

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
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17, RUSSELL SQUARE  
LONDON, WC1B 5DR

29, 1931

No. 8 of 1930.

**In the Privy Council.**

**ON APPEAL**

*FROM THE COURT OF APPEAL FOR EASTERN AFRICA.*

BETWEEN

THE COMMISSIONER FOR LOCAL GOVERN-  
MENT LANDS AND SETTLEMENT (Original  
Respondent) - - - - - *Appellant*

AND

10 ABDULHUSEIN KADERBHAI (Original Applicant) *Respondent*

AND BETWEEN

ABDULHUSEIN KADERBHAI (Original Applicant) *Appellant*

AND

THE COMMISSIONER FOR LOCAL GOVERN-  
MENT LANDS AND SETTLEMENT (Original  
Respondent) - - - - - *Respondent.*

(Consolidated Appeals.)

**Case**

20 FOR THE ORIGINAL RESPONDENT, THE COMMISSIONER FOR  
LOCAL GOVERNMENT LANDS AND SETTLEMENT.

RECORD.

1. These are cross appeals from a Decree of the Court of Appeal for Eastern Africa dated the 6th day of July 1929, reversing a Decree of the Supreme Court of Kenya dated the 8th day of December 1928, and allowing Abdulhusein Kaderbhai, the Original Applicant, to bid for and purchase certain Crown Lands in Mombasa Island proposed to be sold by auction, and upholding a condition contained in the Notice of Sale of the said lands

p. 24.  
p 12.

CASE for the Commissioner for Local Government Lands and Settlement.

restricting any purchaser from permitting any dwelling-house or out-buildings upon the said lands to be used as a place of residence for any Asiatic or African not being a domestic servant employed by him.

p. 4. 2. The above-named Abdhusein Kaderbhai (the Original Applicant) is an Indian subject of His Majesty residing and working for gain in Mombasa, in the Colony and Protectorate of Kenya.

p. 4. App., to Record, p. 4, l. 8. 3. The Commissioner for Local Government Lands and Settlement (hereinafter called "the Commissioner") who is the Original Respondent is the officer appointed by the Governor of the said Colony for the purposes set forth in the Crown Lands Ordinance, being Chapter 140 of the Revised Edition of the Laws of Kenya. 10

p. 4, l. 1. 4. By Section 6 (1) of the said Crown Lands Ordinance the Governor, in addition to but without limiting any other right, power or authority vested in him under the said Ordinance, may (1) subject to the provisions of any Order in Council or to any General or Special Instructions of the Secretary of State, grant, lease or otherwise alienate in His Majesty's behalf any Crown Lands for any purpose and on any terms and conditions as he may think fit. By Section 10 the Commissioner may, subject to any general or special directions of the Governor, execute for or on behalf of the Governor any conveyances or leases of or for the occupation of Crown Lands and do certain other acts under the said Ordinance for and on behalf of the Governor as and subject as therein mentioned. Section 11 (1) provides that all actions, suits and proceedings by or on behalf of the Governor or the Government respecting Crown Lands or respecting any contract relating thereto may be brought by and in the name of the Commissioner of Lands, who may be plaintiff or defendant in any such action, suit or proceeding. Section 17 provides that before any town plot is disposed of under the next succeeding section the Commissioner of Lands shall determine amongst other things (D) the special covenants, if any, which shall be inserted in the lease. Section 18 provides that leases of town plots shall, unless the Governor shall otherwise order in any particular case or cases, be sold by auction. Section 19 provides that notice of the place and time of sale shall be notified in the "Gazette" not less than four weeks nor more than three months prior to the day of sale and that the notice shall state (inter alia) (E) the building conditions and special covenants, if any, to be inserted in the lease to be granted in respect of any plot. 20 30

RECORD.

p. 4. 5. The Commissioner acting under the said Crown Lands Ordinance published in the Official Gazette of the Colony and Protectorate of Kenya dated the 3rd of July 1928 a notice of his intention to sell by auction in the Jubilee Hall, Mombasa, on the 11th August 1928 certain plots of land at Mombasa aforesaid. The said notice was intituled "General 40

Notice No. 714 Crown Lands Ordinance (Cap. 140 Laws of Kenya) Notice—  
Mombasa Island Residential Plots.” and notice was thereby given that  
grants in respect of plots at Mombasa specified in the Schedule thereto  
would be sold by auction as therein mentioned. App., to  
Record, p. 9.

6. Certain General and Special Conditions of Sale were published  
in the said notice. Amongst the General Conditions of Sale was the  
following: “That Europeans only will be allowed to bid and purchase,” p. 9, l. 17.  
and among the Special Conditions was the following: “5. Not at any p. 10, l. 41.  
“time during the term of the grant shall the grantee permit the dwelling-  
10 “house or outbuildings to be used as a place of residence for any Asiatic  
“or African who is not a domestic employed by him.” RECORD.

7. On the 10th of August 1928 the said Abdulhusein Kaderbhai  
applied to the Supreme Court of Kenya by motion in proceedings in which p. 5.  
the said Abdulhusein Kaderbhai was applicant and the Commissioner was  
respondent for an order by way of mandamus commanding the Com-  
missioner to allow the said applicant to bid for and purchase at the said  
auction sale and also commanding the Commissioner to cancel or annul  
the Condition No. 5 of the said Special Conditions contained in the said  
notice.

20 8. By an Order of the Supreme Court of Kenya dated the 10th pp. 5 and 6.  
day of August 1928 the said auction sale was ordered to be postponed  
until further notice.

