

Privy Council Appeal No. 15 of 1959

Reginald Ernest Vere Denning - - - - - *Appellant*

v.

David Geoffrey Edwardes and another - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER, 1960**

Present at the Hearing:

VISCOUNT SIMONDS

LORD MORRIS OF BORTH-Y-GEST

MR. L. M. D. DE SILVA

[*Delivered by VISCOUNT SIMONDS*]

The respondents instituted this action in the Supreme Court of Kenya against the appellant claiming specific performance of an agreement dated 17th April, 1954, whereby the appellant agreed to sell to the respondents a certain parcel of land. The respondents also asked for other forms of relief. The appellant in his defence for stated reasons prayed that all the relief asked for by the respondents be refused. He also made a counterclaim. It will be seen from what follows that questions regarding the other relief asked for by the respondents and the counterclaim do not arise on this appeal. The Supreme Court held that by reason of the combined operation of sections 55 (6) (b) of the Indian Transfer of Property Act, 1882 (applicable in Kenya) and section 127 (2) of the Crown Lands Ordinance the agreement was inadmissible in evidence and dismissed the respondents' action. On appeal the Court of Appeal for Eastern Africa held that the Supreme Court had erred in holding that the agreement was inadmissible. It rejected a further submission made at the hearing of the appeal that the provisions of section 88 of the Crown Lands Ordinance rendered the agreement void. Setting aside the decree of the Supreme Court it ordered that the case be remitted to that Court for further proceedings.

The question of admissibility arises in the following way. Section 55 (6) of the Indian Transfer of Property Act, 1882, is to the following effect :—

“(6) The buyer is entitled—

(b) . . . to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount ;”

The rest of the subsection deals with circumstances in which delivery of the property is refused and has no bearing on the present appeal. Subsections 1 to 5 are also irrelevant.

The appellant contends that money passed from buyer to seller in circumstances which gave rise to a charge and he argues that in consequence the agreement is inadmissible under section 127 of the Crown Lands Ordinance which says :—

“ 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.

(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 ”.

The land is situate in the Highlands of Kenya held by the appellant under a Crown lease registered under the Crown Lands Ordinance. It is not disputed that it is land to which section 127 is applicable.

It was argued by the respondents that by reason of certain other provisions of the Crown Lands Ordinance the charge could not be regarded as existing. Their Lordships find it unnecessary to decide this question because their Lordships are of opinion that assuming that a charge exists the agreement is nevertheless admissible for reasons which follow.

Dealing with the point the President of the Court of Appeal (who wrote the principal judgment) said of section 127 :—

“ what is rejected in Kenya is evidence of specified transactions— of the sale, lease, transfer or charge e.c. 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.”

Their Lordships are of the same opinion. The section says “ no evidence shall be receivable ” “ of a charge ” unless “ the instrument is registered ”. When the sole object of using the instrument has nothing whatever to do with a charge the Court is not receiving evidence of a charge within the meaning of the section. To be “ evidence ” within that meaning it must be evidence for the purposes of the case.

The learned trial Judge in dismissing the action was of opinion that the decision of the Board in *Dayal Singh v. Indar Singh* (L.R. 53 I.A. 214) “ completely governed ” the present case. The Court of Appeal held that there were significant differences between the statutory provisions in India referred to in that case and the corresponding statutory provision in Kenya which made the decision inapplicable. Their Lordships agree. They will refer to one such difference. In the Indian case, as in the present case, under an agreement for the sale of immovable property the buyer became entitled to a charge under section 55, subsection 6 (b), of the Transfer of Property Act, 1882, upon the property in respect of a sum of money that had passed with the result that section 17 of the Indian Registration Act, 1908, required the document to be registered. It was not registered. The effect of non-registration is stated in section 49 of the Indian Registration Act thus :—

“ 49. No document required by section 17 to be registered shall

(a)

(b)

(c) be received as evidence of any transaction affecting such property . . . unless it has been registered.”

The words of the section which have been omitted have no bearing on this appeal.

