

29, 1931

In the Privy Council.

No. 8 of 1930.

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA.

BETWEEN

THE COMMISSIONER FOR LOCAL GOVERNMENT
LANDS AND SETTLEMENT (ORIGINAL RESPONDENT) *Appellant*

AND

ABDULHUSEIN KADERBHAI (ORIGINAL APPLICANT) - *Respondent*

AND BETWEEN

ABDULHUSEIN KADERBHAI (ORIGINAL APPLICANT) - *Appellant*

AND

THE COMMISSIONER FOR LOCAL GOVERNMENT
LANDS AND SETTLEMENT (ORIGINAL RESPONDENT) *Respondent.*

(CONSOLIDATED APPEALS.)

RECORD OF PROCEEDINGS.

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AND

THE COMMISSIONER FOR LOCAL GOVERNMENT,
LANDS AND SETTLEMENT (ORIGINAL RESPONDENT) *Respondent.*

(CONSOLIDATED APPEALS)

RECORD OF PROCEEDINGS.

No. 1.

Notice of Motion.

*In the
Supreme
Court of
Kenya.*

Ex parte.—

TAKE NOTICE that the Court will be moved on Friday the 10th day of August 1928 at 9.30 o'clock in the forenoon or so soon thereafter as the Counsel can be heard on the part of the Applicant that a Mandamus may be granted commanding the Respondent to allow the Applicant to bid for and purchase at the auction sale intended to be held by the Respondent for disposal of Crown Lands being the Plots on the Mombasa Island referred to and specified in the Schedule attached to the General Notice No. 714 appearing at the page 982 of the issue of the Official Gazette dated the

No. 1.
Notice of
Motion,
9th August
1928.

*In the
Supreme
Court of
Kenya.*

3rd day of July 1928 and also commanding the Respondent to cancel or annul the Condition Number 5 of the Special Conditions in the said Notice.

Dated this 9th day of August 1928.

(Sgd.) A. B. PATEL,
Advocate for the Applicant.

(Sgd.) R. L. UNDERWOOD,
District Registrar,
Supreme Court of Kenya,
Mombasa, District Registry.

No. 1.
Notice of
Motion,
9th August
1928—con-
tinued.

No. 2.
Affidavit of
Abdulhusein
Kaderbhai,
9th August
1928.

No. 2.

10

Affidavit of Abdulhusein Kaderbhai.

I, ABDULHUSEIN KADERBHOY, the above-named Applicant make oath and state as follows :—

(1) I am Indian Bohra subject of His Majesty residing and working for gain in Mombasa in the Colony and Protectorate of Kenya.

(2) The Respondent, the Commissioner for Local Government, Lands and Settlement is the Officer at present in charge of the administration of the Crown Lands Ordinance (Chapter 140 Laws of Kenya) and is as such Officer entrusted with the duty of transacting the administration of the said Ordinance and of any law regulating the sale, letting, disposal and occupation of Crown Land. 20

(3) The said Respondent purporting to act under the said Crown Lands Ordinance intends to sell grants in respect of the Plots at Mombasa specified at page 982 of the issue of the Official Gazette dated the 3rd July 1928.

(4) All the Plots specified in the said Schedule are Crown Lands. The Respondent has published in the said Notice No. 714 several conditions of sale or disposal which are headed in two parts as "General Conditions of Sale" and "Special Conditions."

(5) The first portion of the first condition under "The General Conditions of Sale" is "1. Europeans only will be allowed to bid"; and under the "Special Conditions" there appears the following as the fifth condition "5. Not at any time during the term of the Grant shall the Grantee permit the dwelling house or outbuildings to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him." 30

(6) As said above I am an Indian, and as such I am therefore refused the right to bid for and purchase at the auction any of the said Plots, or to occupy any building which may be erected on any of the said Plots except as a menial servant.

(7) I am advised and I believe that the Respondent is in no way 40 entitled under the law he is entrusted to administer to impose the said

restrictive conditions or any of them and that he is, under the said law, in duty bound to throw open the sales or disposals and the use and occupation of the said Plots to anyone without any distinction as to race, by public auction, whoever may care to bid for and purchase the said Plots or any of them.

(8) I have requested the Respondent to annul or cancel the said two restrictions and to let me bid for and purchase any of the said Plots at the auction which is advertised by the said Notice to take place on the 11th August 1928, at 10 A.M. but the Respondent has not as yet complied with my said request, has not withdrawn any of the said conditions and intends to carry out the sales with the said restrictive conditions thus refusing me the right to bid and purchase to which I am entitled in law without also being restricted as to allowing occupation in the manner intended to be enforced.

(9) I am advised and I believe that there is not in law any other remedy than asking for a Mandamus against the Respondent, the said Public Official commanding him to do his duty.

Sworn by the above-named Deponent at Mombasa, this 9th day of August 1928.

Before me,
R. L. UNDERWOOD,
District Registrar,
Supreme Court of Kenya,
Mombasa, District Registry.

(Sgd.) ABDULHUSSEIN KADERBHOY.
Filed by (Sgd.) A. B. PATEL,
Advocate for the Applicant.

*In the
Supreme
Court of
Kenya.*

No. 2.
Affidavit of
Abdulhusein
Kaderbhai,
9th August
1928—con-
tinued.

No. 3.

Order postponing Auction.

UPON MOTION this day made unto this Court for a Mandamus commanding the Respondent to allow the Applicant to bid for and purchase at the auction sale intended to be held by the Respondent for disposal of Crown Lands being the plots on the Mombasa Island referred to and specified in the Schedule attached to the General Notice No. 714 appearing at the page 982 of the issue of the Official Gazette dated the 3rd day of July 1928 and also commanding the Respondent to cancel or annul the condition number 5 of the special conditions in the said Notice AND UPON HEARING Mr. N. M. Budheo and Mr. A. B. Patel Advocates on behalf of the Applicant and upon the undertaking of the Applicant that he will pay to the Respondent all expenses of His Majesty's Government occasioned by postponement of the said auction sale including the publication in a local newspaper of such notices and the distribution of such handbills as the Respondent may deem fit particulars of which expenses the Respondent shall deliver to the Applicant THIS COURT DOTH ORDER that the

No. 3.
Order
postponing
auction,
10th August
1928.

*In the
Supreme
Court of
Kenya.*

said auction sale be postponed until further order of this Court AND IT IS FURTHER ORDERED that a notice to shew cause do issue to the Respondent upon the above mentioned Motion for Mandamus to be returnable on the 19th September 1928.

No. 3.
Order
postponing
auction,
10th August
1928—con-
tinued.

