

*Privy Council Appeal No. 13 of 1964*

**National and Grindlays Bank Limited** – – – – – *Appellant*

v.

**Kentiles Limited (in liquidation) and The Official Receiver (as liquidator thereof)** – – – – – *Respondents*

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER 1965**

*Present at the Hearing:*

LORD HODSON

LORD UPJOHN

LORD WILBERFORCE

*(Delivered by LORD WILBERFORCE)*

The issue in this appeal is whether the appellant is entitled, in the liquidation of the respondent company Kentiles Ltd., to rank as a secured creditor in respect of certain immovable property in Kenya. The action was brought by the respondent Company and its Liquidator, the Official Receiver, as plaintiffs against the appellant Bank and one Brice, whom the Bank had purported to appoint as receiver of the property in question, as defendants. The plaintiffs claimed an injunction to restrain the defendants from entering on the property, a declaration that the Company was the free and unencumbered owner of the property, delivery of possession and other relief. The Bank, as well as resisting this claim, counterclaimed for (1) a declaration that it was a legal mortgagee of the property (2) a declaration that it was entitled to require the Company or its Liquidator to deliver a duly executed memorandum of deposit of the title deeds of the property by way of equitable mortgage to secure advances and (3) other consequential relief.

At the trial it was held by Miles J. in the Supreme Court of Kenya that the Bank was entitled neither to a legal nor to an equitable mortgage but that it was entitled to appoint a receiver of the property. The claim was accordingly dismissed with costs as was the Bank's counterclaim.

The Bank appealed to the Court of Appeal for Eastern Africa against the dismissal of its counterclaim, the respondents to that appeal being the Company and its Liquidator: the Receiver, Brice, was not a party to the appeal. No similar notice of appeal was given by the Company against the dismissal of its action but in the appeal brought by the Bank the Company delivered a document headed "Notice of Cross Appeal" in which the Company sought to have the judgment of Miles J. varied by setting aside so much thereof as dismissed the claim and by entering judgment for the Company on the claim and to have the dismissal of the counterclaim affirmed on grounds other than those relied on by the judge. This notice was served on the Bank but not on the Receiver.

This procedure gave rise to a preliminary objection by the Bank which, after argument, was overruled by the Court of Appeal. On the substantive appeal, the Bank's appeal against dismissal of the counterclaim was, by a majority decision, dismissed. In relation to the claim, the judgment of Miles J. was varied by adding to the declaration, that the Bank was not a secured creditor, a provision whereby the Company was to be at liberty to apply to the Supreme Court for an order directing the Bank to terminate the appointment of the Receiver.

The present appeal is brought against the order of the Court of Appeal pursuant to section 15(2) of the Constitution of Kenya (Amendment) Act, 1965. Although the Company and its Liquidator were duly made respondents, they have not appeared on the appeal which has been argued ex parte on behalf of the Bank.

The facts relevant to the case were proved through certain agreed documents and by a statement of Mr. J. A. Mackie-Robertson, a partner in the firm of Kaplan and Stratton, advocates in Nairobi, which was admitted by consent and not disputed. The Bank is an English Company incorporated under the Companies Act 1862 which carries on business in Kenya. In September 1951 proposals were under consideration for the reconstruction of a Kenya company called "Kenboard Ltd.". This company was the owner of the property in dispute which is land situated in the Highlands of Kenya. The land was at this time subject to a mortgage in favour of Barclays Overseas Development Corporation Ltd. The proposed reconstruction involved the transfer of the property to the respondent Company, Kentiles Ltd., and the discharge by that company of the liabilities of Kenboard Ltd. out of money to be provided by the Bank. The Bank was to allow credit to the company up to £90,000 on the security of a debenture charging the assets of the Company and a legal mortgage on (inter alia) the property.

On 1st October 1951 the following events took place:

- (1) the property was reconveyed by the existing mortgagees to Kenboard Ltd.;
- (2) an agreement to purchase the property from Kenboard Ltd. was approved by a general meeting of Kentiles Ltd.;
- (3) Kentiles Ltd. issued a debenture in favour of the Bank. The relevant terms of this debenture will be referred to hereafter.

