

Mistry Amar Singh - - - - - Appellant
v.
Serwano Wofunira Kulubya - - - - - Respondent

FROM
THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1963

Present at the Hearing:

VISCOUNT RADCLIFFE.
LORD MORRIS OF BORTH-Y-GEST.
LORD GUEST.
LORD PEARCE.
SIR KENNETH GRESSON.

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal by final leave from a judgment and order of the East African Court of Appeal (The Honourable Sir Alastair Forbes, V.P., The Honourable Mr. Justice Crawshaw, J.A., and The Honourable Sir Owen Corrie, Ag.J.A.) dated the 25th January, 1961, allowing the appeal of the respondent (whom their Lordships will refer to as the plaintiff) from a judgment and decree of Her Majesty's High Court of Uganda at Kampala (The Honourable Mr. Justice Lyon) dated the 3rd August, 1960. The issue which arises in the litigation is whether the plaintiff could by legal proceedings recover certain land from the appellant (whom their Lordships will refer to as the defendant) although the plaintiff had put the defendant into possession of the land and allowed him for some years to remain in possession of it following upon certain purported leases which were entered into in contravention of statutory enactments.

The plaintiff is an African. At all material times he was the registered proprietor of certain land of the class of land known as "Mailo" land. The land which is in question consists of three plots situate near to Nakivubo being plots "H" "S" and "T" forming part of land comprised in Mailo Register Volume 750, Folio 12. The defendant is an Indian who resides at Nakivubo.

Certain statutory provisions call for mention. The Possession of Land Law (Cap. 25 of the 1957 Revised Edition of the Native Laws of Buganda) contains in paragraphs (d) and (k) of section 2 the following words (omitting such as are not for present purposes relevant):—

"2. (d) The owner of a mailo shall not permit one who is not of the Protectorate to lease, occupy or use his mailo except with the approval in writing of the Governor and the Lukiko:

.....

(k) The owner of a mailo who contravenes any provision of paragraph (c) or (d) of this section shall be liable on conviction to a fine not exceeding Shs.500/- or to imprisonment not exceeding six months or to both such fine and imprisonment."

Sections 2, 3 and 4 (i) of the Land Transfer Ordinance (Cap.114 of the 1951 Edition of the Laws of Uganda) omitting the provisos to section 2 which are not relevant to this case read as follows:—

“ 2. No non-African or any person acting as his agent shall without the consent in writing of the Governor occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation or possession with the consent of the Governor) or make any contract to purchase or to take on lease or accept a gift *inter vivos* or a bequest of any such land or of any interest therein other than a security for money: . . .

3. The Governor may refuse the consent mentioned in section 2 of this Ordinance without assigning any reason or may specify terms upon which such consent is conditional.

4. (1) Any person who commits a breach of the provisions of this Ordinance or of any terms imposed by the Governor under section 3 shall be guilty of an offence and shall be liable on conviction to a fine not exceeding Shs.2,000/- or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.”

The plaintiff purported to lease plot T to the defendant for one year on the 1st November, 1946, at a rent of Shs.300/- per annum the payment to be in advance. The plaintiff allowed the defendant to enter into possession and thereafter (though after the first year at a rent increased to Shs.350/- per annum) the defendant remained in possession. The approval of the Governor and the Lukiko was not then or at any time obtained. It follows that the plaintiff in permitting the defendant to lease occupy and use his mailo was acting in contravention of the law and was committing an offence. The defendant was also acting in contravention of the law: he was committing an offence when he occupied and entered into possession of the land and when he made a contract to take the land on lease.

Plot H was leased by the plaintiff to the defendant in 1946 and plot S in 1947, the former at a rent of Shs.300/- per annum payable in advance and yearly and the latter at a rent of Shs.240/- per annum payable in advance and thereafter yearly. None of the tenancies was registered.