GIVEN under my hand and the Seal of the Court this 10th day of August 1928 at Mombasa.

(Sgd.) G. H. PICKERING,
Judge, Supreme Court of Kenya.

No. 4.
Proceedings
prior to
hearing.

No. 4.

Proceedings prior to Hearing.

10

10.8.28.

Budheo and Patel for Applicant.

BUDHEO :—

Halsbury Volume 10 page 110 Paragraph 218 and 221.

Sale should be postponed.

Notice May 29th; July 3rd;

Application filed late afternoon 9th August 1928.

Letter to Respondent on 24th July.

ABDULHUSEIN KADERBHAI states that he has credit in his current accounts with Standard Bank of South Africa (Mombasa and Jinja) 20 exceeding £5000.

(Sgd.) G. H. PICKERING.

COURT :—

The application has been delayed up to last moment. I will stay auction upon condition of Applicant paying Government's expenses occasioned by the postponement including publication of such notices in Local Press as the Resident Commissioner Mombasa may deem fit, and distribution of handbills as arranged by the Resident Commissioner Mombasa.

Abdulhusein Kaderbhai undertakes to pay all these expenses; the amount to be payable to the Resident Commissioner Mombasa. 30

ORDER :—

The auction advertised for 11th August 1928 in General Notice No. 714 on page 982 of Official Gazette dated 3rd July 1928 is postponed until further order of this Court upon the above undertaking of Applicant. This Order to be drawn up and served by midday upon the Resident Commissioner Mombasa.

Upon the motion for Mandamus the Respondent is required to show cause in this Court on 19th September 1928 at 10 a.m. Affidavits relied

upon by Respondent to be filed on or before 31st August 1928. Costs in Cause.

(Sgd.) G. H. PICKERING.
10.8.28.

*In the
Supreme
Court of
Kenya.*

22.8.28.

Upon application by Respondent.

Atkinson for Respondent.

Budheo for Applicant.

12.11.28 for hearing of application—Affidavit of Respondent to be
10 filed by 30.9.28.

(Sgd.) G. H. PICKERING.
22.8.28.

No. 4.
Proceedings
prior to
hearing—
continued.

20.10.28.

Upon application that rule be made absolute in default of Affidavit.
Patel for Applicant.

ORDER :—

The Respondent has not filed Affidavit in reply within the time allowed and must be taken not to be disputing the facts as alleged by Applicant. But no order absolute can be made without hearing the Respondent
20 upon the facts as presented and the law applicable thereto. No order on application.

(Sgd.) G. H. PICKERING.

9.11.28

Telegram from Mr. Phadke read.
Hearing date changed to 8.12.28.

(Sgd.) ERIC T. JOHNSON.

8.12.28.

Phadke.
Atkinson.

30

No. 5.

Arguments of Counsel for the Applicant.

PHADKE :

Strictly speaking no return to the Writ.

Section 19 Cap. 140 Laws of Kenya. Applicant contends "European."

Question whether can exclude a class.

Auction as usually defined does not admit restriction.

Wharton. Definition. (COURT :—narrow definition).

Distinction between Part III and Part IV.

Section 27 corresponds with Section 19.

40

Section 27 (c). Such definitely omitted from Section 19.

No. 5.
Arguments
of Counsel
for the
Applicant,
8th Dec-
ember 1928.

*In the
Supreme
Court of
Kenya.*

No. 5.
Arguments
of Counsel
for the
Applicant,
8th Dec-
ember 1928
—continued.

Applicant says such power not given to land.
ATKINSON :—I am instructed not to take any technical points but to argue on the merits.
Section 6 (Part II). Section 8 make him Administrative Officer.
Does not delegate all powers Governor may have.
In reality Section 6 is not intended to regulate Part III.
Section 10 excludes Section 6 from Commissioner of Lands.
Commissioners of Lands in Part III.

No. 6.
Arguments
of Counsel
for the
Respondent,
8th Dec-
ember 1928.

No. 6.
Arguments of Counsel for the Respondent.

10

ATKINSON :—

Auction. Leases need not be by auction—Section 18.
Others whole argument to shew public.
No statutory definition of Auction.
But see English Report 145 at page 1047. Duty on auction sale held in Private. Few friends only.
Heber Hart. Definition of auction.
Auction limited to a class.
Bidders to offer for property by increasing sums.
Auction—not public auction in the Notice. 20
Section 27 proves case for Crown.
Neither 19 or 27 deals with the rights of Crown. Merely procedural.
Right to restrict inherent in Ownership.
Section 27 gives no right.
Rules 1902. Official Gazette 1913 page 132. Even without rules
Land Officer not fettered in restrictions.
Sub Section 3.
3 English Report 640. 641. Eldon.
PHADKE in reply.
Auction connotes public auction. 30
Refer to legislation. Ex enemy aliens.
Decision 10.12.28.

(Sgd.) ERIC T. JOHNSON.

No: 7.
Judgment,
10th Dec-
ember 1928.

No. 7.
Judgment.

The applicant prays that the Court will grant a Mandamus commanding the Respondent, the Commissioner of Lands, to allow the Applicant to bid for and purchase certain Crown Land proposed to be sold by auction

in Mombasa Island and also commanding the Respondent to cancel or annul the condition No. 5 in the Special Conditions of Sale in General Notice No. 714 appearing in the Official Gazette of 3rd July 1928.

The first prayer is concerned with the General Conditions of Sale of which the first part of the first paragraph runs "Europeans only will be allowed to bid and purchase" and the second with the 5th of the Special Conditions which runs "Not at any time during the term of the Grant shall the Grantee permit the dwelling house or outbuildings to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him".

The Notice in question commences "Notice is hereby given that Grants in respect of the Plots in Mombasa specified in the Schedule hereto will be sold by auction in the Jubilee Hall, Mombasa" on a date and at a time specified.

The Ordinance under which Sales of Crown Lands must be conducted is Cap. 140 Revised Laws of Kenya and the mode in which Sales of such lands must be conducted is laid down in Parts III and IV of the Ordinance.

Part II of the Ordinance deals with Administration and by Section 10 the Commissioner of Lands is authorised to execute for and on behalf of the Governor any Conveyance, lease or licence of or for the occupation of any Crown Lands but by a proviso excepting certain powers he is unable to vary the procedure laid down in Section 18 which ordains that, unless the Governor shall otherwise order in any particular case or cases, leases of Town Plots shall be sold by Auction.