In September 1951 the title deeds of the property had been delivered by Barclays Bank (D.C. & O) Ltd., which had been holding them for the Barclays Corporation, to Messrs. Kaplan and Stratton, and on 5th October 1951 the Barclays Corporation released the deeds from their lien. Thereupon Messrs. Kaplan & Stratton considered themselves as holding the deeds to the order of the appellant Bank. On 20th October 1951 Messrs. Kaplan & Stratton applied to the Land Control Board for consent (required under certain legislation to which their Lordships will refer later) to the proposed mortgage of the property to the Bank. On 31st October 1951 the Secretary of the Board wrote that consent was not needed. As will be later explained, this was mistaken: in fact consent was required but at the time the Secretary's advice was accepted and acted upon. On 1st November 1951 the property was conveyed by Kenboard Ltd. to the Company and on the same day it was conveyed by the Company to the Bank by way of legal mortgage; on 19th December 1951 the title deeds were transferred by Messrs. Kaplan & Stratton to the Bank which now holds them. The Bank in fact made advances of considerable sums to the Company. The Company presented a petition for winding up on 19th November 1956 and on 20th November 1956 the Bank appointed Mr. Brice Receiver and Manager of the property. He took possession on 22nd November 1956. The present proceedings were commenced on 7 May 1958 and the counterclaim was delivered on 24 August 1959.

The first point taken before their Lordships by the appellant Bank was that the Court of Appeal had no jurisdiction to entertain the respondent's appeal to that court, because no substantive notice of appeal was given. In the alternative it was submitted that the appeal ought not in the circumstances to have been entertained. Their Lordships cannot accede to either of these submissions. While accepting that the proper course for the Company to have taken, in accordance with the Rules, was for the Company to have given an independent notice of appeal against the Judge's decision, their Lordships consider that the procedure adopted was an irregularity in procedure, to deal with which was entirely within the discretionary power of the Court of Appeal. That court considered and ruled upon the matter and their Lordships can find no basis upon which, at this stage, to interfere with that ruling.

On the substance of the appeal, the first issue between the Company and the Bank is whether the Bank is a legal mortgagee of the property. The Company's claim was that the legal mortgage executed on 1st November 1951 was invalid for two reasons: first because, under the terms of section 328 of the Companies Ordinance (as it existed when the action was started) the Bank was legally unable to hold a legal estate in land in the Highlands; secondly because the Bank had failed to obtain the consents necessary, in relation to land in the Highlands, under the Land Control Ordinance and the Crown Lands Ordinance. The Bank disputed each of these contentions and further claimed, as regards section 328 of the Companies Ordinance, that by virtue of an amendment to that section passed before the delivery of the Bank's counterclaim, any pre-existing disqualification had been removed and that although the amendment was expressed not to affect any proceedings commenced before 13th May 1958 (as were the proceedings in the Company's claim) neither that, nor any judgment which might be pronounced on the claim, prevented the Bank from succeeding in its counterclaim even though the result of so doing might be to produce a result directly contrary to the judgment given on the claim.

On all of these points (except as to the impact of the amending legislation on the claim and counterclaim respectively, a question on which divided opinions were given) all the judges in the courts below decided against the present appellant. Their Lordships do not consider it necessary to deal with more than one of them, the conclusion as to which appears to them clear and which is sufficient to dispose of the appellants' contention that the legal mortgage was validly created, namely that which arises from the absence of consents under the Land Control Ordinance and the Crown Lands Ordinance. Section 7 of the Land Control Ordinance (c.150) as amended by section 2 of the Land Control (Amendment) Ordinance 1949 (No. 38 of 1949) provides that "no person" shall without the consent of the Land Control Board mortgage or charge any land in the Highlands and section 88 of the Crown Lands Ordinance (c.155) contains a similar prohibition against mortgaging land in the Highlands without the consent of the Governor. Each of these sections provides that transactions effected without such consent shall be void. Neither consent was in fact obtained. The contention of the appellant was that although, in accordance with the Interpretation and General Clauses Ordinance (c.1) the word "person", unless there is something in the subject or context inconsistent with such construction, includes a company, there was such an indication in each ordinance. Generally, it was said that the legislation was of a racial character and that race is a characteristic of individuals; when companies are involved control is exercised not over the corporate body itself but over its shareholders; more particularly it was argued that in section 90 of the Crown Lands Ordinance which refers to persons "of a different race to the person by whom such land is sold", "person" can only mean "individual" and that consistency of interpretation required that the word "person" should have the same meaning throughout the legislation. Their Lordships recognise that these indications have some force but consider that they are far outweighed by the anomalies which would arise if companies as such were to be exempted from the requirements of the legislation. It is true that there are provisions which enable control to be exercised over changes in the shareholders of landowning companies, but, if the appellant's construction is correct, companies would enjoy a far greater freedom as regards dealings in land in the Highlands than do individuals.

