court. I made an order adjourning the matter generally for further consideration by the same Court. Mr. Khanna asked for a copy of my judgment; but, as it had not been signed and as the other judgments had not been delivered and the Court was still seised of the matter, I thought that none of the judgments should yet be issued. I have given the judgments to the Registrar to be placed in a sealed packet and kept in a safe until the original Court can be re-constituted. As that will not be until after the return from leave of Mr. Justice Forbes on November 5th, I have thought it well to make this record of the position (which is a little fuller than the note made by me in Court) while the matter is
30 fresh in my mind.

K.K.O'CONNOR
President.

8th August, 1958.

8.11.58. Coram: O'Connor, P.
Briggs, V-P.
Forbes, J.A.

Argument as to costs. Not reproduced.

Adjourned 10 minutes.

40 Court returns and announces that the written judgments which were held up will be delivered in due course and that they will deal with costs.

8/11/58.

K.K.O'CONNOR.

In the Court
of Appeal for
Eastern Africa.

No.13.

President's
Notes.

8th August,
1958
- continued.

8th November,
1958.

In the Court
of Appeal for
Eastern Africa.

No. 14.

NOTES TAKEN BY THE HON. VICE PRESIDENT,
MR. JUSTICE BRIGGS

No.14.

Notes of Mr.
Justice Briggs.

1st July, 1958.

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

Wollen:

Facts.

Argument dated 17th April, 1954.

Possession taken 1st February, 1955. 10

House and other buildings constructed and im-
provements made.

Paragraph 8. Survey to be made.

Survey delayed, but due in December, 1955.

Appellants contend that survey not in accord-
ance with terms of agreement. Plaintiff paragraph 6.

Prolonged negotiations. Suit for specific
performance.

Hearing 18th February, 1958.

Objection to production of agreement. 20

Sanjib v. Santosh 49 Cal. 507.

Mulu v. Lalchand Ramchand. 10 K.L.R. 142.

Section 54. Indian Transfer of Property Act.
55 (6) (b) ibid

Dayal Singh v. Inder Singh. 53 I.A.214,217.

Section 17 (1) (b) Indian Registration Act
1908.

Futteh Chund Sahoo v. Leelumber Singh Doss
14 Moore: 20 E.R. 734 said to create hardship.

The 1908 Act was amended immediately after
Dayal Singh's case. 30

New "explanation" of Section 17 !!!

Anjorwala v. Fajal Klahi. K. Civil Case 99/48
(unreported).

Here property is Crown Land and subject to
Crown Lands Ordinance (Cap.161).

Sections 119, 122, 124, 126.

(This is somewhat similar to Indian Registration Act 1908, Section 17).

127 (2) The agreement was excluded under this Judgment.

Grounds of appeal.

Section 129 (c) similar to Section 17(2) (v)
Ind.

Material differences between Section 49 Indian Registration Act and Section 127.

10 I can argue that sought to give evidence of a charge.

The document as such is not made inadmissible.

Mulla T.P.A. 3rd 390. (in Section 59).

Varada v. J. Rathnammal (45 Mad. 244
(46 I.A. 292)

Dronamraju v. Vissapragada 46 Mad.435,438,444.

Rights here in personam only.

Agreement is admissible to prove those rights, even if not establish a charge.

20 Mattonganey v. Ramnarian 4 Cal.83 (1879)
Parts of document can be severable and admissible for one purpose, but not for another.

Ground 5.

New point: but matter of law.

Section 88. Crown Lands Ordinance.

30 If section 55 T.P.A. creates a charge which is such as to require registration of the agreement section 88 would then apply. H.E's consent is not only necessary but also requires to be endorsed if the "transaction" is within Section 1.

Ground 4.

See sections 137, 138(2), 139.

Deed plan not issued for 18 months.

Section 4 and Section 17 Registration of Documents Ordinance.

Ct. C. of L. v. S.M.Bashir's case. Judgment p.9.

In the Court of Appeal for Eastern Africa.

No.14.

Notes of Mr. Justice Briggs.

1st July, 1958
- continued.

In the Court
of Appeal for
Eastern Africa.

2.7.58. Bench and bar as before. Wollen continues.

Wollen: Bashir's case C.A. 76/57.

No.14.
Notes of Mr.
Justice Briggs.
2nd July, 1958.

The T.P.A. though it applies generally in Kenya, does not apply to Crown Lands at least as regards s.55(6)(b).

Section 4(2) Order in Council 1921.

Section 127(2) Crown Lands Ordinance.

No evidence receivable of any charge unless it is created by an "instrument". This excludes evidence of any charge created by operation of law - if at all - i.e. the T.P.A. 10

Section 127(2) is in effect a prohibition of the creation of any charge in favour of an individual by operation of law.

The Crown Lands Ordinance is inconsistent in this respect with the I.T.P. Act. It envisages that a charge in favour of an individual shall only come into existence.

Section 88 Crown Lands Ordinance (last section of (1)). I also submit the T.P. Act does not apply to Crown Lands at all, so far as concerns direct relation of Crown and subject. 20

Indian Crown Grants Act 1895. But where Crown Land has been alienated the T.P. Act must have effect on subsequent dealings between subjects.

Khanna:

Defence does not allege want of registration: it admits only the existence of the agreement, not that it is registered.

If T.P. Act applies charge arises by operation of law. 30

If under agreement, no payment is made until completion, the agreement is exempt from reign under section 129(e) Crown Lands Ordinance and outside 126 and 127 of the Crown Lands Administration.

Section 49(e) Indian Registration Act.

Effect of Section 127 is stronger.

The charge cannot be proved by any means.

This excludes any document which would establish the existence of a charge.

Fatchand's case 20 E.R.734,5 (1871). These documents are often in fact registered.

The amending Act after Dayal Singh is not in force here. Cannot strain construction.

Sayib v. Santosh (1922) 49 Cal. 507 before Dayal Singh and ignores Fatchand therefore of no authority. (The pleading point).

In the Court
of Appeal for
Eastern Africa.

No.14.

Notes of Mr.
Justice Briggs.

2nd July, 1958
- continued.

10 Mollo Bros. 10 K.L.R. 142 (1926) follows 49 Cal. 146.

There was . . . admission concerning the parcels and the suit could never be decreed without that.

Dayal Singh binds this Court. Where the payment indicates that a charge arises, that payment cannot be alleged for one purpose but not for another. If evidence of the charge is not receivable that must exclude evidence of the part payment.

c/. de Loctang J. in C.S. 99/48.

20 Two Supreme Court Judges now have so held.

Can a charge arising by operation of law (and so not created by any instrument) be within the meaning of 127(2)?

Khanna:

Ind. s.17 and s.49 Registration Act and 55(6) (b) of T.P. Act together here identical with Sections 126 and 127 here.

Section 129 = exactly section 17(e)

(not exactly)

30 c.f. "arise or be created" in section 127(2).

Varada v. J. Rathenald 43 Mad. 244, 246, 251. Turns on S.53A, T.P.Act, which does not apply in Kenya and proviso to section 49. Mulla 3rd 393.

Also see section 123 of T.P.A. 46 Mad. 435.

May be possible to sever in some cases. but not here

4 Cal. 83.

Section 88. Is this a point of pure law?

In the Court
of Appeal for
Eastern Africa.

Comparison between "transactions" and "agreement".
Consent should be endorsed.

Practice may be wrong.

No.14.

Bashir's case p.13 Prior consent necessary.

Notes of Mr.
Justice Briggs.

Section 137, 138 and 139.

2nd July, 1958
- continued.

These deal only with what would be required if
registration is made necessary by some other sec-
tions.

The deed plan once produced could be annexed
to the agreement.

10

The Registration of Documents Ordinance may
apply to the riparian land, to which there is no
existing title - it is Crown Land, but not within
Pt. XII of the Crown Lands Ordinance.

The documents should therefore be required
under both Ordinances.

Bashir does not apply (1) it deals only with
relations between Crown and subject, and a "special
law" about this exists.

2.30 p.m. Bench and Bar as afore.

20

Wollen replies:

Fatchand.

Dayal Singh at p.218.

The other Indian cases do establish that a
document may be admissible for one purpose though
not for another.

4 Cal. 83,87.

This document is clearly "divisible".

We are in a stronger position under Section 127
than applies in India under section 49.

30

Khanna says agreement could have been registered
by attaching plan. But the Respondent's plan is a
wrong plan, not the one contemplated.

Section 55(6)(b), if it applies at all, can
be excluded. Not correct that my firm asked for
both firms in negotiating the agreement. Letters
saying so was an error: partner in question being

absent, sick.