9. The said motion was heard on the 8th December 1928 by  
Mr. Acting Justice Johnson, who gave Judgment on the 10th December pp. 7, 8  
and 12.  
1928 dismissing the motion. By the Decree carrying out such Judgment  
dated the 10th December 1928 it was ordered (1) that the motion be  
dismissed, and (2) that the applicant do pay to the respondent certain  
costs therein mentioned.

30 10. Notice of appeal from the said Decree to the Court of Appeal p. 12.  
for Eastern Africa was given on behalf of the said Abdulhusein Kaderbhai  
on the 6th day of March 1929.

11. The appeal from the said Decree was heard on the 12th day  
of June 1929 by Mr. Acting Chief Justice Sheridan, Mr. Acting Chief pp. 13, 14  
15 and 16.  
Justice Guthrie-Smith and Mr. Justice Muir Mackenzie constituting the  
said Court of Appeal and Judgment was reserved.

12. Judgment of the said Court of Appeal was given on the 6th of  
July 1929 and the said Judges unanimously allowed the said appeal in

so far as it claimed that the Appellant be allowed to bid for and purchase the said Crown Lands so proposed to be sold by auction in Mombasa Island as aforesaid and reversed to this extent the said Decree of the Supreme Court of Kenya. The rest of the Order of the Supreme Court was upheld and the Commissioner was ordered to pay the costs of the said Abdulhusein Kaderbhai in the Supreme Court and in the Court of Appeal.

p. 24. 13. By the Decree carrying out such Judgment and dated the 6th July 1929 it was ordered that the appeal be allowed with costs in the Court of Appeal and in the Court below to the extent that the rule in regard to the first prayer was made absolute, viz., the Appellant was allowed to bid for and purchase certain Crown Lands proposed to be sold by auction in Mombasa Island, that the Decree of the Supreme Court dated the 8th December 1928 be reversed and that the Respondent do pay to the Appellant the costs therein mentioned. 10

14. A copy of the Judgment of Mr. Acting Justice Johnson on the hearing of the motion and copies of the Judgments of Mr. Acting Chief Justice Sheridan, Mr. Acting Chief Justice Guthrie-Smith and Mr. Justice Muir Mackenzie are contained in the Record, pages 8, 9, 10 and 11 and pages 18, 19, 20, 21, 22 and 23 respectively.

p. 27. 15. Leave to appeal to His Most Gracious Majesty the King in Council from the said Judgment and Decree made on the 6th July 1929 was on the 10th December 1929 duly granted to the Commissioner against so much of the said Judgment and Decree as allowed the said Abdulhusein Kaderbhai to bid and purchase at the said proposed sale by auction of the said Crown Lands in Mombasa Island and leave was on the same day granted to the said Abdulhusein Kaderbhai to appeal to His Most Gracious Majesty the King in Council against such part of the said Judgment and Decree as permitted the said Condition 5 to be inserted in any lease and as disallowed the application of the said Abdulhusein Kaderbhai to command the Commissioner to cancel and annul the said fifth condition. 20 30

16. The Commissioner humbly submits that the said Order of the 6th July 1929 in so far as it allows the said Abdulhusein Kaderbhai to bid and purchase at the proposed sale by auction of the said Crown Lands in Mombasa Island and orders the Commissioner to pay any costs ought to be reversed for the following (amongst other) :—

### REASONS.

- (1) BECAUSE under the Crown Lands Ordinance the powers of the Governor to limit the bidding at any sale by auction of Crown Lands to any particular races or classes 40

of persons subject to the provisions of any Order in Council or to any general or special instructions of the Secretary of State is unrestricted.

- 10
- (2) BECAUSE there is no Order in Council or any general or special instructions of the Secretary of State which in any way limits the power of the Governor to grant leases or otherwise alienate any Crown Lands for any purpose or on any terms or conditions he thinks fit.
- (3) BECAUSE the Governor may, apart from the Ordinance, by virtue of his right as a landowner alienate the said Crown Lands by auction and subject to any conditions or limitations he thinks fit.
- (4) BECAUSE the word " auction " in Section 18 of the Crown Lands Ordinance does not mean that any and every person has a right to bid and buy without restriction.
- (5) BECAUSE under Section 19 (E) the Governor had absolute power to insert Special Condition No. 5 in the said Conditions, and such condition was legally inserted.
- 20
- (6) BECAUSE the Judgment of the Court of Appeal of Eastern Africa in so far as it allows the said Abdulhusein Kaderbhai to bid and purchase at the said proposed sale by auction of plots of land in Mombasa is erroneous in law.

STAFFORD CRIPPS.

E. W. LAVINGTON.

**In the Privy Council.**

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**ON APPEAL**

*From the Court of Appeal for Eastern Africa*

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BETWEEN

**THE COMMISSIONER FOR  
LOCAL GOVERNMENT  
LANDS & SETTLEMENT**

(Original Respondent) - *Appellant*

AND

**ABDULHUSEIN KADER-  
BHAI (Original Applicant)**

*Respondent*

AND BETWEEN

**ABDULHUSEIN KADER-  
BHAI (Original Applicant)**

*Appellant*

AND

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(Original Respondent) - *Respondent.*  
(Consolidated Appeals.)

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**Case**

FOR THE COMMISSIONER FOR LOCAL  
GOVERNMENT LANDS AND SETTLEMENT.

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BURCHELLS,

5 The Sanctuary,

Westminster, S.W.1,

Solicitors for the Appellant, the Original  
Respondent.