The Applicant's case is based on the word Auction and on the difference in wording between Sections 17 and 19 and 27 of the Ordinance. Section 27 obliges the Commissioner of Lands in giving Notice of an Auction of Agricultural Lands by Sub Section (c) to include in the Notice a statement as to whether persons other than Europeans will be permitted to bid for the lease of the Farms. There is no similar provision in the case of land within Townships and it is suggested that the omission together with the use of the word auction ties the hands of the Commissioner. The land is freehold and the Governor and his Agent the Commissioner are free to dispose of it within the limits imposed by the Ordinance as they may decide, subject in the case of the Commissioner to the limitations referred to.

For the Commissioner it is said that he is not fettered by the first Part of either Section 17 or Section 19, for Section 17 does not say that he shall determine only the matters referred to in the Section nor Section 19 that the Notice shall state only the particulars given in the Section. In my view the conditions, general and special are within the Commissioner's powers if the word auction does not, as Mr. Phadke presses upon me connote a public auction, that is an auction at which all are free to attend and bid and purchase. If it does, then the Commissioner would not be free to determine whether the land should be offered to a particular class of bidders only, though he still might be able to include the prohibition of further alienation to an excepted class under Section 17 (d).

*In the
Supreme
Court of
Kenya.*

No. 7.
Judgment,
10th Dec-
ember 1928
—continued.

*In the
Supreme
Court of
Kenya.*

No. 7.
Judgment,
10th Dec-
ember 1928
—continued.

No case has been cited in which the word auction has been defined but several have been brought to my notice in which particular forms of sale have been held to be sales by auction.

A definition of the word is to be found in Chambers Dictionary in which it is stated to mean "a public sale in which the bidder offers an increase on the price offered by another and the articles go to him who bids highest". Heber Hart, in the "Law relating to Auctioneers" says, "An auction, in the most usual sense of the word, is a proceeding at which the public are invited to compete for the purchase of property by successive offers of advancing sums". But, he adds:—"It will be sufficient to point out that other meanings of the word are not unusual. For example, an auction often denotes a competition by bidding limited to a particular class or association, as distinguished from the public at large". 10

As an example of this an auction at the end of a Church Bazaar might be instanced where the bidding is confined to those who have paid to enter the building in which the Bazaar is held.

In Halsbury Volume I page 500 "Auction" is defined as "a manner of selling or letting property by bids, and usually to the highest bidder by public competition."

The sales by Auction Ordinance Cap. 103 Revised Laws of Kenya 20 which have not been referred to during the case, in Section 3 defines an auctioneer thus:—"Every person who sells or offers for sale any moveable or immovable property or any interest therein at any sale or roup where any person becomes or may become the purchaser of the same by competition and being the highest bidder, either by being the sole bidder or increasing upon the biddings made by others, or decreasing on sums named by the Auctioneer or person acting as Auctioneer or other person at such sale, or by any other mode of sale by competition shall be deemed to carry on the business of an Auctioneer".

The cardinal essential in all sales by auction seems then to be that it 30 is a sale by competition between those present, with the object, of course, of enhancing the price to be paid whether that competition be stimulated by the expected fall of the hammer or the expiry of a candle flame. But that it is an essential that all and sundry may bid seems to me no part of the connotation of the word as is shown by the instances quoted by Mr. Atkinson in which certain sales have been held to be sales by auction. An auctioneer by Section 3 of 19 Geo. III C.56 is he "who doth or shall exercise the calling, etc., of an auctioneer, by outcry, knocking down of hammer, candle, lot, parcel or by any other mode of sale at aucticn, or whereby the highest bidder is deemed to be the purchaser." The instance quoted by Lord Eldon 40 in 1813 in the case of *Walker vs. Advocate General* (a House of Lords Case) 3 English Reports page 640 of a female auctioneer well bears repetition. "She continued silent during the whole time of the sale; but whenever any one bid she gave him a glass of Brandy. The sale broke up, and in a private room, he that got the last glass of Brandy was declared to be the purchaser." This was decided to be an auction.

In *Walker vs. Advocate General* the facts were that an estate was to be sold at auction.

No bids were made at the place and time of meeting. Soon after the Agent of the owner was approached by some of those who had attended at the public meeting and in a private room it was agreed that offers should be made in writing and the Agent agreed before inspecting the offers that the highest offer should be accepted. This was held to be a sale by auction.

Under our own sales by Auction Ordinance I believe the following facts would constitute a sale by auction enforceable by the bidder.

10 Three adjoining Town Plots are held No. 1 by A, No. 2 by the Crown and No. 3 by B. The businesses of A and of B are prospering and it becomes obvious that either will require to extend his premises.

If the Commissioner of Lands fulfilled the Conditions laid down in Section 17 and 19 but confined the auction to bids from A and B and only one of them turned up at the time and place appointed and offered a bid of the reserve price the Commissioner could be obliged to convey the land.

“Auction” in the Crown Lands Ordinance means I think no more than “a manner of selling immovable property by bids.”

20 Holding this view, the Applicant fails. Costs to the Respondent.
(Sgd.) ERIC T. JOHNSON.

10. 12. 28.

10. 12. 28.

Judgment read.

13. 2. 29.

WRIGHT
PATEL.

Respondent's Bill taxed at Shs. 234/- the disbursements struck out having been deleted by agreement as they are a matter between the Applicant and the Resident Commissioner Mombasa.

30 (Sgd.) R. L. UNDERWOOD.
District Registrar.

19. 3. 29.

Mr. BRUCE (Solicitor General)
Mr. PATEL.

Record settled. Copy notes of Judges, Notice of Motion with Affidavit in support and Order dated 10. 8. 28; Decree of 10. 12. 28 is already copied.

(Sgd.) R. L. UNDERWOOD.
District Registrar.

*In the
Supreme
Court of
Kenya.*

No. 7.
Judgment,
10th Dec-
ember 1928
—continued.

*In the
Supreme
Court of
Kenya.*

No. 8.

Decree.

No. 8.
Decree,
10th Dec-
ember 1928.

Motion for a Mandamus commanding the Respondent to allow the Applicant to bid for and purchase at a certain auction sale of Crown Lands and Costs.

THIS SUIT coming on this day for final disposal before Eric T. Johnson, Esquire, Acting Judge, in the presence of Mr. A. B. Patel and Mr. V. V. Phadke, Advocates for the Applicant and of Mr. G. G. Atkinson, Advocate for the Respondent, IT IS ORDERED (1) that the Motion be dismissed; (2) that the Applicant do pay to the Respondent the sum of Shillings Two Hundred and Forty One only being the costs of this Suit, with Interest thereon at the rate of 6 per cent. per annum from this date to the date of realisation. 10

PARTICULARS.

