

29, 1931

Appeal 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 - - *Appellant*
(Original Respondent).

AND

10 ABDULHUSEIN KADERBHAI - - - *Respondent*
(Original Applicant).

AND BETWEEN

ABDULHUSEIN KADERBHAI - - - *Appellant*
(Original Applicant).

AND

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

(Consolidated Appeals.)

20 **CASE ON BEHALF OF ABDULHUSEIN KADERBHAI,**

Respondent in the First and Appellant in the Second above-mentioned Appeals.

1. These are cross-appeals by the Appellant (Original Respondent) and the Respondent (Original Applicant) from a judgment and decree of the Court of Appeal for Eastern Africa, dated the 6th July, 1929, which reversed the judgment and decree of the Supreme Court of Kenya, sitting at Mombasa, of the 10th December, 1928. RECORD.
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pp. 18—24.
pp. 8—12.

2. **THE PRESENT PROCEEDINGS** pp. 3—5.
were initiated by a Motion for a Mandamus made on the 9th August,

RECORD. 1928, by the Original Applicant, a British Indian subject of His Majesty, in the Supreme Court of Kenya, and directed against the Original Respondent, who was the Commissioner for Local Government Lands and Settlement at Mombasa.

Appendix to
Record, p. 9.

Appendix to
Record, p. 10.

3. By the said Motion for a Mandamus, the Applicant prayed that the Commissioner should be ordered to allow him to bid for and purchase certain Crown Lands in the Mombasa Township which were being offered for sale by auction under a General Condition No. 1 precluding all persons of non-European origin from bidding and purchasing any of the said Crown Lands. The Applicant further prayed that Condition No. 5 of the Special Conditions of Sale, which provided that "not at any time during the term of the grant shall the grantee permit the dwelling-house or out-buildings to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him," should be annulled or cancelled as being contrary to law. 10

Appendix to
Record,
pp. 1-8.

4. The rules governing the disposal of Crown Lands in Kenya are contained in the Crown Lands Ordinance of 1915 (Cap. 140 of the Laws of Kenya), the relevant sections of which are printed as an Appendix to this Record.

pp. 15-16.

Appendix to
this Case,
p. 6.

Appendix to
this Case,
p. 5.

Appendix to
this Case,
p. 5.

Appendix to
to this Case,
p. 5.

5. It was argued by the Applicant in the Courts below that the insertion of restrictive clauses, based on racial discrimination between the European and the Asiatic population, in the disposal of Crown property, was not only contrary to the Crown Lands Ordinance, but was also opposed to the policy enunciated by the Secretary of State for the Colonies in the White Paper of the 23rd July, 1923, the material portions of which were published under Government Notice No. 250 in the Official Gazette of Kenya, dated the 25th July, 1923. By a previous Government Notice No. 340 of the 12th October, 1920, the Governor had sought to reserve as a "European residential reservation" an area of lands in Mombasa Township, but this Notice was revoked by Government Notice No. 208 of the 30th May, 1921. Moreover, the Acting Land Officer by General Notice No. 586 of the 23rd May, 1921, had declared that as it was "undesirable to prejudice any decision that might be made by the Secretary of State in the matter of Indian policy now under consideration by him," it had been decided to postpone until further notice the sale of leases of Crown Lands (farms). 30

Appendix to
this Case,
pp. 6-7.

Appendix to
this Case,
p. 7.

As regards agricultural lands in the Highlands, the White Paper adopted the policy of reservation for Europeans, and the General Notices published in 1924 and subsequent years all contain a condition of sale to the effect that as these lands were in the Highlands, the purchase thereof "will be confined to Europeans only (or their accredited agents) in conformity with the decision of His Majesty's Government." 40

In the Townships, the policy of "no segregation on racial lines" laid

down by His Majesty's Government in July, 1923, appears to have been strictly adhered to until the publication of General Notice No. 714 of the 3rd July, 1928, which contained the conditions of sale purporting to govern the grants of the Crown Lands out of which the present appeals arise. RECORD.
Appendix to
Record, p. 9.