In no case was the consent of the Governor and Lukiko obtained though consent was later sought. The case was fought in the High Court on an agreed statement of facts which included the following:—

“ Consent of Governor and Lukiko never obtained although it was sought after the agreements. Lukiko refused [2.11.49. Notice to quit served on defendant on 13.11.59 for the 31st day of December, 1959, for each of the plots. Rent was paid to the plaintiff up to and including 31.12.59 for each of the plots. The defendant entered into occupation of the three plots in 1946 and 1947, and has remained in occupation contrary to section 2 of the Land Transfer Ordinance.”

By his Amended Pleint (which was dated the 26th April, 1960) the plaintiff set out that he is an African landowner and the registered proprietor of the three plots and that the defendant is an Indian. Having set out the agreements his claims at that time were:—

- “(a) Possession of the said land and eviction of the defendant therefrom;
- (b) Mesne profits from the 1st day of January, 1959, at the rate of Shs.890/- per annum until possession is granted;
- (c) An injunction perpetually restraining the defendant from trespassing on the said land;
- (d) Costs;
- (e) Damages;
- (f) Further or other relief.”

Having regard to the contention mainly relied upon by the defendant at the trial it becomes necessary to refer to those paragraphs of the Plaintiff which were relevant to the defendant's contention. They are as follows:—

“ 3. By an Agreement made the 21st day of November, 1946, the plaintiff leased to the defendant Plot No. ‘ T ’ being part of the land comprised in Mailo Register Volume 750 Folio 12 for one year from the 1st day of November, 1946, at a rent of Shillings three hundred (Shs.300/-) such rent being payable in advance, (such lease to be renewable from year to year).

4. By an Agreement made the 29th day of March, 1946, the plaintiff leased to the defendant plot No. ‘ H ’ being part of the land comprised in Mailo Register Volume 750 Folio 12 for one year from the 1st day of March, 1946, at a rent of Shillings three hundred (Shs.300/-) such rent being payable in advance, (such lease to be renewable from year to year).

5. By an Agreement made the 1st day of October, 1947, the plaintiff leased to the defendant Plot No. ‘ S ’ being part of the land comprised in Mailo Register Volume 750 Folio 12 for one year from the 1st day of September 1947 at a rent of Shillings two hundred and forty (Shs.240/-) such rent being payable in advance.

6. On the termination of the tenancies above referred to the defendant held over on each of them as a tenant from year to year at an increased rent of Shillings three hundred and fifty (Shs.350/-) in respect of the said plot ‘ T ’ and Shillings three hundred and Shillings two hundred and forty (Shs.300/- and Shs.240/-) respectively in respect of plots ‘ S ’ and ‘ H ’ in accordance with clause 5 of each of the tenancy agreements above referred to.

7. The consents necessary to any of the above leases were not obtained.

8. On the 12th day of November, 1959, notice to quit the said plots ‘ S ’, ‘ T ’ and ‘ H ’ was given to the defendant, such notice to be effective on the 1st day of January, 1960. Copies of such notices were annexed to the original plaint herein and marked ‘ A ’.

9. The defendant has neither paid nor tendered any rent in respect of the said land subsequent to the 31st day of December, 1958, and remains illegally in occupation of the land.”

In his statement of defence the defendant pleaded as follows:—

“ In the alternative, the defendant states that the plaintiff was party to illegal agreements. The said agreements are referred to in paragraphs 3, 4 and 5 of the plaint. Therefore the plaintiff is not entitled to file any action on the said agreements.”

The relevant paragraphs of the reply of the plaintiff are as follows:—

“ 2. The plaintiff agrees that the Agreements referred to in paragraphs 3, 4 and 5 of the Plaintiff were illegal without consents of the Governor and the Lukiko and admits that such consents have not been given.

3. The plaintiff asserts that the defendant has at all material times occupied, and still occupies, the land referred to in the said Agreements illegally.

.....

5. The plaintiff abandons his claim for rent, mesne profits and damages.”

At the hearing certain issues were framed and agreed by learned Counsel viz.