Costs as taxed	-	Shs. 234.00
Cost of Decree	-	„ 7.00
Total	-	Shs. 241.00

GIVEN under my hand and the Seal of the Court this 10th day of December 1928.

(Sgd.) ERIC T. JOHNSON, 20
Acting Judge, Supreme Court of Kenya.

NOTE :—

If the amount is paid into Court 1 per cent. on the total must be added to cover Court collection Fees.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 9.

Grounds of Appeal.

No. 9.
Grounds of
Appeal,
6th March
1929.

The Appellant above named craves leave to appeal against the decree and judgment in His Majesty's Supreme Court (Mombasa District Registry) Civil Case No. 83 of 1928 delivered by His Honour Eric T. Johnson Esq., Acting Judge on the 10th day of December 1928 (inter alia) on the following grounds :— 30

(1) That the learned Acting Judge erred in the interpretation of the word "Auction."

(2) The learned Acting Judge erred in holding that the sale by auction in the notice referred to in the application meant only a manner of selling immoveable property by bids and that the bidding could be restricted to a class of persons at the instance of the Vendor.

(3) The learned Acting Judge erred in omitting to give weight to the fact that the restrictive clauses occurring in other parts of the Ordinance are omitted from the parts III and IV of Chapter 140 of the Revised Edition of the Laws of Kenya.

(4) That the learned Acting Judge erred in holding that the word "Auction" should not be construed in its usual sense of a public auction.

(5) The judgment of the learned Acting Judge is against the facts and is contrary to law.

(6) The Appellant therefore humbly prays that the judgment of the learned Acting Judge be reversed and the decree passed be set aside and the relief prayed for by the Appellant in his original application be granted with costs.

Dated at Nairobi this 6th day of March 1929.

Filed by :—

(Sgd.) V. V. PHADKE,
Advocate for the Appellant.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 9.
Grounds of
Appeal,
6th March
1929—*con-
tinued.*

No. 10.

Judges' notes of arguments.

Coram : SHERIDAN, Acting Chief Justice, GUTHRIE-SMITH, Acting Chief
Justice and MUIR MACKENZIE, J.

(a) SHERIDAN, A.C.J.

BURKE and A. B. PATEL for appellant.

BURKE :

3rd July 1928 Gazette.

Cap. 140 S. 6 (1)

S. 10 — particularly the proviso see amendment.

S. 8.

S. 17 & 19 — 27 (e) and 39.

S. 17 any special covenants would have to be by Governor himself if
Commissioner had not the power (cf. S. 10).

S. 27 and 39 (agricultural land).

(250 O.G. 25th July 1923 P. 637).

27 (c)

S. 39 Significant no such restrictive provision in part 3 as regards
township land.

"it shall be lawful"—mandatory and not discretionary.

Is (c) of S. 27 superfluous?

If the Commissioner had power in Town leases to insert such a clause
O.G.? than in agricultural leases should power have been taken in under

27 (c)?

Turquand v. Board of Trade 11 A.C. p. 286 p. 291 Lord Blackburn.

"Take the whole of the Act together."

No. 10.
Judges'
notes of
arguments,
12th June
1929.
(a) Sheri-
dan, A.C.J.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 10.
Judges'
notes of
arguments,
12th June
1929.
(a) Sheri-
dan, A.C.J.
—continued.

An auction
which will
result in the
best bids.

So as to prevent any of the clauses being superfluous, void or insignificant.

Hornsey Local Board v. Monarch Investment Society 1890 24 Q.B.D. p. 1.

Ordinary meaning of words in English language.

Auction in the most usual sense of the word public sale.

Attorney General v. Beech 1898, 2 Q.B. p. 147 at p. 155.

Has Commissioner any right to restrict the auction to a particular class?

Selling by bids may be an auction but the ordinary way is by public sale. 10

Colquhoun v. Brooks, 14 A.C. p. 493.

Lord Herschell.

(1904) 2 K.B. p. 514 (*sic*).

Nothing in Ordinance authorizing Commissioner to insert restrictive conditions and nothing in Ordinance which can detract from ordinary meaning of word auction.

2nd point was not decided.

Commissioner of Lands powers limited.

HOWELL :

Command Paper.

S. 6 (1) and S. 17 complementary.

6 (1) deal with alienation.

Condition 5 not *ultra vires*

Commissioner like an Estate Agent.

No power given to anyone to restrict and nothing restricting.

S. 27 a procedure section—not power—giving.

19 and 27 not power giving

27—deals by inference.

Auction.

18 and 26.

Used in restricted sense.

S. 71 and 73.

Is condition 5 a competent Condition to insert in lease.

Ordinance 18/27.

Auction means a sale by bids and has no reference to class of people.

1. No restriction on Governor to sell to whomsoever he pleases.

2. Nothing repugnant in restricted auction.

27 (c) procedure and not power-giving.

Auction sale by increasing bids.

G.N. 714 P. 1120 O.G. 24th July 1928.

Onus on applicant to show he has a legal right.

17 (d).

BURKE in reply :

No authority for insertion of restrictive covenant.

S. 10 expressly excepts the Commissioner of Land's power to do this.

20

30

40

Shall determine in S. 17.
 Notice shall state in S. 27.
 Has Governor's sanction to be obtained for the notice in S. 27.
 1897 A.C. p. 38.
 C.A.V.

*In the
 Court of
 Appeal for
 Eastern
 Africa.*

(b) GUTHRIE-SMITH, A.C.J.

Burke for the appellant.
 Crown Lands Ordinance Sections 6, 10, 8, 17 and 19.
 27 (c) and 39.

No. 10.
 Judges'
 notes of
 arguments,
 12th June
 1929.
 (b) Guthrie-
 Smith,
 A.C.J.

10 Refers to O.G. 25th July 1923 Notice 250 at p. 637 para. 7.
 As to construction *Queen v. Bishop Oxford* 1879 4 Q.B.D. 245, 261,
 para. 27c is according to the Judge "superfluous" if the like restriction
 applies to township plots as well as agricultural land.

Turquand v. Board of Trade 11 A.C. 286 at p. 291.
Hornsey Local Board v. Monarch Investment Society 1890 24 Q.B.D. p. 1.
 1898 2 Q.B. *Attorney General v. Beech* p. 147, 155.
Colquhoun v. Brooks, 14 A.C. 493.
 1904 K.B. p. 514, 521, 522.

20 As to second objection. It is covered by the 1st.
 There must be a specific provision in the Ordinance giving power to settle
 area for black and white. Sections 27c and 39 answer the first point.
 HOWELL for Commissioner.