Rather than accept such an anomalous result their Lordships prefer to recognise that the word "person" is used without consistency or accuracy in this legislation, the drafting of which is, indeed, in many respects far from precise, and that the limitation of the word "person" to "individuals" in one context does not impose the same meaning in another. Their Lordships accordingly conclude that consent under each Ordinance was required and that the absence of such consent invalidated the purported legal mortgage. Their Lordships would observe, before leaving this legislation, that there is in each Ordinance a specific exception in favour of equitable mortgages by deposit with (inter alia) the appellant Bank, so that on the alternative head of the Bank's claim (next to be considered) the absence of consents is not fatal.

Their Lordships now consider the Bank's alternative claim to an equitable mortgage by deposit of title deeds. The Bank has since November 1951 held and still holds the deeds and it has made advances to the Company but this is not sufficient under the law of Kenya to entitle it to be treated as an equitable mortgage of the land.

The law as to equitable mortgages is contained in the Equitable Mortgages Ordinance (c.152 of the Laws of Kenya) section 2 which provides as follows:—

“ Subject to the provisions hereinafter contained nothing in Section 59 of the Indian Transfer of Property Act, 1882 (Act IV of 1882), as applied to the Colony shall be deemed to render invalid mortgages made in the Colony by delivery to a creditor or his agent of a document or documents of title to immovable property with intent to create a security thereon. Such delivery shall, subject to the provisions of the Crown Lands Ordinance, whether made before or after the date of this Ordinance, have the same effect on the immovable property sought to be charged as a deposit of title deeds in England at the date of this Ordinance ”.

Thus, delivery of title deeds, with intent to create a security, may create an equitable mortgage, provided that the provisions of the Crown Lands Ordinance are complied with. These in effect require that a memorandum of the equitable mortgage shall be registered in the registry maintained under the Ordinance.

It is necessary to set out verbatim certain portions of sections 127 and 129 of the Ordinance which relate to matters of proof.

“ 127. No evidence shall be receivable in any Civil Court:—

- .....
- (2) Of a lien, mortgage or charge . . . 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.

Provided, however, that nothing hereinbefore contained shall apply to an equitable mortgage by deposit of documents of title provided that a memorandum of such equitable mortgage shall have been registered in the register . . . . Every memorandum shall be transmitted to the registry in duplicate and shall be in such form . . . . as may be prescribed.”

“ 129. Nothing in [section 127] 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; or . . . . ”

The substance of the Bank's claim is that it is entitled to require the Company to execute and deliver to it a memorandum sufficient to enable it to comply with section 127(2) of the Ordinance. This claim rests upon clauses 1 and 2 of the Debenture which are in the following terms:

“ (1) The Company hereby charges with the payment and discharge of all moneys and liabilities intended to be hereby secured (including expenses and charges arising out of or in connection with the acts authorised by Clauses 5, 8 and 9 hereof) ALL its undertaking goodwill assets and property whatsoever and wheresoever both present and future including its uncalled capital for the time being.