“ 1. Are the parties not *in pari delicto* being each in turn guilty of an offence in permitting and taking a lease ?

2. If yes, can the plaintiff recover possession on the strength of the illegality of the lease to which he was a party ?

3. Has any possession or property been transferred by the illegal agreements ?

4. Having pleaded illegality in order to support his claim and seeking to found his claim on the illegal contracts, can the plaintiff recover possession or obtain an injunction to restrain the alleged trespass? ”.

The learned Judge dismissed the plaintiff's claim. He based his decision on the ground that both parties were *in pari delicto* and that as a result the plaintiff could not recover. He said:—

“ Both parties knew all their transactions were illegal, both of them knew that consent, the necessary consents, had been refused, yet the plaintiff allowed the defendant to occupy the plots in dispute for over thirteen years, and accepted rent for many years, and now seeks an order for eviction in circumstances where even if the so-called lease were valid no proper notice to quit has been given. The plaintiff's claim has no merit; and I am surprised that the Court was ever troubled with it. All the transactions were illegal, and certainly the plaintiff does not come to this Court with clean hands.”.

Answering the question raised by the first issue in the affirmative he answered the questions raised by the remaining three issues in the negative.

On appeal by the plaintiff to the Court of Appeal the appeal was allowed and a decree was made which provided that the defendant should be evicted from the lands and should grant possession to the plaintiff. In the judgments it was pointed out (rightly as their Lordships think) that a rejection of the plaintiff's claim would have the result that the defendant, a non-African, would be entitled to remain permanently in possession of African land, to the exclusion of the registered African owner, and without payment of any nature whatsoever.

Although as has been seen, the plaintiff set out in his plaint that he had entered into agreements to lease the plots of land to the defendant his right to claim possession did not depend upon those agreements. His claim was in the end based independently of those agreements. Though the plaintiff did in his plaint claim mesne profits and damages he later abandoned those claims and at the trial he made no claim for rent or for mesne profits. He was able to rest his claim upon his registered ownership of the property. The defendant did not have and could not show any right to the property. In view of the terms of the legislative provisions he could not assert that he had acquired any leasehold interest. For the same reason the defendant could not assert that he had any right to occupy. As a non-African he had no right without the consent in writing of the Governor to occupy or enter into possession of the land or to make any contract to take the land on lease. Quite irrespective of the circumstance that the plaintiff by giving certain notices to quit had purported to withdraw any permission to occupy the defendant was not and never had been in lawful occupation.

The defendant for his part could not point to or rely upon the illegal agreements as justifying any right or claim to remain in possession and without doing so he could not defeat the plaintiff's claim to possession. In so far as the plaintiff may have thought that in the circumstances it was reasonable to give the defendant notices to quit he could give such notices without their being related to or dependent upon the unlawful agreements. Because the agreements were unlawful no leasehold interest vested in the defendant. He had no right to hold over or to hold from year to year. His occupation of the land was contrary to law.

Their Lordships consider therefore that the plaintiff's right to possession was in no way based upon the purported agreements. It was the defendant who might have needed to rely upon them because had they been valid and permissible agreements the defendant would have contended that the tenancies would have needed for their termination longer periods of notice than those contained in the notices to quit that were given. As it was, the contention of the defendant (based on paragraph 3 of the defence) was that the plaintiff was disabled from suing because he had been a party to illegal agreements. It was quite correct as set out in that paragraph of the defence that the plaintiff had been a party to illegal agreements. At the time of the trial however he was not basing his claim “ on the said agreements ”. Indeed he