White paper not an instruction from Secretary of State to Colony.
 Governor's powers not restrict the powers of enactment in section 6.
 Sections 6 and 17 are not watertight compartment. They are comple-
 mentary.

The powers of discretion are on the Governor alone section 6.
 O.G. 1928 July 24th for Notice.

30 BURKE: No authority for Governor to insert a covenant against
 non-European occupation in any lease. The Commissioner cannot exercise
 this power by virtue of Section 10.

(c) MUIR-MACKENZIE, J.

Burke with him Patel for Appellant.
 Howell for Commissioner of Lands, Respondent.

(c) Muir-
 Mackenzie,
 J.

BURKE opens.
 Affidavit read.
 Judgment read.

Under Ordinance Governor would be only person entitled to restrict
 persons entitled to bid under Section 6.

40 Policy of the law is not matter for consideration.
 Section 6 Cap. 140. Vol. III 1539.

Governor may . . . alienate . . . on any terms and conditions
 as he may think fit.

Section 10. Commissioner of Lands may . . . nothing shall be
 deemed to authorise the Commissioner of Lands to exercise any of the
 powers conferred by Section 6 . . .

*In the
Court of
Appeal for
Eastern
Africa.*

No. 10.
Judges'
notes of
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(c) Muir-
Mackenzie,
J.—con-
tinued.

Section 8. Commissioner of Lands to administer.
Section 17 and 19. Compare with 27 (c) and (39).
Special conditions 17 (e) might refer to class of business.
Any condition not expressly authorised would have to be inserted
by Governor himself in view of Sections 6 and 10.
Government Notice 250 of 25th July 1923 P. 637 para. 7.
Special instructions of Secretary of State.
Agricultural Land 27c and 39.
Special conditions as to Europeans.
No such restrictive provisions in Part III as regards township lands. 10
Reg v. Bishop of Oxford 1879 IV Q.B.D. 235 at p. 261.
"It shall be lawful" is a mandatory expression.
Judge's finding would indicate 27 (c) is superfluous because he finds
the Commissioner of Lands can, according to him, introduce restrictions
into any sale.
Rule of construction is—Statute ought to be so construed that if it
can be prevented no clause sentence or word shall be inserted which is
superfluous, void or insignificant.
Turquand v. Board of Trade 11 A.C. 286 Blackburn L.J. p. 291 "The
whole of the Act together must be taken." 20
Statute must be construed according to the ordinary meaning of the
words.
Lord Esher—*Hornsey Local Board v. Monarch Investment Board
Society*, 1829, 24 Q.B.D. p. 1.
There must be strong ground from context or reason for words to be
construed otherwise than in their ordinary meaning.
Chambers and Heber Hart.
Whether particular transaction amounts to an auction is a different
question altogether.
1898 2 Q.B. p. 155 *Attorney General v. Beech* } on point of ordinary 30
Colquhoun v. Brooks 14 A.C. 493, } construction.
The judgment followed to its logical conclusion will give Commissioner
of Lands wider powers than Governor.
He can import any condition.
Auction is intended to bring in best price.
1904 2-K.B. p. 521, 522.
Language of section consistent with either view must look at other
sections.
Special Condition.
No. 5. 40
Part IV. Sec. 39 specially deals with in case of Agricultural leases.
No such condition in Part IV Section 39.
Question as to what particular class of business is a matter under
Township rules.
1921 Order in Council any order may be made necessary to the justice
of the case.
Same guiding principles of construction apply.

Same argument as to special conditions cannot be inserted unless by the Governor under Section 6 and 10.

To import such a provision into 17 or 19 is to legislate.

HOWELL for Crown—Commissioner of Lands.

White paper is not special instructions of Secretary of State.

Section 6 and 17 are complementary one to the other.

Section 6 (1) deals with alienation.

Commissioner does not grant lease. That is matter for the Governor.

The Commissioner drafts conditions of sale.

10 Lease is afterwards granted by the Governor.

Amendment of Section 10 makes this even clearer.

Agree—no power to restrict sale of plots to particular person is given.

The Governor can sell to whom he likes.

He is in no worse position than any other person.

27 (c) assumes that the power exists.

It is a procedure section.

Can't say why it was omitted from Section 19.

Neither 19 or 27 confers any power on anyone they are merely procedure.

Auction—meaning of in this Ordinance.

20 Cf. Section 18 and 26. 26 clearly anticipates restricted auction because of 27 (c).

Procedure does not affect his right.

Sections 71 and 73—Notice and Veto.

It would be idle to allow people to bid if special condition 5 is void and assignor sublet could be vetoed under 73.

Auction merely means a sale by bids.

Latin derivation means only—an increasing.

1. No restriction on Governor to sell to whom he pleases.

2. 27(c) purely procedure.

30 3. Auction means no more than sale by increasing bids.

Government Notice—1120 Gazette July 24th 1929.

BURKE in reply :

Howell's submission strengthens case.

Commissioner of Lands is not agent of Governor.

Expressly excepted by section 10.

Section 17. Commissioner of Lands shall determine.

27. Such notice shall state.

C.A.V.

*In the
Court of
Appeal for
Eastern
Africa.*

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Judges'
notes of
arguments,
12th June
1929.
(c) Muir-
Mackenzie,
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tinued.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 11.
Judgment of
Sheridan,
A.C.J.,
6th July
1929.

No. 11.

Judgment of Sheridan, A.C.J.

This is an appeal from a Judgment of the Supreme Court of Kenya sitting at Mombasa. In connexion with the sale of certain township plots in Mombasa a Government Notice No. 714 was published in the Gazette at page 982.

The Notice contained two conditions one a General Condition the other a Special Condition. For the purpose of this case it suffices to quote those two conditions. The General Conditions reads:—

“Europeans only will be allowed to bid and purchase and no person will be allowed to purchase more than one plot”. (The latter part of this condition is not relevant to the case.) The Special Condition reads: “Not at any time during the term of the grant shall the grantee permit the dwelling-house or outbuildings to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him”.

The Appellant on the 10th August 1928 obtained a rule calling upon the Respondent to show cause. This rule was discharged by the Judgment from which this appeal has been lodged. The case before the Supreme Court would appear to have been argued principally on the meaning to be attached to the word “auction” in the Crown Lands Ordinance. I think the learned Judge considered that the decision of the first prayer decided the second prayer. If he thought so I do not agree for the fact that a person is not allowed to bid at a sale of property does not *per se* prohibit his being allowed to occupy the property by the Grantee.

Section 18 of the Crown Lands Ordinance provides that leases of town plots shall, unless the Governor shall otherwise order, in any particular case or cases, be sold by auction.