(2) The charge created by this Debenture shall rank as a first charge on all the property hereby charged and as regards all immovable property of the Company (to be mortgaged as hereinafter provided) shall constitute a fixed charge and as regards all other property hereby charged shall constitute a floating security but so that the Company is not to be at liberty to create any mortgage or charge upon any of the property comprised in this security to rank either in priority to or pari passu with the charge hereby created. The Company shall forthwith upon the execution of this Debenture deposit with the Bank the title Deeds of all immovable properties now vested in the Company and shall from time

to time likewise deposit with the Bank the title deeds of any immovable property which may hereafter be acquired by the Company (all such deposits of title deeds being by way of equitable mortgage as collateral security for the repayment of the principal moneys and interest hereby secured) and shall at its own expense whenever called upon by the Bank so to do execute legal mortgages or charges as the case may require in favour of the Bank over any such immovable properties.”

On these provisions two questions arise: first (a question of construction) whether they give rise to an obligation on the Company to provide the Bank with the requisite memorandum of deposit; second (a question of law) whether the Bank can put the relevant provision in evidence, having regard to section 127 of the Ordinance.

In dealing with these questions it is necessary to appreciate that Clauses 1 and 2 of the Debenture are comprehensive provisions intended to deal with a number of separate cases viz: with movable property on the one hand and immovable property on the other and, within the category of immovable property, with that which was “vested in the company” at the date of the Debenture on the one hand and, on the other, with future acquired property. It is to property within the last mentioned category that the Bank’s claim relates. With respect to this the obligations undertaken by the Company were (a) to deposit the title deed by way of equitable mortgage and (b) when called on, to execute a legal mortgage.

Admittedly there is here no express obligation to execute a memorandum of deposit, but since under the law of Kenya no valid equitable mortgage could be created without a memorandum, their Lordships have no difficulty in finding that the Company impliedly agreed to provide one since without such an implied obligation the contract would be ineffective. This obligation was not affected in any way by the Company’s purported grant of a legal mortgage: this was (for the reasons already given) simply a nullity, and the ineffectual attempt to grant it cannot diminish the Company’s obligation either to create an equitable mortgage or, on demand, to execute a valid legal mortgage. Provided that the necessary evidence is available, the Bank is fully entitled now to insist on security of one kind or the other.

This being then, as their Lordships construe the Debenture, the nature of the Company’s obligation, can the Bank adduce evidence of it? This is an issue of some difficulty upon which the learned judges in the courts below were not agreed. In the first place, their Lordships are of opinion that what is prohibited by section 127 is evidence (other than by a written document) of particular transactions, i.e., in this case, evidence of “a lien, mortgage or charge”. The fact that a particular document may, *inter alia*, create a lien mortgage or charge does not prevent a party from putting the document in evidence so long as the purpose for which he does so is not to prove a lien, mortgage or charge but some other purpose not referred to in the prohibitory clause, in this case section 127(2). This is the effect of the decision of their Lordships in *Denning v. Edwardes* [1961] A.C. 245. There Viscount Simonds, delivering the judgment of the Board, distinguishing the corresponding Indian Act (Indian Registration Act 1908) which made inadmissible the document itself, expressed his agreement with the opinion expressed by the learned President of the Court of Appeal for Eastern Africa in which he said (p. 252)

“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”.

It follows that the Debenture is not *per se* inadmissible merely because it creates a charge on certain immovable property (viz., that vested in the Company) and that the question is whether when the Bank seeks to use it to enforce an obligation to execute a memorandum of deposit of title deeds it is doing so for a prohibited purpose.

In their consideration of this issue, the learned judges in the courts below were, up to a point, as their Lordships understand the judgments, agreed. They accepted that if, after the date of execution of the Debenture, the Company had become the owner of immovable property and had received the