could have presented his claim (if it were limited to a claim for possession) without being under any necessity of setting out the unlawful agreements in his plaint. He required no aid from the illegal transactions in order to establish his case. (Compare *Simpson v. Bloss* 7 Taunton 246.) It was sufficient for him to show that he was the registered proprietor of the plots of land and that the defendant who was a non-African was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy. It is true that the plaintiff referred to the purported agreements to which he had been a party and that he repudiated them and acknowledged that they were illegal. It was however in spite of and not because of those illegal agreements that he was entitled to possession. Though the plaintiff had offended by being a party to the illegal and ineffective agreements their Lordships do not consider that considerations of public policy demanded the failure of his claim for possession: on the contrary such considerations pointed to the necessity of upholding it in order to eject a non-African who was in unlawful occupation. Their Lordships agree with Forbes, V. P., "that it would be contrary to public policy for the courts to refuse to assist an African to eject a non-African in illegal occupation of the former's land, even though the African may have committed an illegal act in permitting the non-African to enter on the land." This their Lordships consider is in line with the decision of the Court of Appeal in *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] 1 K.B. 65 in which case Du Parcq, L. J., delivering the judgment of the Court said (at p. 70):—"Prima facie, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority."

In his judgment in *Scott v. Brown, Doering, McNab & Co.* [1892] 2 Q.B. 724 Lindley, L. J., at p.728 thus expressed a well-established principle of law:—

"*Ex turpi causa non oritur actio.* This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him."

Lindley, L. J., added (at p.729): "Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced."

A. L. Smith, L.J. (at p.734), said:—"If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action."

In the earlier case of *Taylor v. Chester L.R.* 4 Q.B. 309 it was said (at p.314):—"The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." In that case it became impossible for the plaintiff to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. He was therefore defeated by the principle which is expressed in the maxim "*in pari delicto potior est conditio possidentis*". That was a case therefore where a plaintiff was forced, in order to support his claim, to plead the illegality of a contract. The case was referred to in the judgment of the Court of Appeal

in *Bowmakers Ltd. v. Barnett Instruments Ltd.* (supra). At page 71 it was said:—

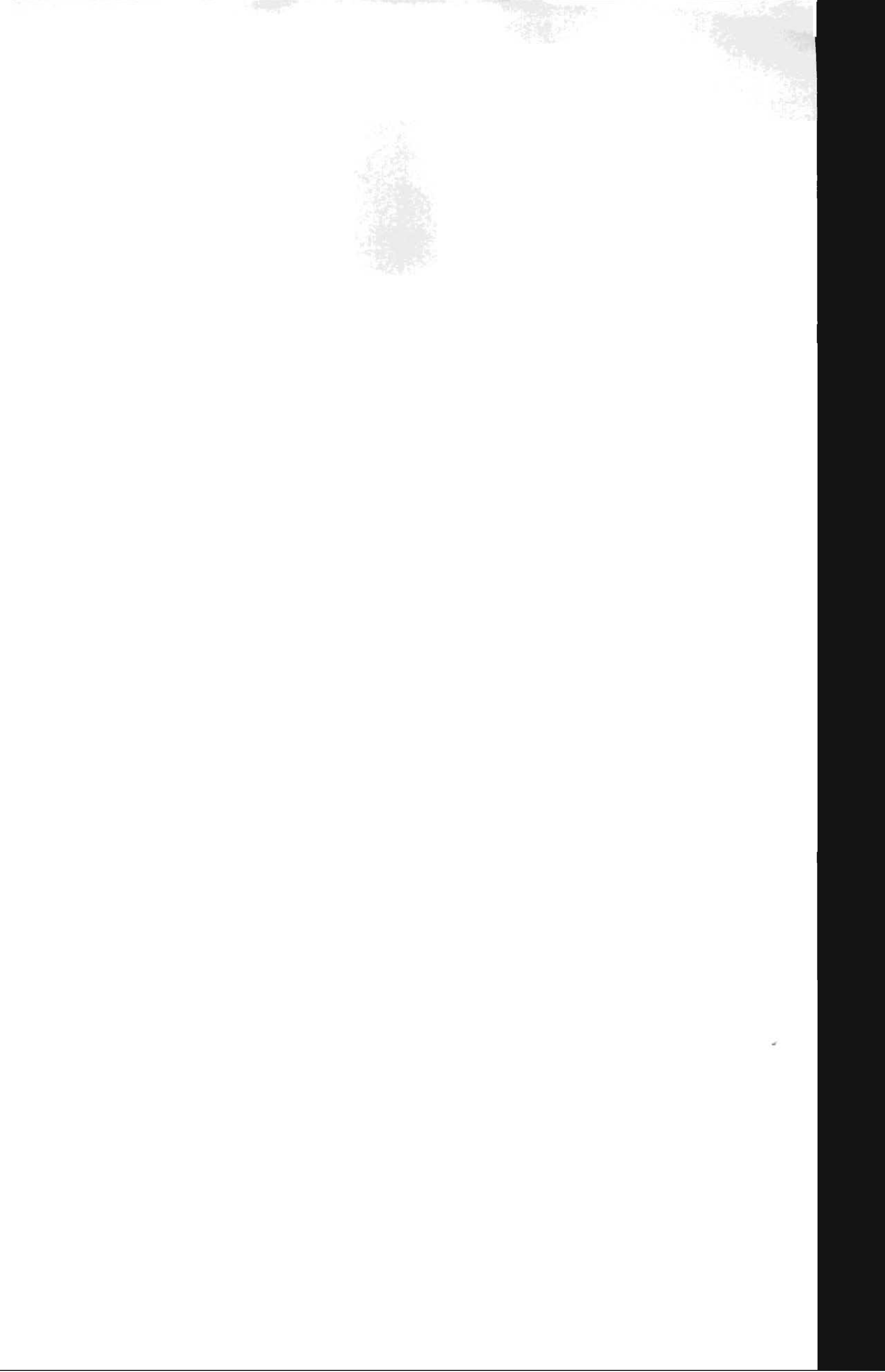
“ In our opinion, a man’s right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant’s possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.”.