It will be seen that the Indian Act unlike the Kenya Ordinance makes inadmissible the document itself. The learned President said :—

“Section 49 of the Indian Registration Act makes ‘documents’ required by Section 17 to be registered not receivable as evidence of any transaction affecting immovable property unless registered. This disqualifies the instrument *per se* in so far as it is to be received as evidence of any transaction affecting immovable property. On the other hand, Section 127 of the 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 immovable property, but evidence of certain specified transactions, and of those only”.

With this view their Lordships agree and they are of opinion that the President’s view that the agreement for sale was admissible is correct.

It is also contended that the agreement is void by reason of the provisions of section 88 of the Crown Lands Ordinance which says :—

“88.—(1) No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with the possession of any land which is situate in the Highlands, or any right, title or interest whether vested or contingent, in or over any such land to any other person, nor, except with the written consent of the Governor shall any person acquire any right, title or interest in any such land for or on behalf of any person or any company registered under the Companies Ordinance; nor shall any person enter into any agreement for any of the transactions referred to in this subsection without the written consent of the Governor; . . .

(3) Any instrument, in so far as it purports to effect any of the transactions referred to in subsection (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 : ”

Subsection (2) has no bearing on the case.

It is argued that the agreement to sell is void by reason of the provisions of subsection (3). There was an admission in the course of the proceedings in Kenya that the Governor’s consent to the agreement has been obtained subsequent to execution by the parties. It is argued by the appellant that the consent should have been obtained prior to execution and that in any case it should be endorsed on the instrument before it can be regarded as valid.

Subsection (3) is applicable only to an instrument which “purports to effect any of the transactions referred to in subsection (1)” for instance a conveyance which makes a sale effective. Their Lordships are of opinion that an agreement to sell does not “effect a transaction” and that therefore subsection (3) is not applicable to the agreement in question.

The view that subsection 3 is applicable to an agreement to sell necessarily involves the view that an “agreement for any of the transactions referred to in this subsection”, namely subsection 1, is also a “transaction” within the meaning of subsection 1. Their Lordships are unable to take this view and are of opinion that subsection 3, applicable to the transactions mentioned in subsection 1, is not applicable to agreements for such transactions.

It has been urged that if subsection (3) is held to be inapplicable to the provision “nor shall any person enter into an agreement for any of the transactions referred to in this subsection without the written consent of the Governor” in subsection 1 the provision is left without a sanction in express terms such as is to be found in subsection (3). There is force in this argument but their Lordships are of opinion that what they have said earlier outweighs the considerations that arise from

the argument. As subsection (3) is inapplicable the consent of the Governor need not be endorsed on the agreement.

Subsection (1) requires the written consent of the Governor to an "agreement for any of the transactions" set out in the subsection. They include a transaction of sale. It has been argued that the consent of the Governor must be obtained before the agreement is entered into and that subsequent consent is insufficient. Some form of agreement is inescapably necessary before the Governor is approached for his consent. Otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their Lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequence that ensued was that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective.

It is to be observed that in clause 4 of the agreement the parties provided that "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." Thus the parties had every regard for the provisions of subsection (1) of section 88 and it would be remarkable if they could not negotiate in the manner in which they did.

An argument was addressed to their Lordships based upon section 129 of the Crown Lands Ordinance which says:—

" 129. Nothing in the last two preceding sections shall apply to
(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 ; "

The other subsections are not relevant.

It was submitted that the agreement to sell came within the class of documents specified in subsection (e) and that therefore section 127 was inapplicable. On the view which their Lordships have taken of section 127 it is not necessary for them to consider the submission.

For the reasons which they have given their Lordships are of opinion that the agreement to sell was not void and that it was admissible in evidence. They agree with the Court of Appeal that the case should be remitted to the Supreme Court for further hearing. They will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the respondents the costs of the appeal.

In the Privy Council

REGINALD ERNEST VERE DENNING

v.

DAVID GEOFFREY EDWARDES and another

DELIVERED BY MR. L. M. D. DE SILVA

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