In the absence of any limiting words in this Section the word auction should I think be given the meaning it most usually bears namely a sale by public auction. I do not think it can reasonably be said that where plots are to be sold by auction the sale is to be restricted to a particular section of the Community in the absence of express and unequivocal words. True, as the authorities reveal, there may be many sales which would come within the meaning of the word, but that would not be a reason for giving the word in a particular case a limited meaning. The learned trial Judge seemed to think that because a sale could be held in a variety of ways any one of those ways being an auction that it was competent for the Commissioner of Lands to hold the sale in any one of those ways as could be said to be an auction. To pursue this argument to its logical conclusion such an interpretation would permit of the Commissioner holding a sale and restricting the bidding to two or three persons. Before such a construction can be accepted the words of a Statute must be clear and free from ambiguity.

Now in the particular Ordinance there is an indication not that such a limited view could be taken of the meaning of the word auction but that the Legislature had no intention of adopting the unusual method of restrict-

ing the bidding at a sale of township plots to a particular section of the Community. In the first place Section 19 which prescribes what a notice of sale shall state makes no reference to the bidding being restricted to a particular class of persons. Secondly section 20 refers to the reading of the terms and conditions of sale and says "all persons bidding at the sale shall be bound by the conditions and terms so read", and there is nothing in the Section suggesting a limited class of bidders. Thirdly—and this is the point on which Mr. Burke has placed most reliance—Section 27 which refers to the notice of auction of Agricultural Lands provides *inter alia* that
 10 such notice shall state "Whether persons other than Europeans will be permitted to bid for the lease of the farms".

If the notice of auction of Agricultural Land must contain those words and no mention of such a restriction is made in the Section prescribing what the notice of auction of township plots shall contain it seems not unreasonable to think that no such restriction was contemplated in the latter case. In so far as the Appellant's right to bid is concerned I am of the opinion that the rule should be made absolute. I now turn to his prayer that the 5th Special Condition should be cancelled. By virtue of Section 17 (*d*) of the Ordinance the Commissioner of Lands shall determine
 20 the special covenants, if any, which shall be inserted in the lease. This Section in my view is sufficiently wide to authorize the Commissioner to determine that a special covenant such as the 5th Special Condition in this case shall be inserted in a lease. I consider therefore that the Appellant should fail in regard to the second prayer.

The appeal is therefore allowed to the extent that the rule in regard to the first prayer is made absolute. It was on the first prayer that the case was mainly fought in the Supreme Court and I would consequently allow the Appellant costs in this Court and the Court below.

(Sd.) JOSEPH SHERIDAN.

30 6.7.29.

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No. 11.
Judgment of
Sheridan,
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6th July,
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No. 12.

Judgment of Guthrie-Smith, A.C.J.

This is an appeal from an order of Mr. Acting Justice Johnson refusing a mandamus against the Commissioner of Lands. The Commissioner of Lands is the officer charged with the duty of disposing of Crown Lands. He is established under the Crown Lands Ordinance Laws Vol. III Chapter 140. As regards Townships, his duties are laid down in Part III of the Ordinance. Section 15 allows him to "divide the township into plots suitable for the erection of buildings for business or residential purposes and
 40 such plots may be disposed of in manner hereinafter provided." By Section 17 he may determine the rent payable for any plot, the upset price, building conditions and special covenants to be inserted in the lease. By section 18

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Guthrie-
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Judgment of
Guthrie-
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plots are to be sold by auction unless otherwise ordered by the Governor. The present case arises from the fact that the Commissioner has advertised some plots in Mombosa for sale and has inserted a provision that only Europeans would be permitted to bid. This is objected to by the applicant who is a British Indian. The Ordinance is silent as to such provisions in relation to Township plots and it is worth remembering that the section of the Act as to agricultural leases provides that the notice of sale is to state whether Non-Europeans are to be permitted to bid. Part IV Section 27a. The learned Judge devotes most of his judgment to a discussion of what the word "auction" means, and he holds that a sale to a limited class is an auction. I do not doubt this. If I called in a few friends and got them to bid for my effects, this would certainly be an auction, though not a public auction. The Ordinance does not say "Public auction" and I understand the learned judge to hold that such a limited auction would be an "auction", within the meaning of the Ordinance, and so a proper execution of the powers and trusts reposed in the Commissioner. I disagree. The Commissioner is a trustee and as such he is bound to get the best price he can in the interest of the Cestui que trust, who here is the Government. This is a self-evident proposition but if authority for it be wanted, it will be found in *Downs versus Grazebrook* 3 Mer 208. If he limits the classes of people who will be permitted to bid he does not sell to the best advantage. Such a limitation tends to reduce the price bid since it cuts out a class of potential bidders. Again powers like these have to be carried out exactly e.g. a power to sell by auction will not authorize a sale by private treaty *Daniel v/s Adams* Amb. 495. Unless there were an express power to sell in this way it would be illegal to do so. There is no such power in the case of Township plots though there is such a power in case of Agricultural plots, so it may be safely inferred that to sell Township plots in this limited way is unauthorized by the Ordinance. 10

The second point raised in the application for a mandamus was an objection to special condition No. 5 in the notice of sale. It reads "not at any time shall the grantee permit the dwelling house or outbuilding to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him." This is passed over in the judgment with very slight notice and it would appear that the learned judge considered it covered by his decision on the first point. This is incorrect. To say that a Non-European shall not bid for a plot is not at all the same thing as to say that he shall not live in it. A town plot may be a rising security in which a man might wish to invest without any intention of himself going into occupation. It must therefore be determined whether a lease with such a restrictive covenant as No. 5 is authorised by the Ordinance. Section 6 of the Ordinance makes the Governor the source of all sales and leases of Crown Lands. Section 8 sets up the Commissioner of Lands as the officer charged with the administration of the Ordinance. He is in effect the Governor's attorney. Section 10 allows him to sign leases etc. for the Governor by order, but he is not to exercise the powers *inter alia* of the Governor under Section 6. Part III of the Ordinance deals 20 30 40

with leases of Township plots and section 17 (d) provides for "the special conditions which are to be inserted in the lease." Special restrictive covenants among other things provide for the sorts of buildings to be erected and the use to be made of them. As regards condition 5 I can see nothing in the Ordinance to prevent the Commissioner from inserting any such condition if he believes it to be in the best interest of the surrounding plots. If an owner of land instructed his estate agent to draw up a building scheme and sell the estate in lots as in Section 15 the agent would have to draw up conditions, and if a member of the public disliked any condition it would be absurd for him to say that it was illegal. He might however represent to the owner that his agents were acting unreasonably. We have no evidence whether condition 5 is unreasonable or not, but assuming it to be so the appellant's remedy is as stated and not by legal proceedings. It follows that the appeal succeeds as to the restriction on bidding but fails as to the covenant against occupation by Non-Europeans. Since both issues were issues of law and not of fact, it is not possible to sever the costs of the two, and so the appellant must have his costs in both courts.