C.A.V.

F.A. BRIGGS,
Vice-President.

8.11.58. Bench and Bar as before.

Argument as to costs not reproduced.

In the Court
of Appeal for
Eastern Africa.

No.14.

Notes of Mr.
Justice Briggs.
2nd July, 1958
- continued.

8th November,
1958.

No. 15.

NOTES TAKEN BY THE HON. JUSTICE OF APPEAL,
MR. JUSTICE FORBES

No.15.

Notes of Mr.
Justice Forbes.

10 1.7.58. Coram: O'Connor, P.
Briggs, V-P.
Forbes, J.A.

1st July, 1958.

S.R.Wollen for Appellant.

D.N.Khanna for Respondent.

Wollen:

Facts.

1954 written agreement to purchase a portion
of Respondent's farm.

Agreement at p.29 of Record.

20 Actual possession taken by Appellants on 1st
February 1955.

Appellants constructed a dwellinghouse and
other improvements.

Respondent to cause survey to be made.

Survey not carried out till November 1955 -
due to practical difficulty of obtaining a surveyor.

30 Appellants contended that survey, when com-
pleted, was not in terms of Agreement. - v - p.5
of Record - frontage of riparian land only 619
instead of 645 yds. - Plan at p.34.

Title in riparian land is in Crown - but Deed
of Indemnity - para. 4 of Plaintiff.

In the Court
of Appeal for
Eastern Africa.

No.15.

Notes of Mr.
Justice Forbes.
1st July, 1958.
- continued.

Para. 6(3) of Plaintiff.

After survey, prolonged negotiations, but no agreement reached.

Proceedings for specific performance.

Plaint filed May 1957.

Plaint contains number of claims with which this Court not concerned.

Only concerned with claim for specific performance.

No appeal taken against Judge's ruling on other points. 10

At resumed hearing, written agreement tendered in evidence (p.18 of record) but was objected to by Respondent.

Objection was upheld - result was dismissal of suit.

It was considered whether case could succeed on admissions in pleading.

Sanjib etc. v. Santosh etc. 49 Cal. 507
Followed in Kenya.

Mollo etc. v. Lalchand etc. 10 K.L.R. 142 - 20
v. p.19 of Record.

I did concede at trial that in view of those cases I could not argue that agreement should be admitted on basis of admission.

It is not pleaded in Defence that Agreement was void for want of registration.

s.54 of Indian Transfer of Property Act.

Dayal Singh case holds that charge created. 53 L.R. I.A. 214. Suit not maintainable having regard to s.49 of Indian Registration Act. 30

Law in India amended - Act 2 of 1927 - after that decision of P.C. Amendment is by way of insertion of an "Explanation".

Dayal Singh was ex parte before P.C. Will argue this Court not bound by Dayal Singh because of different effect of Crown Lands Ordinance.

Civil Case No. 99/1948 - unreported.

Effect of this ruling is the same as that of trial Judge in this case.

Submit doubts raised as to effect of s.55 of Transfer of Property Act.

No dispute that property in instant case is Crown Land and comes under Crown Lands Ordinance.

Crown Lands Ordinance - Cap.155 (Vol.2).

Refer to s.126 in first place. Similar to s.17 of Registration Act, 1908 - (1)(b). s.127 of Cap.155.

- 10 (1) Does not apply - refers to "sale" as opposed to an agreement to sell.
- (2) Under that sub-section that agreement in this case was excluded in lower Court - p.22 of Record.

Submit Dayal Singh's case does not govern this one - first 3 grounds of appeal - rights in personam.

S.129(e) of Crown Lands Ordinance - similar to s.17(2)(v) of Indian Registration Act.

20 But this case governed not by Indian Registration Act but by Crown Lands Ordinance.

Submit important distinction between s.127 of Crown Lands Ordinance and s.49 of Indian Registration Act.

S.49 says "no document" shall be received etc.

30 S.122 says "no evidence" shall be receivable. In this case no evidence was sought to be adduced of a charge. No suggestion that this was a charge. Only question before Court was specific performance of an agreement. Submit agreement for sale admissible in circumstances of this case.

Mulla Transfer of Property Act 3rd Ed. 393.

Commentary on s.59.

285. Varada etc. v. Juma etc. 43 Mad. 244; 46 I.A. Ruling followed in subsequent cases.

Refer.

Dronamraju etc. v. Vissapragada etc. 46 Mad. 435:438:444.

In the Court of Appeal for Eastern Africa.

No.15.

Notes of Mr. Justice Forbes.

1st July, 1958
- continued.

In the Court
of Appeal for
Eastern Africa.

Submit agreement in this case is admissible in evidence in so far as it relates to rights in personam, and is admissible in suit for specific performance.

No.15.
Notes of Mr.
Justice Forbes.
1st July, 1958
- continued.

Totally different matter if money had been advanced by way of loan.

4 Cal. L.R. 83(1874) - Mattonganey v. Ramnarian etc. p.86.

Submit in instant case document is clearly severable. Ground 5 of Memo. of Appeal. 10

This point was not taken in lower Court, but is a matter of law and therefore open to me here.

S.88 of Crown Lands Ordinance - Written consent of Governor necessary.

If s.55 of Transfer of Property Act creates a charge which requires that Agreement evidencing that charge shall be registered under s.127 of Crown Lands Ordinance, then incumbent that provision of s.88 should also apply.

ss.(3) of s.88. 20

No consent of Governor is endorsed on Agreement. Agreement for sale not required to be endorsed. Consent of Governor has been obtained. Agreement is expressed to be conditional.

Submit ss.(3) refers to instrument passing on interest - not merely an agreement.

In so far as Agreement relates to a charge, consent ought to be obtained and endorsed. Such a consent has not been obtained.

(President: Charge effected by operation of law. Instrument does not purport to effect a charge). 30

S.88(3) nullifies s.55 of Transfer of Property Act.

Para. 4 of Memo. of Appeal.

S.137(1). Plan in this case is not signed by Director of Surveys - it is only a sketch plan.

S.137(2)

S.138(1); (2) is case here.

S.139.

Effect is that unless there is clear and accurate description of land or a plan signed by Director of Surveys, document cannot be registered. Here survey was only 18 months after Agreement signed. S.139 - Very point at issue was because no clear plan.

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Eastern Africa.

No.15.

Notes of Mr.
Justice Forbes.

1st July, 1958
- continued.

10 If decision right, then would be unsafe ever to enter into agreement to purchase land in Kenya where land is sub-divided. Could not be intent of legislature so to restrict transactions in undivided portions of land.

Could have been registered under Cap.161, s.4.

Proviso (8) I submit this document not registrable under Crown Lands Ordinance.

S.17. Document is registrable with leave of Court. S.127. Does require registration "under this Part". But instrument cannot be registered under ss. 137, 138 and 139.

20 Submit ruling of lower Court should be overruled and agreement should be admitted in evidence.

(President: Draw attention to Bashir's case - p.9 of judgment - question whether Transfer of Property Act applies to Crown leases in Kenya).

Adjourned to 10.30 on 2.7.58.

A.G. FORBES, J.A.
1.7.58.

2.7.58. Bench and Bar as before.

2nd July, 1958.

30 Wollen continues:

Bashir's case - p.9 of judgment.

Would submit that Transfer of Property Act applied by Order in Council.

Art. 4(2) of 1921 Order in Council.

S.127 of Crown Lands Ordinance ss.(2) -

No charge is registrable unless it is created by an instrument.

Here charge created by operation of Transfer of Property Act, if at all.

In the Court
of Appeal for
Eastern Africa.

No.15.

Notes of Mr.
Justice Forbes.

2nd July, 1958
- continued.

i.e. created not by instrument but by operation of law.

Section does not envisage the creation of a charge by operation of law.

Therefore submit no charge is created by the Transfer of Property Act.

Crown Lands Ordinance is last word on the matter. S.55(6)(b) of Transfer of Property Act - Judgment of trial Judge.

Agreement "evidences the creation of a charge". Ordinance envisages that charge may only be created by registrable instrument except in case of Government. 10

If so, submit s.129(e) of Crown Lands Ordinance covers the point.

Refer s.88(1) of Crown Lands Ordinance - Agreement not to be entered into without consent of Governor.

ss.(3) submit that "instrument" does not include an agreement. 20

Q. Whether Transfer of Property Act applies at all to Crown land. In India specifically excluded by Crown Grants Act, 1895 from application to "grants" from Crown. Total exclusion of Transfer of Property Act would lead to great confusion.

