

38099

1938

38099

KENYA

C0533/493

Charles Cottar

Compensation for cancellation of title to mining claims.

Previous

297

1938

Subsequent

1939

291

2-23

297

24/8

Mr Summle

25/E

Mr Duncan

10/9/68

Mr Summle

21/9

Mr Summle

16 299

27/9

297

17/11

309

14/11

Mr Parker

14

Mr Duncan

26/6/68

Mr Parn

17/11

Mr Fuzato

5

309

2909

6/12

68
Nominal

Governor 166

10/1/38

Enclo further petition from Mr Cottar with copies of relevant correspondence. Feels that only legal aspect of claim merits consideration.

In No. 7 on -/36 the Governor was asked to inform Mr. Cottar, in reply to a petition, that the Secretary of State was not prepared to intervene by compensating him for the forfeiture under the Mining Ordinances of his mining claims. The history of the case is set out in document No. 16 enclosed in No. 6 on that file. In spite of having been treated with every consideration by Government, it was clear that Mr. Cottar had himself been solely responsible for the developments which led to the forfeiture of his claims.

In this despatch the Governor encloses a similar petition from Mr. Cottar. There are two new developments which require consideration. In the first place, the matter has recently formed the subject of unsuccessful legal proceedings commenced by Mr. Cottar with a view to preventing the present owners of his mining claims developing the property. These proceedings are referred to in the 28th paragraph of the petition and it is these alone which, in the opinion of the Governor, are worthy of consideration. Mr. Cottar's claim to compensation is supported by no better argument now than when it was refused in 1936, but - and this is the second development which requires consideration - the petition is now backed up by a letter of the 9th of July from the American Consul in Nairobi suggesting that some compensation should be made on the grounds (a) that Mr. Cottar's claims are valid and (b) that Mr. Cottar cannot afford to go on fighting indefinitely and that his

old

DESTROYED UNDER STATUTE

2. To Kenya 565 - 1 Amund. Com. 27.9.38

Government 622

3/10/38

Ref. 2. encs memo. setting out opinion of Attorney Genl on legal point raised in enclosure to No. 1.

The case of this matter would appear to be in § 3 (iii) of Mr Hanagin's Memo, namely that Mr Cottan is attempting in his petition to get a decision by the Executive on a question which he had opportunity but failed to put before the Court in Kenya. It is clearly undesirable ^{in principle} that Mr Cottan should be allowed to succeed in doing this, and anyway Mr Hanagin is confident that had Mr Cottan put the question before the Court the decision would have gone against him. Moreover, the question can still be regarded as being sub judice in view of Mr Cottan's declared intention to file a petition with the Privy Council.

It would appear therefore that if the Soff declines to intervene no injustice will be done.

? To understand for legal obsaco.

Clotie White
14/11

J.P. Passon
14/11

agree with the A.G.'s interpretation of
Section 102 of the Mining Ordinance 1933.

I think that the reply should be that
the S.A.S. has received and considered
the petition, but regrets that he is unable
to intervene in the matter.

At the same time we might take up with
the Comptroller the point raised in para. 2
of the attached note by Mr. Clark (Legal
Adviser F.M.S.). I also think that his
suggestion in para. 3 is well worth considering.

4/12/38 H. Duncan.

J. J. Pascoe
5/12
B. B. B. B.
5 etc

S. K. 702. 3. 16. 12. 38

WT 1818-94 11,000 2/18 T.R. 608
WT 2651-2 20,000 20/18 T.R. 608

3809 9/1384
saw

C.O.

- Mr. Costley-White.
- Mr. Parkin
- Mr.
- Mr. A. J. Dewe.
- Sir H. Moore.
- Sir G. Tomlinson.
- Sir J. Shuckburgh.
- Perms. U.S. of S
- Parly U.S. of S
- Secretary of State.

1/12
9/12 f.s.

Sit

O. D.
R 10 DEC
D 14

Downing Street.

16 December, 1938.

DRAFT. conson.

Sir,

KENYA.

NO: 762

GOVERNOR.

I have etc. to acknowledge the

receipt of your despatch No. 622 of the

(3) 3rd November on the subject of the

petition by Mr. Charles Cottar in

velating Co
~~connection~~ with the forfeiture of his
mining claims.

2. The petitioner should be
informed that I have considered his
petition but regret that I am unable to
intervene in the matter.

3. There is one point in
connection with Mr. Cottar's claims for
compensation which ~~has been brought to my~~
I would like to bring to

you notice. In paragraphs 10 and 12 of his

petition

FURTHER ACTION.

1044-150 WT. 1852-24 15,000 2/55 T.S. 600
1044-150 WT. 2853-5 20,000 10/55 T.S. 600

C. O.

Mr.

Mr.

Mr.

Mr. A. J. Dawe.

Sir H. Moors.

Sir G. Tomlinson.

Sir J. Shuckburgh.

Permi. U.S. of S.

Permi. U.S. of S.

Secretary of State.

to satisfy the American Consul that your Government has acted with patience and forbearance in dealing with Mr. Cottar's claims, and that the unfortunate circumstances in which he now finds himself are due only to his own unwisdom.

I have, etc.

DRAFT.

FURTHER ACTION.