(Sgd.) F. GUTHRIE-SMITH.

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No. 12.
Judgment of
Guthrie-
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No. 13.

Judgment of Muir-Mackenzie, J.

20

This appeal comes before the Court from a decision of the Supreme Court of Kenya refusing to grant a mandamus.

1. Commanding the Commissioner of Lands to allow the Appellant, an Indian, to bid for and purchase certain Crown land proposed to be sold by Auction in Mombasa Island.

2. Commanding the Commissioner to cancel condition 5 of the special conditions.

Both the 1st and 2nd of these conditions appeared as a general condition of sale and a special condition of sale in General Notice 714 in the Gazette of 3rd July, 1928.

Summarised their effect was:—

1. That Europeans only would be allowed to bid and purchase.

2. That the purchaser must covenant in the lease not at any time during the term of the grant to permit the dwelling house or outbuildings to be used as a place of residence for any Asiatic or African who is not a domestic servant employed by him.

3. In his Judgment the learned trial Judge refers to the relevant Sections of the Crown Lands Ordinance Cap. 140 (Vol. III Laws of Kenya) and thereafter applies himself almost entirely to a discussion of what the word Auction means, for he says: "In my view the conditions general and special are within the Commissioner's powers, if the word auction does not, as Mr. Burke presses upon me, connote a public auction."

40

No. 13.
Judgment of
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Mackenzie,
J., 6th July
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4. In my view, with respect to the learned trial Judge, the issue before the Court was not so much concerned with what the word auction meant or what might be considered to be included in an auction, as whether or not the Crown Lands Ordinance gives powers to the Commissioner to include in an auction of Town plots restrictive conditions of sale general and special such as he has sought to include here.

5. I really think it is hardly necessary to cite authority to establish that auction usually means public auction or that auction may mean an auction restricted to a particular class of bidders or that the bidding may be conducted in a variety of ways.

All we are concerned with is the powers of the Commissioner of Lands to insert these conditions in an auction of Town plots.

6. Auctions of Town plots are governed by Sections 17, 18, 19 and 20 of the Crown Lands Ordinance, Auction of Agricultural land by Sections 26, 27 and 28.

7. It is mandatory upon the Commissioner of Lands that in the notice of an auction of Agricultural lands he shall state "Whether persons other than Europeans will be allowed to bid." Section 27 (c).

8. That must mean whether or not persons other than Europeans are allowed to bid. He must say something in his notice. He can not merely issue the notice without any condition and thereby exclude persons other than Europeans.

9. There is no mandatory provision of this sort in relation to the auction of Town plots in Section 19 the corresponding Section to Section 27 dealing with agricultural plots.

10. I can not think that in its absence this Court ought to assume that power is given to the Commissioner of Lands to make such a condition.

11. I think it is right and in accordance with the established rules of construction of Statutes which have been cited to us, to assume that the power having been expressly granted under the one Section and omitted in the other it was not intended to grant it in the one from which it was omitted. For this Court to hold that such a power may be assumed without being expressly granted would be to take upon itself the functions of the legislature.

12. As to the special condition restricting by covenant the user by the purchaser, that appears to me to be on a different footing.

13. In my opinion the Commissioner of Lands has power to insert this special condition because the power is granted in the Ordinance and similar powers are granted both in respect of Town plots and Agricultural land.

14. It has been suggested by the Appellant that Sections 6 and 10 bar the Commissioner of Lands from inserting this special condition. The material portion of Section 6 states :—

(1) Subject to directions of the Secretary of State the Governor may alienate on any terms and conditions he think fit.

(2) He may remit covenants, agreements and conditions in a lease.

15. Section 10 says :— That subject to any general or special directions by the Governor the Commissioner of Lands may do any act or thing,

exercise any power and give any order or direction which may be done or exercised by the Governor under this Ordinance. Provided that nothing in this Section shall be deemed to authorize the Commissioner of Lands to exercise any of the powers conferred upon the Governor by Section 6 and certain other Sections with which we are not concerned.

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16. I can not find that there is anything in Section 6 to confine the power to insert special conditions of sale of an auction to the Governor ; but turning to Section 17 I find the express provision : Before any town plot is disposed of under the next succeeding Section the Commissioner of Lands—
10 not the Governor be it noted—but the Commissioner of Lands shall determine the special covenants if any which shall be inserted in the lease.

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17. Further the matter is made still more clear on turning to Section 19 where it is stated :—The notice—that is the notice of the auction—shall state the special covenants, if any, to be inserted in the lease to be granted in respect of any plot :—

18. There then, it seems to me, the Commissioner of Lands is specially empowered and directed to determine the special covenants, and when they are so determined to insert them in the notice.

19. It is argued that Section 39 which creates an implied special
20 restrictive covenant in all agricultural leases shows that, since there is no corresponding Section in the previous part of the Ordinance dealing with Town plots, it was not intended that power was to be given to insert a special restrictive covenant in the notice to sale. I do not agree.

20. To begin with the case dealt with by Section 39 is an implied covenant in the lease and has nothing to do with the notice and to go on with it is quite a different covenant to the one with which we are concerned only applying, as it does, to leases made to Europeans. Thirdly, whereas in the case of the general covenant it is specially mentioned in regard to agricultural land and no mention is made at all as regards Town plots.
30 In the case of special covenants the Commissioner of Lands is specially directed to determine and give notice of them both in agricultural and Town plots.

21. For the reasons I have stated I think that the Appellant succeeds on the 1st prayer and fails on the second.

23. Both in this Court and in the Court below the main argument was addressed to the 1st prayer and it seems to have been very largely assumed that if the 1st prayer was granted or refused the second would follow suit.

The addition of the second prayer can not have added appreciably to the costs. I therefore consider that the Appellant having succeeded on
40 the chief ground of appeal he should receive his costs both of the Appeal and in the Court below.

(Sgd.) K. J. MUIR-MACKENZIE.

6. 7. 29.

*In the
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ORDER OF THE COURT.—

The appeal is allowed to the extent that the rule in regard to the first prayer is made absolute. The appellant will have costs in this Court and the Court below.

(Sgd.) JOSEPH SHERIDAN.

6. 7. 29.

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No. 14.

Decree.

No. 14.
Decree,
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1929.