Should submit Transfer of Property Act applies to Crown Lands except in so far as Crown Lands Ordinance does not overrule it.

Even tho' Act does not apply to Crown grant or Crown lease where Crown a party, the Act does apply to subsequent transactions between subjects in relation to the land granted or leased by the Crown. 30

e.g. S.54 of Transfer of Property Act provides that an Agreement for Sale does not of itself create a charge on such property. That section has been applied to date. If thrown back on common law, agreement for sale would create an equitable interest - such interests never previously recognised.

Khanna:

Defence did not raise issue expressly that agreement was registrable.

Defence did not admit that instrument was registered. 40

If Transfer of Property Act applies, then a charge by operation of law arises.

S.129(c) exempts agreement if no payment made by way of earnest or part payment. Agreement would then simply be a document giving right to obtain another document.

Textual variation between s.49 of Indian Registration Act and s.129 of Crown Lands Ordinance.

Commissioner of Stamps v. Oie Tjong Swan.

10 If anything, Kenya section is stronger and wider.

Indian section says "no document".

Kenya section says "no evidence".

Submit if any recital of charge in document, then that is evidence of the charge, and that is not receivable under Kenya section. Kenya section is a restriction going to the jurisdiction of the Court. Does not have to be invoked by pleading or argument.

20 20 E.R. 734 at p.735. Futteh etc. v. Leelun-ber etc. Submit this is a total prohibition going to the jurisdiction of the Court.

Executory agreements are registered in my experience.

49 Cal.507.

Futteh Chund Sahoo not noticed in that case, so not of great assistance.

But even so did not give effect to lack of pleading, tho' that commented upon.

30 Submit true view is that laid down in Futteh Chaud Sahoo.

Similarly 10 K.L.R.142 (Moloo v. Lalchand) follows 49 Cal.

Decree could not have been had without looking at wording of agreement as regards parcels and in whose party's favour wording was.

Dayal Singh's case - ex parte, but fully considered.

In the Court
of Appeal for
Eastern Africa.

No.15.

Notes of Mr.
Justice Forbes.

2nd July, 1958
- continued.

In the Court
of Appeal for
Eastern Africa.

No.15.

Notes of Mr.
Justice Forbes.
2nd July, 1958
- continued.

Submit effect of Crown Lands Ordinance is to make the two decisions of P.C. applicable with some greater force.

Ruling of de Lestang to same effect.

How can one emit of payment be at same time valid and invalid, admissible and inadmissible, according to different aspects of case. It is either both or nothing. Civ. C.99/48.

Not exempted from registration if it is in favour of anyone other than Crown.

10

Charge springs up from the payment. Recital in Agreement of payment, it furnishes both evidence of consideration and evidence of the charge.

S.127(2) means that charge must be put in writing and registered before it can be proved.

Submit effect of s.49 of Indian Transfer of Property Act and s.127(2) of Crown Lands Ordinance is the same and disqualified the document itself from being given in evidence for any purpose.

S.129(e) itself declares what documents are included in S.127(2).

20

Indian section - "operates to create" - submit no wider. S.127(2) itself gives wider meaning to word "create" in that it contemplates charge arising under statute. Charges arising by operation of law are covered.

Indian cases cited - if in conflict with P.C. decision P.C. must prevail.

But not in conflict.

43 Mad.244 - Turns on special provisions - no general construction to be deduced from it.

30

Mulla, 2nd Ed. p.364 (3rd Ed. p.393). Turns on proviso to S.49 and S.53A. - p.243 of 43 Mad.

Clearly case outside s.17 of Registration Act.

Therefore of no assistance: p.251 of 43 Mad.

46 Mad.435 - Again no reference to Indian Registration Act or other provision shutting out document.

P.443 - turns on express wording of Indian Act. If there severable parts, then rest can be used though part invalid.

Of no help in present case.

4 Cal.83 - Held not possible to sever document.

Section 88 - Point not taken below - doubtful if pure law - depends on evidence.

10 S.83(1) refers to agreement to sell. Submit against Appellant. If consent necessary then agreement void and cannot be carried into effect.

Practice - cannot govern statute. Bashir case. If s.88 requires prior consent, fact that practice is otherwise, it cannot avail. In this case agreement was concluded before consent obtained. Therefore void.

Submit that if by giving evidence of agreement you give evidence of charge, the whole agreement must be excluded.

20 Ss.137, 138 and 139 of Crown Lands Ordinance. Do not deal with compulsion to register, but only with machinery for effecting registration where it is compulsory. Procedural sections. Never has been possible to effect conveyance without a deed plan.

At hearing date, deed plan, such as it was, could have been attached and the agreement registered. Non-registration due to negligence of Plaintiff.

30 Policy of Crown Lands Ordinance is that Courts should not be troubled with boundary disputes - hence insistence on surveyed plan.

P.22 of Record - Cap.161, s.4(g) - Crown land compulsorily registrable under Cap.155.

Riparian land - no title to it which could be transferred. Agreement incorrect to that extent.

Same Solicitor acting for both parties.

If any title to lake land, document would be compulsorily registrable under Cap.161.

Submit S.127(2) overrides s.17.

40 Lake land also Crown land.

In the Court
of Appeal for
Eastern Africa.

No.15.

Notes of Mr.
Justice Forbes.

2nd July, 1958
- continued.

In the Court
of Appeal for
Eastern Africa.

Agree that if any registrable title with regard to lake land it is not registrable under Cap. 155 but under Cap.161.

No.15.

Lake land indivisible from remainder. One single transaction.

Notes of Mr.
Justice Forbes.
2nd July, 1958
- continued.

Bashir case

Submit no bearing on present case.

Only conclusions relevant to this case are -

- (a) as between Crown and subject, a Crown grant is not governed by Transfer of Property Act. 10
- (b) S.111 of Transfer of Property Act displaced by s.83 of Crown Lands Ordinance.

Therefore, Bashir case of no assistance here. Submit appeal should be dismissed.

Adjourned to 2.30 p.m.

A.G.F.

2.30 p.m.

Bench and Bar as before.

Wollen replies:

20

20 E.R.734: No amending legislation followed it. But under old Act. See Dayal Singh - addition in terms of s.129(e).

4 Cal.83: Submit a general principle is established, i.e. that a document inadmissible for one purpose can be admitted for another purpose. p.87 - Document there found not to be divisible. If divisible, Court would have been able to look at section of it. Based also on s.49 - "document" disqualified. 30

Allegation that Agreement could have been reg. at date of trial by attaching plan.

But plan produced by Respondent is very thing on which this matter has come to Court. It is a wrong plan - not the one which should be attached to Agreement.

Crown Lands Ordinance - Intent of legislature as to disputes re boundaries.

Submit nothing in Crown Lands Ordinance to lead to that conclusion. s.55.

In the Court of Appeal for Eastern Africa.

Sole Solicitor acting for both sides. That was not the case. There was a letter from Ennion & MacDougall saying they were acting for both parties. That written 3 years after Agreement entered into and in absence of partner who dealt with Agreement. Arose through misunderstanding.

No.15.

Notes of Mr. Justice Forbes. 2nd July, 1958 - continued.

C.A.V.

A.G. FORBES, J.A.

2.7.58.

10

8.11.58. Bench and Bar as before.

8th November, 1958.

Argument as to costs not reproduced.

Reserved judgment will be delivered later.

A.G.F.

No. 16.

No.16.

JUDGMENT

Judgment.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

22nd November, 1958.

CIVIL APPEAL NO. 42 of 1958

(a) O'Connor P.

20

BETWEEN:- DAVID GEOFFREY EDWARDES and DAPHNE ELIZABETH NAOMI EDWARDES Appellants

- and -

REGINALD ERNEST VERE DENNING Respondent

(Appeal from a ruling and judgment of Her Majesty's Supreme Court of Kenya at Nairobi (Mr. Justice Pelly Murphy) dated the 14th March 1958, in

Civil Case No. 528 of 1957

30

BETWEEN:- DAVID GEOFFREY EDWARDES and DAPHNE ELIZABETH NAOMI EDWARDES Plaintiffs

- and -

REGINALD ERNEST VERE DENNING Defendant)

JUDGMENT

O'CONNOR P.

This is an appeal from a ruling of a Judge of

In the Court
of Appeal for
Eastern Africa

the Supreme Court of Kenya dated 14th March, 1958,
and a decree dated 26th May, 1958.

The matter arises in this way:

No.16.
Judgment.
22nd November,
1958.
(a) O'Connor P.
- continued.