6. By an order, dated the 10th August, 1928, the Supreme Court of Kenya directed that the auction of the said Crown Lands should be postponed until further order of the Court, and that a notice should issue to the Commissioner of Lands to show cause upon the Applicant's Motion for a Mandamus to be returnable on the 19th September, 1928. pp. 5—6.

10 7. The Supreme Court of Kenya (Mr. Acting Justice Johnson) delivered judgment on the 10th December, 1928, refusing to grant the Mandamus prayed for by the Applicant. pp. 8—12.

8. An appeal was thereafter taken by the Applicant to the Court of Appeal for Eastern Africa, which on the 6th July, 1929, delivered three separate judgments allowing the Applicant's appeal on his first prayer, but dismissing it as regards his second prayer. pp. 18—24.

9. The Applicant submits that the judgments of the Court of Appeal for Eastern Africa are right and should be affirmed in so far as they decided that he was entitled to bid and purchase at the auction of Crown Lands, but that they are wrong and should be reversed in so far as they upheld the restriction against use and occupation of the said lands by an Asiatic or African other than a domestic servant employed by a grantee, for the following, among other,

REASONS :—

1. Because the words "sale by auction" in section 18 of the Crown Lands Ordinance, 1915, mean a sale by public auction at which all members of the public should be allowed to bid and purchase.
- 30 2. Because this meaning of a public auction is further confirmed by section 20 of the Ordinance, which uses the words "all persons bidding at the sale," and there is nothing in the Ordinance suggesting or implying a limited class of bidders.
- 40 3. Because the fact that section 27 (c) of the Ordinance requires the Commissioner of Lands to give notice in an auction of agricultural lands whether "persons other than Europeans will be permitted to bid for the lease of the farms," and that no similar provision appears in the case of the disposal of lands within Townships sufficiently indicates that the Legislature had no intention of restricting the grant of Township plots to a particular class or race.

4. Because the Commissioner of Lands is in the position of a trustee, and as such under the obligation to obtain the best price for the Government by allowing the largest number of persons to take part in the auction of Crown Lands.
5. Because the Crown, in the disposal of its lands by auction, is not in the position of a private individual, but is bound to afford equal opportunities to all its subjects to acquire, occupy and use such lands without any distinction of class, race or colour.
6. Because the insertion of restrictive clauses in the sale or lease ¹⁰ of Crown Lands adversely affecting the Asiatic or African population of the Colony of Kenya is contrary to law and justice, and is, further, opposed to the declared policy of His Majesty's Government.
7. Because the adoption of conditions of sale based on racial discrimination is, in any event, *ultra vires* of the Commissioner of Lands under sections 6 and 10 of the Crown Lands Ordinance.

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APPENDIX TO APPLICANT'S CASE.

EXTRACTS FROM THE OFFICIAL GAZETTE OF THE COLONY AND PROTECTORATE OF KENYA.

GOVERNMENT NOTICE No. 340 of the 12th October, 1920, p. 928.

The East Africa Townships Ordinance, 1903,

and

The Townships (Public Health, Segregation of Races) Rules, 1918.

IT IS HEREBY notified that in exercise of the powers conferred on him by the East Africa Townships Ordinance, 1903, and in accordance with the
10 Townships (Public Health, Segregation of Races) Rules, 1918, the Governor has been pleased to reserve in Mombasa Township as a European residential reservation an area bounded as follows:—

GOVERNMENT NOTICE No. 208 of the 30th May, 1921, p. 468.

The East Africa Townships Ordinance, 1903,

and

The Townships (Public Health, Segregation of Races) Rules, 1918.

IT IS HEREBY notified that in exercise of the powers conferred upon him by the East Africa Townships Ordinance, 1903, and all other powers thereunto him enabling, His Excellency the Governor has been pleased to
20 revoke Government Notice No. 340 of the 12th day of October, 1920, wherein a European residential reservation and the boundaries thereof in the Township of Mombasa were prescribed.

GENERAL NOTICE No. 586 of the 23rd May, 1921, p. 470.

The Crown Lands Ordinance, 1915.