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.
Civil Appeal No. 3 of 1929.

10

(From Original Decrees in Civil Case No. 83 of 1928 of H.M. Supreme Court of Kenya in the District Registry at Mombasa.)

ABDULHUSEIN KADERBHAI - - - (Original Applicant) Appellant.

v.

THE COMMISSIONER FOR LOCAL GOVERNMENT LANDS AND
SETTLEMENT - - - (Original Respondent) Respondent.

This Appeal coming on 6th July 1929, for hearing before His Majesty's Court of Appeal for Eastern Africa in the presence of J. A. C. Burke, Esq., Advocate on the part of the Appellant and of C. G. Howell Esq., Advocate on the part of the Respondent It is ordered that (a) the appeal be allowed with costs in this Court and the Court below to the extent that the rule in regard to the first prayer is made absolute viz. the appellant is allowed to bid for and purchase certain Crown Land proposed to be sold by auction in Mombasa Island (b) the decree of the Supreme Court dated 8th December 1928 be reversed and (c) the respondent do pay to the appellant the sum of Shillings Two thousand and fifty three made up as under : -

Costs in this Court as per attached certificate	-	Shs.	1146.	00
Costs in the Supreme Court as taxed	-	-	907.	00

Total Shs.	-		2053.	00
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(Sgd.) MURRAY M. JACK

30

Registrar.

Dated this 6th day of July 1929.

No. 15.

Application by the Commissioner for Local Government Lands and Settlement for leave to appeal to His Majesty in Council.

*In the
Court of
Appeal for
Eastern
Africa.*

Let all parties concerned attend the Court on or about the 16th day of September, 1929, at 10 o'clock in the forenoon when the Court will be moved on the part of the Respondent.

That leave to appeal to His Majesty's most Honourable Privy Council against so much of the judgment of this Honourable Court as affects the Appellant's first prayer be granted to the Respondent herein and that the
10 costs of this motion be provided for.

(Signed) MURRAY M. JACK,
Registrar,
H.M. Court of Appeal for E.A.

No. 15.
Application
by the Com-
missioner
for Local
Government
Lands and
Settlement
for leave to
appeal to
His Majesty
in Council,
23rd July
1929.

Dated the 23rd day of July, 1929.

This summons was taken out by Counsel for the Respondent.

(Signed) T. D. H. BRUCE,
Acting Attorney General of Kenya.

No. 16.

Affidavit in support of application of the Commissioner for Local Government Lands and Settlement for leave to appeal to His Majesty in Council.

20

I, Thomas Dundas Hope Bruce, Acting Attorney General of the Colony and Protectorate of Kenya, of Nairobi, Kenya Colony, make oath and say, as follows :—

1. I have been instructed by the Commissioner for Local Government Lands and Settlement, the Respondent above named, to apply to this Honourable Court for leave to appeal to His Majesty's Most Honourable Privy Council against the judgment of this Honourable Court, dated the 6th July, 1929, allowing the appeal of the Appellant from the judgment of Mr. Acting Justice Johnson, Acting Puisne Judge of the Supreme Court
30 of Kenya dated the 10th day of December, 1928, in so far as the said judgment of this Honourable Court affects the appellant's first prayer.

2. That the question involved in the appeal is one of great general and public importance, and in the alternative the Respondent is entitled as of right to appeal from the said judgment inasmuch as the appeal involves a question respecting property or a civil right amounting to the value of ten thousand rupees or upwards.

No. 16.
Affidavit in
support of
application
of the Com-
missioner
for Local
Government
Lands and
Settlement
for leave to
appeal to
His Majesty
in Council,
23rd July
1929.

*In the
Court of
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Africa.*

No. 16
—continued.

I therefore pray that this Honourable Court will grant leave to the said Respondent to appeal to His Majesty's Most Honourable Privy Council against the said judgment.

(Signed) T. D. H. BRUCE.

Sworn at Nairobi this 23rd day
of July 1929.

Before me,

(Signed) MURRAY M. JACK,
Registrar.

No. 17.
Petition by
Abdulhusein
Kaderbhai
for leave to
appeal to
His Majesty
in Council,
23rd July
1929.

No. 17.

10

Petition by Abdulhusein Kaderbhai for leave to appeal to His Majesty in Council.

THE HUMBLE PETITION of Abdulhusein Kaderbhoy SHOWETH—

1. THAT your petitioner is a British Indian Landowner and Merchant carrying on business at Mombasa and elsewhere.

2. THAT your petitioner is aggrieved by the judgment of This Honourable Court dated the 6th July 1929 wherein this Honourable Court held that the Respondent had power to determine that special condition No. 5 to the effect, "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" shall be inserted in the lease and therefore disallowed the application of the Appellant to command the Respondent to cancel or annul the said fifth condition.

20

3. THAT your petitioner has been advised and has reason to think that the judgment of this Honourable Court as far as the decision on the said special fifth condition is concerned will be reversed if referred to the Judicial Committee of His Majesty's Privy Council.

4. THAT your petitioner submits that the question involved in the appeal is one which by reason of its great general and public importance and by reason of its effect of depriving a large and a great portion of His Majesty's subjects to have the benefit and use of the properties they might own, ought to be submitted to His Majesty in Council for decision.

30

5. THAT your petitioner is prepared to provide such security and comply with all such conditions as this Honourable Court may prescribe as conditional to the prayer of this petition being granted.

WHEREFORE your petitioner humbly pray for leave to appeal to His Majesty in Council and for all such directions as may be necessary and just and your petitioner will ever pray.

P.P. A. H. KADERBHOY.
(Sd.) TYABALI ISMAILJI.

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Africa.*

The contents of the above petition are true to the best of my knowledge, information and belief.

(Sd.) TYABALI ISMAILJI.

No. 17.
Petition by
Abdulhusein
Kaderbhai
for leave to
appeal to
His Majesty
in Council,
23rd July
1929—*con-
tinued.*

10 Filed by
(Sd.) A. B. PATEL,
Advocate for the Appellant.
Mombasa,
23rd July 1929.

No. 18.

Order allowing final leave to appeal to His Majesty in Council.

The provisions of Article 21 of the Order in Council 1921 have been complied with. Both parties apply for final leave to appeal. Formal order for final leave made.

(Sd.) C. J. GRIFFIN.
(Sd.) JOSEPH SHERIDAN.
(Sd.) S. J. THOMAS.

20
10th December 1929.

No. 18.
Order
allowing
final leave
to appeal to
His Majesty
in Council,
10th Dec-
ember 1929.

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

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.)

RECORD OF PROCEEDINGS.

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