The Appellants who were Plaintiffs in the Supreme Court filed, on the 1st May 1957, a Plaint in which they pleaded that by an agreement in writing dated 17th April, 1954, (which I will call "the Agreement") the Respondent (the Defendant in the Supreme Court) agreed to sell to the Appellants for Shs.200,000 a portion of the Respondent's farm at Naivasha being an area of 180 acres more or less and having a frontage of 645 yards or thereabouts to Lake Naivasha, with the riparian land appurtenant thereto estimated to comprise an area of 67½ acres or thereabouts. The land described as "riparian land" is land lying between that portion of the Respondent's farm which was subject of the Agreement and the line of the water's edge, which line varies according to the rise and fall of Lake Naivasha. The Appellant pleaded that it was a term of the Agreement that the Respondent should cause the land to be surveyed and a deed plan to be issued in respect of it by the Survey Department of the Colony. In or about November, 1955, the Respondent caused a survey to be made, but, according to the Appellants, this survey was not in accordance with the Agreement, in that inter alia the area of the non-riparian land was 147½ acres only, and the frontage was less than the frontage mentioned in the Agreement. In paragraph 13 of the Plaint, it was pleaded that, in pursuance of the Agreement, the Appellants paid Shs.180,000 to the Respondent on account of the purchase price. This was paid on the 1st February, 1955, and the Appellants entered into possession of the land and the adjoining riparian land before it had been surveyed and constructed a house and buildings thereon. The Appellants pleaded further that, since the survey, the Respondent had claimed 32½ acres, which the Appellants said was theirs, and corresponding riparian land, and had trespassed on their (the Appellants') land. The Appellants claimed specific performance of the Agreement and prayed that the Respondent be ordered to cause a survey to be made of land having a frontage of 645 yards to Lake Naivasha and an area of 180 acres more or less, to cause a deed plan of the land to be issued and to cause the boundaries of the riparian land to be surveyed and demarcated in accordance

with the frontage and area aforesaid; and further, to execute a proper conveyance of the land of the Appellants accordingly. Alternatively, the Appellants claimed rectification of the Agreement and specific performance of it as rectified, or damages for falsely representing the extent of frontage and area of the land, which damages they calculated as the difference between the value of the land as represented and the value of the land as surveyed, and damages for trespass and special damage for cutting crops. The Appellants also claimed an injunction to restrain the Respondent from entering on their land and cutting crops or timber and removing the same.

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In his Defence, the Respondent admitted the making of the Agreement and that by it he had agreed to sell to the Appellants, for Shs.200,000/-, a portion of his farm, of the area and dimensions mentioned above. He said that he had caused a survey to be made of that part of his land described in Clause 1 of the Agreement and that the survey had disclosed that the area of the piece of land so described was 147 acres only and not 180 acres more or less as stated in the Agreement. Otherwise he denied the correctness of the allegations contained in the Plaint and maintained that the land surveyed was the land described in Clause 1 of the Agreement. He raised certain other matters not material to this appeal and said that the Appellants were not entitled to an order for specific performance of the Agreement or to the other relief claimed. He counterclaimed for an order for rectification of the Agreement to make it conform with the real understanding between himself and the first Appellant or alternatively that he be allowed to perform his part of the Agreement by transferring 180 acres of his non-riparian land to the Appellants.

In their Reply and Defence to the counterclaim the Appellants raised points not material to the present appeal.

We have been informed by Counsel that by a Ruling delivered on or about 10th January, 1958 (of which there is no copy in the Record, but which I will refer to as "the Ruling of 10th January") the Court dismissed, on a preliminary point the claims for rectification of the Agreement, damages and an injunction, without having made any order as to the

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costs of the claims dismissed, leaving to be decided the claims for specific performance and for further and other relief and costs.

The hearing of what remained of the suit was commenced on the 12th March, 1958, when the first Appellant gave evidence to the effect that he had entered into a written agreement (i.e. the Agreement) at the end of 1954 to purchase a portion of the Respondent's farm at Naivasha. He tendered the Agreement. Mr. Khanna, for the Defendant, thereupon objected to the Agreement being put in evidence, on the ground that it was an instrument which required registration under Section 126 of the Crown Lands Ordinance (Cap.155) and had not been registered. Mr. Khanna submitted that, by the operation of Section 55(6)(b) of the Indian Transfer of Property Act, 1882, the Agreement created a charge for the amount of the earnest money and purchase money (Shs.180,000) paid under it. He submitted that the Agreement, being a registrable instrument and not registered, could not, under Section 127 of the Crown Lands Ordinance, be admitted in evidence.

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The learned Judge accepted the arguments of Mr. Khanna, and following the decision of the Privy Council in Dayal Singh v. Inder Singh (1926) 53 I.A. 214, which he considered governed the present case; and the decision of De Lestang J. in Ebrahimji Gulamhussein Anjarwalla and others v. Sheikh Fazal Elahi (Kenya Civil Case No.99 of 1948 unreported), held that he was precluded from receiving the Agreement in evidence. Accordingly, by a Decree dated the 14th March, 1958, he dismissed the Plaintiffs' claims and ordered that the Plaintiffs pay to the Defendant the taxed costs of the suit down to and including that decree. We have been informed that the costs have been taxed and paid. Against the whole of the Decree of 14th March, 1958, the Appellants appeal, by leave to this Court.

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The Agreement which, as already mentioned, is dated the 17th April, 1954 was made between the Respondent (therein called the Vendor) of the one part and the Appellants (therein called the Purchasers) of the other part. After reciting that the Vendor was registered as the owner as lessee from the Crown, for all the unexpired residue of a term of 99 years from the 1st May, 1906, of land

therein described and that the Vendor had agreed with the Purchasers for the sale to them of a portion of that land at the price of Shs.200,000/-, it was agreed between the parties that the Vendor should sell and the Purchasers should purchase the land described in the Agreement having a frontage of 645 yards to Lake Naivasha or thereabouts and containing an area of 180 acres more or less together with the riparian land appurtenant thereto estimated to contain $67\frac{1}{2}$ acres or thereabouts, as more particularly delineated and described on the Sketch Plan annexed to the Agreement, together with improvements, but subject to the apportioned rent payable to the Crown and to the performance and observance of the covenants in the Head Lease. By Clause 2 of the Agreement it was stipulated that the purchase price of Shs.200,000/- should be paid, as to Shs. 8,000/- on the signing of the Agreement, the receipt of which the Vendor acknowledged, as to Shs.172,000/- on or before the 30th April, 1954, and the balance on delivery by the Vendor to the Purchasers of a proper legal assignment. It was admitted on the pleadings that Shs.180,000/- that is the first two instalments, had been paid. The Agreement permitted the Purchasers to take possession of the premises from the date of payment of the second instalment of the purchase price, and possession was taken accordingly. Clause 4 of the Agreement reads:

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"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".

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By Clause 7 of the Agreement it was provided that upon payment of the second instalment of the purchase price (when the Purchasers would be entitled to take possession) the Vendor should become the tenant of the said piece of land from the Purchasers at a monthly rent and that such tenancy should continue for a minimum period of six months and be thereafter terminable by three months' notice in writing. It is difficult to see how the Vendor could become a tenant holding from the Purchasers until the Purchasers had become owners of the land, which would not occur until an

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assignment was executed. Under Section 54 of the Indian Transfer of Property Act the Purchasers would not become equitable owners of the land or obtain any interest in it merely by reason of the execution of the Agreement, and a mere licence to occupy the land such as was conferred by Clause 3 would not entitle them to grant a tenancy. I do not think, therefore, that Clause 7 of the Agreement created an interest in the land.

Clauses 8 and 9 of the Agreement read as follows:- 10

"8. The Vendor shall with all convenient speed cause the said premises to be surveyed and Deed Plans issued by the Survey Department of the said Colony.

9. Within Twenty eight days of the delivery of the relevant Deed Plan to the Purchasers' Advocates the Purchasers shall make payment of the balance of the purchase price in full to the Vendor and the Vendor with all other necessary parties (if any) shall thereupon execute and deliver to the Purchasers a legal Assignment of the said premises hereby agreed to be sold". 20

The other clauses of the Agreement are not relevant to this appeal.

It will be noted that:

(a) The Agreement is an agreement for sale of a leasehold interest in land situate in the Highlands of Kenya and held under a Crown lease and registered under the Crown Lands Ordinance (Cap. 155 of the Laws of Kenya). It does not, in terms, purport to transfer or charge the land or to create, declare or assign any right, title or interest to or in the land, though it confers a licence to the purchasers to take possession. It creates a right to obtain another document, that is to say a valid assignment to the Purchasers of the leasehold interest of the Vendor. Whether a charge for the instalments of the purchase money paid is created by operation of law, i.e. by operation of section 55(6)(b) of the Indian Transfer of Property Act, is a question which will be discussed hereafter. 30 40

(b) Notwithstanding the words of Clause 4

"the purchase and sale hereby effected", the Agreement does not effect a sale as defined by Section 54 of the Indian Transfer of Property Act, 1882. It is an agreement for sale merely.