As IT IS undesirable to prejudice any decision that may be made by the Secretary of State in the matter of Indian policy now under consideration by him, it has been decided that the sale of leases of Crown Lands (farms) advertised (General Notice No. 196 of 17th February, 1921) to take place at Nairobi on Monday, 6th June, 1921, will be postponed until
30 further notice.

GOVERNMENT NOTICE No. 250 of the 25th July, 1923, p. 637.

Paper presented to Parliament relating to Indians in Kenya.

An introductory note by the Secretary of State for the Colonies, dated the 23rd July, states that the following Memorandum summarises the history of the Indian question in Kenya and sets out the general policy laid down by His Majesty's Government with the decisions they have taken on the practical points at issue:—

Paragraph 7 of Part II.: Segregation in Townships.—The next matter for consideration is that of segregation of the European and non-European races. Following upon Professor Simpson's report, the policy of segregation was adopted in principle, and it was proposed by Lord Milner to retain this policy, both on sanitary and social grounds. In so far as commercial segregation is concerned, it has already been generally agreed that this should be discontinued. But with regard to residential segregation, matters have been in suspense for some time, and all sales of Township plots have been held up pending a final decision on the question of principle involved. It is now the view of competent medical authorities that, as a sanitation measure, the segregation of Europeans and Asiatics is not absolutely essential for the preservation of the health of the community; a rigid enforcement of sanitary, police and building regulations, without any racial discrimination, by the Colonial and Municipal authorities will suffice. It may well prove in practice that different races will, by natural affinity, keep together in separate quarters, but to effect such separation by legislative enactment except on the strongest sanitary grounds would not, in the opinion of His Majesty's Government, be justifiable. They have, therefore, decided that the policy of segregation as between Europeans and Asiatics in Townships must be abandoned. But for the present, at any rate, it is considered desirable, as in other native dependencies, to keep the residential quarters of natives, so far as practicable, separate from those of the immigrant races. In the case of individual natives, such as servants, strict segregation would be unworkable; but it is important, when areas have been fixed in Townships for native residence, that those areas be regarded as definitely set aside for the use of natives and no encroachment thereon by non-African races be permitted.

Paragraph 8: Reservation of the Highlands recites the history of the question since 1906, and then proceeds:—In adhering to the position adopted by his predecessors in this matter, Lord Milner, when Secretary of State, made it clear that the reservation of a certain area for Europeans implied that a similar reservation should be available for Indians who wished to take up agricultural land, and he contemplated the reservation of such lands in the Lowlands of Kenya on the understanding that the land offered to Indian settlers would be examined as to its suitability and adequacy by a representative whom the Indian Government might send. After reviewing the history of this question and taking into consideration

the facts that during the last fifteen years European British subjects have been encouraged to develop the Highlands, and that during that period settlers have taken up land in the Highlands on this understanding, His Majesty's Government have decided that the existing practice must be maintained as regards both initial grants and transfers. An area of land in the Lowlands which can be set aside without infringing native reserves and without conflicting with native requirements will be temporarily reserved in order that it may be ascertained by experience what demand there is for agricultural land on the part of Indians who will give suitable
 10 guarantees of their intention to develop the land themselves. After the expiration of a limited period, the reservation of this area in the Lowlands will be reconsidered in the light of the experience so gained.

GENERAL NOTICE No. 155 of the 27th February, 1924, p. 175.

The Crown Lands Ordinance, 1915.

THE GRANTS of the farms specified in the Schedule hereto will, subject to the provisions of the Crown Lands Ordinance, 1915, be offered for sale at the Railway Institute, Nairobi, commencing at 10 a.m. on Monday, the 26th May, 1924.

Conditions of Sale.

- 20 1. Each farm shall be auctioned separately.
2. These farms are in the Highlands and purchase will therefore be confined to Europeans only (or their accredited agents) in conformity with the decision of His Majesty's Government.

Similar conditions in identical terms appear in the *Official Gazettes* of the 5th, 12th, 19th and 26th March, 2nd, 9th, 16th and 23rd April, 1924, 23rd March, 1925, and 8th February, 1926.

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