For these reasons their Lordships consider that the plaintiff was neither obliged to found his claim on the illegal agreements into which he entered nor, in order to support his claim, to plead or to depend upon the agreements. He was not therefore “ *in pari delicto* ” with the defendant.

This conclusion is reinforced when the scope and purpose of the legislative provisions are considered. Their Lordships agree with the view expressed in the Court of Appeal that the legislation was intended to be for the benefit of Africans as a class. In a case in 1957 the Court of Appeal for Eastern Africa recognised that the object of the Land Transfer Ordinance is to protect Africans by regulating any transfer of mailo land and by controlling (as a matter of public policy) the sale of mailo land to non-Africans. (See *Motibai Manji v. Khursid Begum* [1957] E.A.L.R. 101.) Section 2 of the Land Transfer Ordinance positively prohibits occupation by a non-African unless the consent in writing of the Governor has been given. A non-African who commits a breach of the provisions of the Ordinance becomes guilty of an offence. The circumstance that under the Possession of Land Law an owner of “ mailo ” land also commits an offence if, without the approval in writing of the Governor and the Lukiko, he permits “ one who is not of the Protectorate ” to lease occupy or use such land does not alter the fact that the purpose of the legislation is to protect Africans and to preserve African land for use by Africans. In this case the plaintiff in spite of what was set out in his pleadings and in spite of the claims which the pleadings at first contained did not at the trial in any way rely upon or seek to enforce the unlawful agreements though he had himself made it known that he had entered into them. That however did not make him “ *in pari delicto* ” with the defendant. He was a member of the protected class.

In his judgment in *Browning v. Morris* 2 Cowp. 790 Lord Mansfield said: “ But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not *in pari delicto*; and in furtherance of those statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.” So in *Kearley v. Thomson* L.R. 24 Q.B.D. 742, Fry, L.J., (at p.745) referred to the case of oppressor and oppressed “. . . in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the delictum is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract.”.

Their Lordships agree with the conclusions which were reached in the Court of Appeal and accordingly will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.



In the Privy Council

MISTRY AMAR SINGH

v.

SERWANO WOFUNIRA KULUBYA

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