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10 (c) The purchase and sale are expressly made
subject to the consents thereto of the Land Control
Board and the Governor: if such consents are re-
fused, the Agreement is to become null and void and
any payment thereunder is to be refunded. We were
informed from the Bar that the consent of the Gov-
ernor had been obtained since the Agreement was
signed but not prior to its execution. The consent
of the Governor was not endorsed on the original
Agreement which had been tendered in the Court be-
low and which was on the Court file. We have no
information whether the written consent of the Land
Control Board was obtained pursuant to Section 7(1)
of the Land Control Ordinance (Cap.150) or whether
20 or not that Board tendered advice to the Governor
under Section 8(1)(a) of that Ordinance.

(d) The Agreement has annexed to it a sketch
plan only, by reference to which the property was
more particularly described. This plan is not
signed by the Director of Surveys and accordingly,
the document is precluded from being accepted for
registration by Section 137(1) of the Crown Lands
Ordinance. As a matter of practice, the Director
would always refuse to sign a sketch plan of this
type.

30 The relevant provisions of the Crown Lands Or-
dinance are:

40 "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, alien-
ate, 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

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

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.

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(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:

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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".

Section 126 reads as follows:

"126. 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".

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Section 127 of the Crown Lands Ordinance, so far as material, provides:

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"127. No evidence shall be receivable in any civil court:-

(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.

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10 (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 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".

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There follows a proviso dealing with equitable mortgages by deposit of title deeds.

Section 129, so far as material, provides :-

"Nothing in the last two preceding sections shall apply to -

20 (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"

Section 137(1) reads:-

30 "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 the Director of Surveys, shall not be accepted for registration".

Section 138 requires, inter alia, that every document produced for registration shall contain an accurate and clear description of the property affected thereby; and section 139 provides that documents which do not state the particulars required by Section 138 shall not be admitted to registration except with the sanction of the Principal Registrar.

40 As already stated, the objection by learned Counsel for the defence to the admission of the Agreement in evidence was based on Section 55(6)(b) of the Indian Transfer of Property Act, 1882. That Act was applied to Kenya by Article 11(b) of the

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East Africa Order in Council, 1897. In the Commissioner of Lands v. Sheikh Mohamed Bashir (Civil Appeal No.76 of 1957 E.A.C.A.) unreported one of the questions raised was whether the provisions of Section 111 of the Indian Transfer of Property Act relating to forfeiture of a lease applied to a grant of Crown land in Kenya. It was held that they did not. In the course of my judgment in that case I said that the Indian Crown Grants Act, 1895, had declared that the Transfer of Property Act, 1882, should not apply or be deemed ever to have applied to Crown lands in British India and that, for that reason, the Transfer of Property Act would not, in 1897 (when the Act was applied to Kenya), have applied to Crown land in Kenya. This was inaccurately stated. The Indian Crown Grants Act, 1895, enacted that the Indian Transfer of Property Act, 1882, should not apply or be deemed ever to have applied to Crown grants, as regards the construction and effect of such grants. Similarly, the Indian Transfer of Property Act would not apply to, or affect the construction of Crown grants in Kenya as between Crown and subject (which was the matter before the Court in Bashir's case); but, so far as I am aware, there is nothing to negative the application of the Indian Transfer of Property Act, 1882, to dealings between subject and subject relating to lands held upon Crown grants or leases, which is the matter raised in the present case. I will, therefore, proceed on footing that Section 55(6)(b) of the Indian Transfer of Property Act, 1882, applies in the present case.

Section 55 of the Indian Transfer of Property Act provides; among other things, that, in the absence of a contract to the contrary, the buyer and seller of immovable property, respectively, are subject to the liabilities, and have the rights mentioned in the rules which follows. Paragraph (b) of Rule 6, which follows, says inter alia that the buyer is entitled, unless he has improperly declined to accept delivery of the property to a charge on the property as against the seller for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and interest on such amount and, when he properly declines to accept delivery, also for the earnest (if any).

The argument against the admission of the Agreement in evidence was that by virtue of Section

55(6)(b) it created a charge over the property for the part of the purchase money paid under it, i.e. it created or conferred an interest in land: therefore it required to be registered under Section 126 of the Crown Lands Ordinance; and, under Section 127(2), as it had not been registered, no evidence of it was receivable: it would not be excluded from the operation of Section 127 by Section 129(c), because it was itself a document creating an interest in land.

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The learned Judge dealt with the matter as follows:

"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.

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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.

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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 considered that the decision in Dayal Singh v. Inder Singh (1926) I.A. 214 (P.C.) completely governed this case and he held that he was precluded from receiving the Agreement in evidence.

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In Dayal Singh's case an agreement for sale of immovable property acknowledged the receipt of a part of the purchase price paid by the buyer as earnest money. The seller having refused to complete, the buyer sued for specific performance. So

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far as can be ascertained from the report, he did not claim damages or any other relief. The agreement was not registered. It was held that under Section 55(6)(b) of the Transfer of Property Act, 1882, the buyer was entitled to a charge on the property in respect of the earnest money, and that, consequently, the agreement created an interest in the property: with the result that the agreement was required to be registered by Section 17(1)(b) of the Indian Registration Act, 1908, and was not exempt by Section 17(2)(v) thereof. Therefore the suit could not be maintained.

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The Indian Acts considered by their Lordships in Dayal Singh's case are not all obtainable here; but the main statutory provisions which their Lordships were there considering were Section 55 (6)(b) of the Indian Transfer of Property Act (the gist of which is set out above), and Section 17(1)(b) and (2)(v) and Section 49 of the Indian Registration Act, 1908. Section 17(1)(b) made compulsorily registrable "non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immoveable property". Section 17(2)(v) is identical in all material respects with Section 129(e) of the Crown Lands Ordinance set out above. Section 49 of the Indian Registration Act enacts *inter alia* that no document required by Section 17 of the Registration Act to be registered shall affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property unless it has been registered.

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It will be noticed that there are significant differences between the wording of the statutory provisions considered in Dayal Singh's case and the wording of Sections 126 and 127 of the Crown Lands Ordinance. In the first place, Section 17 of the Indian Registration Act refers to "documents" and "instruments" and Section 49 of the Indian Registration Act makes "documents" required by Section 17 to be registered not receivable as evidence of any transaction affecting immoveable property unless registered. This disqualifies the instrument per se in so far as it is to be received as evidence of any transaction affecting immoveable property. On the other hand, Section 127 of the

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Kenya Crown Lands Ordinance says: "No evidence shall be receivable in any Civil Court of a sale, lease charges etc." what is rejected by Section 127 is not the unregistered instrument per se in so far as it is to be received as evidence of any transaction affecting immoveable property, but evidence of certain specified transactions, and of those only, such for instance as a sale, lease mortgage or charge. An instrument may effect a transaction which is required to be registered by Section 126; but might, nevertheless, not itself be excluded from evidence by Section 127, though not registered. Sections 126 and 127 are not co-terminous, as are Sections 17 and 49 of the Indian Registration Act, 1908, considered in Dayal Singh's case. In the second place, the Indian provisions disqualify instruments which purport or operate to create etc. an interest in land. Not only, therefore, are instruments not receivable in evidence which purport to create interests, but expressly also those which create an interest in land by operation of law, e.g. those which confer on a purchaser a charge for purchase money under Section 55 of the Indian Transfer of Property Act. Under the Indian provisions, therefore, such an instrument as the Agreement in this case would not be receivable as evidence of any transaction affecting immovable property comprised therein. But, under Section 127 of the Crown Lands Ordinance, what is rejected is evidence of the sale, lease or other transfer and of a lien, mortgage, charge, etc. of registered land, unless it is effected or created by an instrument in writing and the instrument has been registered under Part XII.

The effect of the decision in Dayal Singh's case seems to have been unacceptable in India, because in the following year an amendment was made to the Indian Registration Act 1908 by adding to Section 17 an 'Explanation' in the following terms:

"A document purporting or operating to effect a contract for the sale of immoveable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money".

No such amendment was made in Kenya. Sale agreements providing for payment of a deposit on execution are common here, and may be required to be registered and registrable if they fall within

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Section 126 and comply with Sections 137 and 138.
But whether they are receivable in evidence or not
depends on Section 127.