title deeds, the Bank could have relied upon the Debenture to enforce the Company's obligation to deposit the deeds and execute a memorandum. Miles J. considered that the Debenture, in so far as it related to future acquired property, not only need not be registered but could not be registered and that at most it came within section 129(e) of the Crown Lands Ordinance. In the Court of Appeal Crawshaw J. (who dissented in his ultimate conclusion from the majority) held that the Debenture contained a provable agreement to call for an equitable mortgage by deposit and that if the deeds were with the respondents the appellant could call on them to deposit them and supply a memorandum of deposit. The opinion of Gould Ag.P. was that if the Bank (having lent or agreed to lend money) were seeking enforcement of a right to a deposit of documents of title and a memorandum they would have been entitled to do so, and the agreement to that effect would have been admissible in evidence. Newbold J. did not expressly deal with this point. Before their Lordships, the appellants, submitting that these opinions were correct, referred to sections 58 and 59 of the Indian Transfer of Property Act 1882 (which as the Kenya Equitable Mortgages Ordinance makes clear has been adopted as the basic legislation as to mortgages in Kenya) and to certain cases decided thereunder, as supporting their argument. Not having heard argument on the other side and not having the benefit of the opinions of the courts below upon them, their Lordships will not comment upon these provisions nor upon the cases cited: they consider it sufficient to say that for the purposes of the present case they see no reason to differ from the opinions expressed, so far without disagreement, by the learned judges below and they resume the argument at the point where the judgments appealed from begin to differ. Miles J. held that the Bank's claim ultimately failed because of the execution on 1st November 1951 of a legal mortgage and because the lower security (viz., of an equitable mortgage) would merge in the higher. This argument was not upheld in the Court of Appeal and their Lordships cannot agree with it: the legal mortgage was, in the event, invalid: the Bank acquired no title, legal or equitable, under it and in their Lordships' view the rights of the Bank must be considered as if it had not been made.

In the Court of Appeal Gould Ag.P. held that the Bank's claim to a memorandum depended upon their being able to prove that they held the documents of title under an equitable mortgage. But the Bank's claim, as their Lordships understand it, was founded not upon the deposit but upon the implied agreement contained in Clause 2 of the Debenture to execute a memorandum. If this implied agreement could be proved and given effect to upon receipt of the documents of title by the Company before their deposit with the Bank, their Lordships do not appreciate how these rights could have been lost to the Bank once the documents were deposited with it. The fact of deposit with intent to create a charge was not the foundation of the Bank's case for execution of a memorandum: all that needed to be proved was the contract created by the Debenture. Their Lordships agree with Crawshaw J. when he said

“ The crux of this matter is, as I see it, not whether possession of the deeds created an equitable charge (proof of which is restricted by section 127), but whether the Debenture contains a provable agreement to call for an equitable mortgage by deposit with a memorandum. In my opinion it does. If the deeds were with the respondents the appellant could call on them to deposit them and supply a memorandum therewith. It is not in dispute that the deeds are already in the possession of the appellant (in whatever capacity that might be) and so all it has now to do is to demand the memorandum to which, in my view, it is entitled ”.

Their Lordships are therefore of opinion that the Bank is entitled to succeed in its counterclaim in so far as it sought to establish and enforce an obligation on the Company to execute and deliver a memorandum of deposit. They would add that no point was pleaded nor it appears taken in either court below to the effect that the Bank's right to relief under this head was affected by the liquidation of the respondent Company and their Lordships can only proceed upon the basis that this was not the case.

The appeal will therefore be allowed. The order of the Court of Appeal for Eastern Africa will be set aside and the order of the Supreme Court of

Kenya will be varied by substituting for that portion thereof whereby the appellant's counterclaim was dismissed (1) a declaration that the appellant is entitled to require the respondents to deliver a memorandum of deposit of the title deeds of the property referred to in paragraph 4 of the Plaint sufficient for registration and to satisfy the proviso to section 127 of the Crown Lands Ordinance (2) an order that the Official Receiver as Liquidator of Kentiles Limited forthwith prepares executes and delivers or procures the preparation execution and delivery by Kentiles Limited of such memorandum at the expense of Kentiles Limited. The appellant will have liberty to apply to the High Court for an account of the moneys due to the appellant on the security of the Debenture referred to in the counterclaim. The respondent Company must pay the appellant's costs of this appeal and in the courts below such costs to be added to the debt secured by the said Debenture.

In the Privy Council.

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NATIONAL and GRINDLAYS BANK  
LIMITED

7.

KENTLES LIMITED [in liquidation]  
and THE OFFICIAL RECEIVER

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