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Notwithstanding any consideration of incon-
venience we are bound to follow Dayal Singh's case
in so far as it was decided upon an Indian Act
identical in wording or in pari materia with the
provisions of the Crown Lands Ordinance; but the
effect of the differences in the legislation in the
two countries must be considered. As has been
pointed out above, what is rejected in Kenya is
evidence of specified transactions - of the sale,
lease, transfer or charge etc. of registered land.
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. I am of
opinion that the Agreement was not excluded by
Section 127(2) from being received as evidence in
this suit. It has not been argued that the Agree-
ment is evidence of a 'sale' under Section 127(1)
and I do not think that it is. The words 'or other
transfer' in that sub-section make it plain that
'sale' in this context is a completed sale, a
transfer of ownership (cf. Section 54 of the Indian
Transfer of Property Act, 1882) and not an execu-
tory agreement to sell.

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It follows that, if I am right that the agree-
ment was not within Section 127 and was not pre-
cluded by that section from being received in evi-
dence for the purposes of the present suit, it is
unnecessary to consider the effect of Section 129
(c) upon which sub-section the decision of the
Privy Council in Dayal Singh's case; having been
given upon a virtually identical provision of an
Indian Act, is binding upon this Court.

30

This is sufficient to dispose of the appeal;
but there was a further ground raised by the Ap-
pellant with which I had better deal, in case I am
wrong in holding that the Agreement was not caught
by Section 127. This contention was expressed as
follows in Ground 5 of the Memorandum of Appeal:

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"5. In the further alternative the learned Judge
failed to appreciate that as the Respondent
(Vendor) had failed to comply with the pro-
visions of Section 88 of the Crown Lands
Ordinance, the agreement for sale in so far
as it purports to effect a charge is void

and does not therefore require to be registered".

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10 Mr. Wollen's argument may be summarised as follows: The land was situate in the Highlands. The reason of the learned Judge for excluding the Agreement from evidence was that, by virtue of Section 55 of the Indian Transfer of Property Act, the Agreement effected a charge over the land: it was, therefore, excluded from Section 129(e) and caught by Section 127. But, under sub-section (3) of Section 88 read with sub-section (1), an instrument which has not the Governor's consent endorsed upon it is void in so far as it purports to effect a charge over the land in the Highlands. The original Agreement, which had been tendered in the Court below and was on the Court file for reference, did not have any consent by the Governor endorsed upon it. It could not, therefore, have validly effected a charge. Accordingly, notwithstanding Dayal Singh's case, Section 129(e) would apply to the Agreement which would, by that sub-section, be excluded from Section 127 and be exempted from the necessity for registration.

30 Mr. Khanna argued that this point was not taken in the Court below and could not be taken now, as it depended on evidence: the Governor's consent might have been endorsed on the counterpart of the Agreement. He drew attention to the words in Section 88(1) "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" and argued that the consent must be obtained before the Agreement was entered into: this had not been done and the Agreement was, therefore, void and the suit should be dismissed: if, by giving evidence of the Agreement, one automatically gave evidence of a charge, the Agreement could not be received.

40 As regards Mr. Khanna's first argument: In Connecticut Fire Insurance Co. v. Kavanagh (1892) A.C. 473 (P.C.) Lord Watson said at p.480:

"When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be

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doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea".

10

I am satisfied by the fact that the original Agreement bears no endorsement of the Governor's consent, that no such endorsement has, in fact, been made on it. If an endorsement had been made on the counterpart and not on the original (which would be a very unusual procedure) I feel sure that that endorsement would have been copied upon the copy of the Agreement reproduced in the Record, since it would clearly be relevant under Ground 5 of the Memorandum of Appeal. I am satisfied that it is established beyond doubt that the Agreement does not bear an endorsement of the Governor's consent. Accordingly, I think, since a substantial point of law is involved, that we ought to entertain the question raised in Ground 5, notwithstanding that it was not taken below.

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Mr. Khanna, in his second contention, relied on the words in sub-section (1) of Section 88, which prohibit the entry into agreements for any of the transactions referred to in the sub-section. I think that that argument is answered by the form of the Agreement. The sale of the land was expressly made subject to the consent of the Governor. That was not an agreement to sell land without the consent of the Governor, which is what is prohibited by sub-section (1). I see no reason for holding that the consent of the Governor to an agreement in that form must be obtained before the agreement is entered into or that such an agreement is made void by Section 88. I think that sub-section (3) and the proviso thereto indicate that the consent of the Governor may be given after an agreement is entered into.

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Mr. Khanna's last-mentioned argument has already been dealt with. I have already indicated my opinion that the Agreement was not evidence of a charge, it was not tendered as such, and any evidence of a charge would have been irrelevant to any

issue arising on the pleadings in this case. I have drawn attention to the differences between Section 127 and the statutory provisions considered in Dayal Singh's case.

10 I think Mr. Wollen's argument on the effect of Section 88 is sound, if the Agreement is an 'instrument which purports to effect' a charge within the meaning of sub-section (3). It does not in terms 'purport' to effect a charge. I have said that, in my opinion, the Agreement is not 'evidence' of a charge within Section 127 which deals with the reception of evidence in courts, unlike Section 88 which avoids the instrument in so far as it offends. But the agreement does not purport to acknowledge the receipt of earnest money which, by the operation of Section 55(6)(b) of the Indian Transfer of Property Act, effects a charge. To that extent it 'purports to effect' a charge. The mischief aimed at by Section 88 is the effecting, without the consent of the Governor, of the transactions referred to, and, clearly, charges arising by operation of law on the execution of a particular instrument would be within the mischief of the section no less than charges created by express words of charge. For instance, I think that a memorandum of equitable mortgage or charge created by deposit of title deeds would be an 'instrument' within sub-section (3) of Section 88, notwithstanding that it merely recorded the deposit of the deeds as security for a loan and did not contain express words purporting to charge the property. It may be that the expression "purports to effect" in the context of sub-section (3) of Section 88 is used for the reason that, under the sub-section, the instrument cannot be said to "effect" the transaction, because its effect is avoided unless the terms and conditions of the transaction have received the Governor's consent. If such consent has not been received, the instrument does not "effect" the transaction; but could be said to "purport to effect" it.

40 I have also entertained some doubts as to whether an instrument which does not have endorsed upon it the written consent of the Governor, is void if, in fact, that consent has been obtained. I am inclined to think, however, that the words "which shall be endorsed on the instrument" are mandatory, and that the endorsement, and that only, is the evidence which the Ordinance requires of the

In the Court
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No.16.

Judgment.

22nd November,
1958.

(a) O'Connor P.
- continued.

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No.16.

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22nd November,
1958.

(a) O'Connor P.
- continued.

fact that the consent has been obtained.

My conclusion on Ground 5 is, therefore, that the Agreement is an instrument which "purports to effect" a charge within the meaning of Section 88 (3). It is accordingly, void, under that subsection, to that extent, by reason of the fact that the Governor's consent to its terms and conditions is not endorsed upon it and such endorsement would (apart from section 65 of the Indian Evidence Act, which is not shown to be applicable) be the only receivable evidence of such consent. It follows that the Agreement does not create a charge: it, therefore falls within Section 129(e) and is thereby excluded from the operation of Section 127 (assuming that Section 127 would otherwise apply to it. This is not inconsistent with the decision in Dayal Singh's case as to the correct interpretation of Section 129(e). It is a matter of construing the effect on Section 129(e) of a statutory provision relating to land in the Highlands of Kenya, which does not exist in the Indian legislation considered by their Lordships in Dayal Singh's case.

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I had better also mention briefly Ground 4 of the Memorandum of Appeal and Mr.Wollen's arguments based on Sections 137, 138 and 139 of the Crown Lands Ordinance.

Mr. Wollen contended that Section 127 of the Ordinance could not apply to exclude a document from evidence on the ground that it was not registered, if it was not, in fact, registrable because the plan attached to it was a sketch plan only and was not signed by the Director of Surveys as required by Section 137(1). He also contended that the Agreement was not registrable by reason of Sections 138 and 139 in that it did not contain an accurate and clear description of the property affected thereby, its boundaries, extent and situation. He said that surveyors' plans, which alone the Director of Surveys would sign, took months to obtain; and, moreover, that it was impossible for the parties to comply with Section 138 because a decision on what property was affected by the Agreement and a clear description of it was precisely what the parties had not got and sought to obtain in the suit.

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Mr. Khanna argued that Sections 137, 138 and 139 were merely machinery sections and that the

fact that the parties to the Agreement might be unable to comply with the provisions of those sections did not avoid the obligations to register the document under Section 127.

If the Agreement were registrable under Section 127, I should be inclined to agree with Mr. Khanna; but I have held that it is not so registrable.

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22nd November,
1958.

(a) O'Connor P.
- continued.

10 I would allow the appeal and set aside the Ruling of the learned Judge rejecting the Agreement as inadmissible in evidence. In consequence the decree must be set aside and the suit must proceed.

We have heard argument on the question of costs. Mr. Khanna has argued as regards the costs of the appeal, that the Appellants have succeeded only on a point of law not taken in the Court below and should, therefore, be deprived of their costs and no order as to costs should be made.

20 This is not correct. The Appellants have succeeded on their main point that the learned Judge was wrong in holding that he was bound by Dayal Singh's case because of the difference between the provisions of the Kenya Ordinance and the Indian Acts considered in Dayal Singh's case, and that the Agreement was not within Section 127 of the Crown Lands Ordinance and was admissible in evidence. This point was taken in the Court below and I have
30 already said in this judgment that, in my view, that was sufficient to dispose of the appeal. It is true that the Appellants also succeeded on their argument based on Section 88 which was not raised below: but that is additional and is no reason for depriving them of their costs of the appeal. I think that the Appellants should have their costs of the appeal.

As to the costs in the Supreme Court, Mr. Khanna argues:

40 (a) that, although the Memorandum of Appeal purports to appeal against the whole of the Decree of the 14th March, there are no Grounds of Appeal relating to the claims previously decided by the Ruling of the 10th January, or relating to anything but the claim for specific performance;

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(a) O'Connor P.
- continued.

(b) that the Ruling of the 10th January is not appealed against and is not before us and that costs of the claims thereby decided must follow the event and that we should not set aside the order re costs contained in the Decree of the 14th March, but should only vary it by directing a deduction from the costs of the suit of the costs attributable to claim No.1.

I would agree if the Supreme Court had dealt in the Ruling of 10th January with the costs of the claims then disposed of. But it did not deal with the costs of those claims until it had been held (erroneously I think) that the Defendant succeeded also on claim 1 by reason of his preliminary objection. The only order as to costs is that in the Decree of 14th March and the whole of that is appealed against. I do not think that we should fetter the discretion of the Judge who will hear the suit as to the costs of the whole of it or attempt to make an apportionment on papers not before us. No doubt the Judge will bear in mind, when dealing with the costs of the suit, that the Defendant succeeded on the claims dismissed by the Ruling of the 10th January. The costs of the suit already paid should, in my opinion, be repaid and those costs should be costs in the cause.

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DATED at Nairobi the 21st day of November,
1958.

K.K.O'CONNOR,
President.

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(b) Briggs V.P.

BRIGGS V.P.

I have read the judgment of the learned President and am in full agreement with his reasoning and conclusions as regards the essential differences between the Indian Registration Act and the Crown Lands Ordinance. I agree that those differences make the decision of the Privy Council in Dayal Singh v Inder Singh, 53 I.A. 214, inapplicable to the present case. The only doubt which I feel as regards this part of the judgment is that, although Section 127 does not, I think, preclude the reception of the agreement in evidence in support of a claim for specific performance, the agreement, in so far as it operates to create a charge, is apparently within the wording of Section 126, which provides that "All transactions entered into, affecting or conferring or purporting to

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confer ... limit or extinguish any right, title, or interest ... to, in or over land ... shall be registered". In consequence of the provisions of Section 55(6)(b) it might be argued that this Agreement did affect the title of the Vendor by creating a statutory charge against it, and did confer a corresponding interest on the purchaser. I think there are two possible answers to this argument, first, that assuming it to be correct, Section 126 alone is *brutum fulmen* and does not affect substantive rights. The sanctions for enforcing registration are provided by Section 127, and are not such as to affect this agreement. The second answer is that, in interpreting the words "Transactions entered into" in Section 126, one may be guided both by the general scheme of the Ordinance and by the express words of Section 88 (1), which distinguishes between "transactions" and "agreements for transactions", and clearly restricts the meaning of "transactions" so as to exclude an executory agreement to effect a "transaction". I think it is permissible to say that "transaction" in Section 126 has a similarly limited meaning. It is perhaps a slight support to this argument that Section 129(e) does not use the word "transaction".

As regards Ground 5 of the Memorandum of Appeal, I again agree with the Learned President. It is clear from the wording of Section 88(3) that an instrument may be avoided in part and remain valid in part. It is avoided to the extent that were it not for the provisions of the sub-section, it would effect one of the "transactions" (In the special sense) governed by the first part of Section 88(1). In so far as it would not have that effect, it remains in full force. This agreement is, I think, typical of such severable instruments. The statutory charge is avoided, but otherwise the agreement stands. It is then a document precisely within the terms of Section 129(e), and is exempted from registration.

I confess to a feeling of some relief at being able to reach this conclusion. Registration of these agreements is normally impossible, because no proper plan exists at the time when they are made. If the decision of the Supreme Court were to stand, either legislation would be necessary, or conveyancers would be obliged to insert, in every agreement for sale of land which acknowledged a part-payment, a provision negating the operation of Section 55(6)(b). This would be a

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grave trap for the unwary, and it must be remembered that agreements of this kind are often prepared by laymen.

No.16.

I agree with the order proposed by the learned President.

Judgment.

DATED at Nairobi the 10th day of November, 1958.

22nd November,
1958.

F.A.BRIGGS,

(b) Briggs, V.P.
- continued.

Vice-President.

(c) Forbes, J.A.

FORBES, J.A.

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I agree.

A.G.FORBES,

Justice of Appeal.

Nairobi,

Dated 22nd November, 1958.

DELIVERED on 22nd November, 1958, at Nairobi.

No.17.

No. 17.

Order.

ORDER

22nd November,
1958.

In Court this 22nd day of November, 1958.

Before the Honourable the President (Sir Kenneth O'Connor)

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the Honourable the Vice-President (Mr. Justice Briggs)

and the Honourable Mr. Justice Forbes, a Justice of Appeal.

This Appeal coming on for hearing on the 1st and 2nd days of July, 1958, in the presence of Mr. S.R.Wollen, Advocate for the Appellants and Mr. D.N. Khanna, Advocate for the Respondent, and on the 8th August, 1958, for judgment when the Appeal was stood over for argument as to costs, and this Appeal standing for argument as to costs on the 8th November, 1958, when the Appeal was stood over for judgment, and this Appeal standing for judgment this 22nd day of November, 1958, IT IS ORDERED that the Appeal be and is hereby allowed AND THAT the Ruling of Her Majesty's Supreme Court of Kenya (Mr. Justice Pelly Murphy) dated the 14th March, 1958, be set aside AND THAT the decree of Her

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Majesty's Supreme Court of Kenya dated the 26th May, 1958, be set aside AND THAT this suit do proceed AND IT IS FURTHER ORDERED that the Respondent do pay to the Appellants the costs of this Appeal as taxed by the Registrar of the Court AND THAT the costs of the suit already paid by the Appellants to the Respondents be repaid and all costs in the suit be dealt with by the Judge at the trial of the action.

In the Court of Appeal for Eastern Africa.

No.17.

Order.

22nd November, 1958

- continued.

10 GIVEN under my hand and the Seal of the Court at Nairobi, the 22nd day of November, 1958.

F. HARLAND.

Registrar.

ISSUED this 10th day of January, 1959.

No. 18.

ORDER GRANTING FINAL LEAVE TO APPEAL TO THE PRIVY COUNCIL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

20 CIVIL APPLICATION NO.1 of 1959

(In the matter of an intended Appeal to Her Majesty in Council)

BETWEEN:- REGINALD ERNEST VERE DENNING Applicant

- and -

1. DAVID GEOFFREY EDWARDES and

2. DAPHNE ELIZABETH NAOMI EDWARDES

Respondents

30 (Intended Appeal from the final judgment of the Court of Appeal for Eastern Africa Sessions holden at Nairobi dated 22nd November, 1958, in Civil Appeal No.42 of 1958, and the formal order thereof, of the same date,

BETWEEN:- DAVID GEOFFREY EDWARDES and DAPHNE ELIZABETH NAOMI EDWARDES

Appellants

- and -

REGINALD ERNEST VERE DENNING Respondent)

No.18.

Order granting Final Leave to Appeal to Privy Council.

22nd April, 1959.

In the Court
of Appeal for
Eastern Africa.

IN CHAMBERS

this 22nd day of April, 1959.

Before The Honourable Mr. Justice Windham, Justice
of Appeal.

No.18.

ORDER.

Order granting
Final Leave to
Appeal to Privy
Council.

22nd April,
1959

- continued.

UPON the application presented to this Court on the 16th day of April, 1959, by Counsel for the above-named Applicant for final leave to Appeal to Her Majesty in Council AND UPON READING the Affidavit of Mohamed Bakhsh of Nairobi in the Colony of Kenya Clerk sworn on the 15th day of April 1959 in support thereof and the exhibits therein referred to and marked "MB1" and "MB2" AND UPON HEARING Counsel for the Applicant and for the Respondents THIS COURT DOETH ORDER that the application for final leave to appeal to Her Majesty in Council be and is hereby granted AND DOETH DIRECT that the Record including this Order be despatched to England within fourteen days from the date of issue of this Order AND DOETH FURTHER ORDER that the costs of this application do abide the result of the appeal.

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GIVEN under my hand and the Seal of the Court at Nairobi, the 22nd day of April, 1959.

F. HARLAND,
Registrar.

ISSUED this 22nd day of April, 1959.



E X H I B I T S

Exhibits

AGREEMENT

Agreement.

KENYA REVENUE	KENYA REVENUE	SD £6	1/- Stamp
THREE POUNDS	THREE POUNDS		Penalty £1
KENYA REVENUE			
TEN SHILLINGS			

17th April 1954.

10 AN AGREEMENT made the Seventeenth day of April One thousand nine hundred and fifty four

BETWEEN REGINALD ERNEST VERE DENNING of Naivasha in the Colony of Kenya Settler (hereinafter called the Vendor which expression shall where the context so admits include his personal representatives and assigns) of the one part and DAVID GEOFFREY EDWARDES of Naivasha aforesaid a Lieutenant Colonel in Her Majesty's Army (Retired) and DAPHNE ELIZABETH NAOMI EDWARDES his wife (hereinafter called the Purchasers which expression shall where the context so admits include their respective personal representatives and assigns) of the other

20 part W H E R E A S the Vendor is registered as the owner as Lessee from the Crown for all the unexpired residue of the term of Ninety Nine years from the First day of May One thousand nine hundred and six of ALL THAT piece or parcel of land comprising Two thousand five hundred and forty eight decimal four acres or thereabouts situate in the Naivasha District of the said Colony of Kenya being

30 portion of Number 416/2 SUBJECT to the payment of the apportioned yearly rent payable to the Crown and to performance and observance of the covenants and conditions contained in the Head Lease relating to the said premises which said piece or parcel of land is more particularly delineated and described on the Plan annexed to an Indenture of Assignment dated the First day of June One thousand nine hundred and ten and made between Bertram Gray Allen (therein described) of the first part John Dawson Hopcraft (therein described) of the second part and George Edward Tuson (therein described) of the

40 third part and thereon bordered red AND WHEREAS the Vendor has agreed with the Purchasers for the sale to them of a portion of the said land at the price of Shillings Two hundred thousand free from encumbrances NOW IT IS HEREBY MUTUALLY AGREED by and between the parties hereto as follows :-

1. THE Vendor agrees to sell and the Purchasers agree to purchase ALL THAT piece or parcel of land

Exhibits

Agreement.

17th April 1954

- continued.

having a frontage of Six hundred and forty five yards to Lake Naivasha or thereabouts (the South East boundary running in part along the edge of the present lucerne crop which is Seventy five feet from the wall of the big windmill belonging to the Vendor) and containing an area of One hundred and eighty acres more or less TOGETHER WITH the riparian land appurtenant thereto estimated to comprise an area of Sixty seven and one half acres or thereabouts as the said piece or parcel of land is a portion of the above recited premises and is more particularly delineated and described on the Sketch Plan annexed hereto and thereon bordered red TOGETHER ALSO with all improvements now erected and being thereon but SUBJECT to the apportioned rent payable to the Crown as may be assessed in respect of the said premises AND SUBJECT ALSO to performance and observance of the covenants and conditions contained in the Head Lease from the Crown so far as the same affect the said premises

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2. 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.
- (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

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3. THE Purchasers shall be permitted to take formal possession of the said premises as from the day upon which payment of the second instalment of the purchase price is made to the Vendor under Clause 2(b) hereof and shall as from such date pay all outgoings in connection therewith and be entitled to all incomings except the proceeds of crops taken off by the Vendor during his tenancy of the premises hereinafter mentioned

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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

Exhibits
Agreement.

17th April 1954
- continued.

5. UPON completion of the sale the Vendor shall deliver to the Purchasers free of cost to them one second hand Hay mower and one second hand Hay rake both of which shall be in good working order.

10 6. THE Vendor shall at his own expense carry out all formalities required to obtain conversion of the Crown Lease under which the said land is held from a term of Ninety nine years to a term of Nine hundred and ninety nine years (approval of which has already been given by Government) and shall reimburse the Purchasers any expenses they may incur in this connection

20 7. UPON payment of the second instalment of the purchase price in accordance with Clause 2(b) hereof the Vendor shall become the tenant of the said piece of land from the Purchasers at a monthly rental of Shillings One thousand payable on the last day of each calendar month in arrear and such tenancy shall continue for a minimum period of Six months terminable thereafter on either side by Three months previous notice in writing During such tenancy the Vendor agrees that he will farm cultivate manure and manage the said property in a good and husbandlike manner according to the most approved methods of husbandry followed in the District and will keep the arable land in good heart and condition and will not allow any part to become impoverished injured or deteriorated and will keep the same clean and free from weeds and will make an adequate return in artificial or other manures for all hay straw fodder roots and green crops sold or removed from the same

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40 The Purchasers shall be permitted access to the premises during the said tenancy for the purpose of erecting and constructing a dwelling house with ancilliarities including outbuildings and road of access

8. THE Vendor shall with all convenient speed cause the said premises to be surveyed and Deed Plans issued by the Survey Department of the said Colony.

Exhibits

Agreement.

17th April 1954

- continued.

9. WITHIN Twenty eight days of the delivery of the relevant deed plan to the Purchasers' Advocates the Purchasers shall make payment of the balance of the purchase price in full to the Vendor and the Vendor with all other necessary parties (if any) shall thereupon execute and deliver to the Purchasers a legal Assignment of the said premises hereby agreed to be sold.

10. THE said Assignment shall be prepared by the Purchasers' Advocates and shall be made subject to the Crown rent assessed in respect of the said premises and subject also to the covenants and conditions contained in the Head Lease so far as the same affect the said premises but otherwise free from encumbrances. 10

11. IF the Purchasers shall make default in payment of the balance of the purchase price or any part thereof when the same shall fall due or within Fifteen days thereafter then and in any such case the Vendor may at his option either :- 20

(a) Sue the Purchasers forthwith for the whole balance of the said purchase price or

(b) Rescind the sale hereby agreed and re-sell the said premises and sue the Purchasers for the ultimate deficit (if any) after crediting the Purchasers (against the balance of the purchase price as aforesaid) with the net proceeds on such re-sale or keep for himself any ultimate profit on such re-sale. 30

12. ALL expenses and costs incidental to the survey of the said premises and having the Deed Plans issued shall be borne by the Vendor and all legal costs and expenses incidental to the preparation and completion of this Agreement and to the said Assignment shall be borne by the Purchasers including Stamp Duty and Registration fees.

IN WITNESS whereof the Vendor and the Purchasers have hereunto set their hands the day and year first hereinbefore written 40

SIGNED by the Vendor in)
the presence of :-) R.E.V. DENNING.

E. Taylor,
c/o K.F.A. Naivasha,
Typist Clerk.

SIGNED by the Purchasers) D.G. EDWARDES
in the presence of :-) D.E.N. EDWARDES.

R.P. Mortimer,
13, Market Place,
Reading.

Bank Official.

Exhibits
Agreement.
17th April 1954
- continued.

A penalty of Shs.20/- for late
Stamping has been imposed.

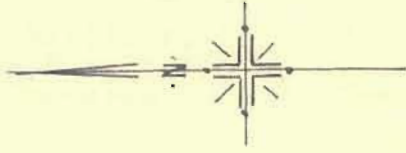
KENYA REVENUE
ONE POUND

SKETCH PLAN

Scale 1 in 25,000



Boundaries of Subdivisions approximate only.



Hopcraft

North Lake Road
11 miles to tarmac
20 " " Naivasha



PLOT C
40 acres

PLOT B
40 acres

220 yds.



PLOT A
675 yds

PLOT D

R O I C O

L R 417/1

416/2

415/2