4^b
Mr. Duncan

Chas. Cotton's Petition
Southern Rhodesia

1. Have read all these papers and, on the legal point, see nothing to dissent from in the A.G.'s Memorandum attached to (3) and nothing to add thereto except that in considering the construction of S.102 of the Mining Ordinance, 1953, reference might have been made to Section 7(2)(c) of the Interpretation etc. Ordinance, Cap 1 R.L. I think, however, that "a contrary intention appears" clearly in this case from knowledge of S.102 of the Mining Ordinance, 1953, & that the construction put upon that sec. by the A.G. is obviously correct.
2. There is one small point in connexion with the claim for compensation: possibly there is nothing in it but it has not been dealt with specifically. In paras 10 & 12 of his petition Cotton speaks of improvements made at his own expense i.e. a road 22 miles long & certain buildings. If these are still in existence & have some value then even though Cotton may have forfeited all mining rights he might be morally entitled to some ex gratia payment for in respect of these improvements. I think this point might be cleared up with Kenya.
3. It may save the Colonial Office & the Foreign

Office eventual trouble, also - if the
petition is rejected - if the Kenya Govt
cd see its way to authorizing the P.G.
to go through all the ^{laws of the} facts - informally
or confidentially - with the American
Consul with a view to satisfying him
that the Kenya Govt in fact acted with
patience and forbearance & that any
tribulations suffered by his ageing Comrades
are due entirely to the a. c.'s "pure Oldness".

John Clark

29. XI. 58

KENYA
No. 622



GOVERNMENT HOUSE
NAIROBI
KENYA

RECEIVED
NOV 23 1953

November 23, 1953

Sir,

With reference to your letter of the 17th September concerning the petition addressed to you by Mr. Charles Cottar on the subject of the cancellation of his mining claims, I have the honor to enclose a Memorandum setting forth the considered opinion of the Attorney General on the said petition. The said Memorandum is the first para. of the enclosure to the accompanying letter to be sent to the Hon. A. K. R. M. P.

Answer 15

I have the honor to be,
Sir,
Your most obedient,
Humble servant,

Ad. M. W. D.

for
AIR CHIEF CLERK
GOVERNMENT HOUSE

THE RIGHT HONOURABLE
MALCOLM MACDONALD, M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S.W. 1.

Annexure V.

(e) The plaintiff appealed against the decision of Webb, J. The Court of Appeal unanimously dismissed the appeal. Copy of the judgment is attached.

Subsequently the plaintiff applied to the Court of Appeal for leave to appeal to the Privy Council in forma pauperis. This application was unanimously dismissed by the Court of Appeal.

On the 10th May, 1938, Mr Cottar's advocate advised me by letter that he proposed to file a petition with the Priv. Council - copy of letter attached. Up to the present I have received no notice that any such petition has been filed.

Annexure VI:

The points I wish to draw from the following history of the case are -

- (i) That from the very inception of the case Mr Cottar was legally represented.
- (ii) That Mr. Cottar was shown every opportunity to appear before the Court but refused the invitation to do so at the Court's leadings.
- (iii) That the plaintiff and Mr. Cottar never had the opportunity to plead in Court the point which Mr. Cottar now relies in paragraph 15 of his petition. In other words - Mr. Cottar now attempts to challenge a decision of the Executive on a question which he had every opportunity to raise before the Court.
- (iv) That the question raised in the petition is purely a legal one and that a party to the action, Line Limited, have not seen and will have no opportunity of addressing the Secretary of State on Mr. Cottar's petition.
- (v) That in view of the contents of Annexure VI, the matter can still be considered sub judice.
- (vi) That if any action is taken on the petition Line

community based, with the exception of Mr. Cotter, all other miners' interests, which were recorded in Section 10, of the 1925 Mining Act, and which were extinguished by the 1933 Act.

5. The Acting Attorney General of the United States, in his opinion of June 1, 1933, in regard to the proposed extension of the 1925 Mining Act, stated in a memorandum attached to his report to the Secretary of State No. 446 of the 10th August, 1933, the only argument which could possibly be taken in favour of the claims under the 1925 Act, in view of the fact that the 1933 Act had not been extinguished. But in my view such an argument would render section 102 meaningless and offend against the following two legal canons, that in construing a statute -

- (a) construction is to be such as will give effect to all words;
- (b) no part of a statute must be treated as meaningless.

6. In 1936 I advised that Mr. Cotter's claims were not validly recorded in Section 10 of the 1925 Act, and that the Secretary of State's report of the 10th August, 1933, No. 446 of the 10th June, 1933, was not validly recorded in Section 10 of the 1925 Act, and that the 1933 Act had not been prepared in accordance with the provisions of the 1925 Act.

7. I still believe that the claims of Mr. Cotter under the 1925 Act, and the claims of the other miners under the 1925 Act, were not validly recorded in Section 10 of the 1925 Act, and that the Secretary of State's report of the 10th August, 1933, No. 446 of the 10th June, 1933, was not validly recorded in Section 10 of the 1925 Act, and that the 1933 Act had not been prepared in accordance with the provisions of the 1925 Act. I still believe that the claims of Mr. Cotter under the 1925 Act, and the claims of the other miners under the 1925 Act, were not validly recorded in Section 10 of the 1925 Act, and that the Secretary of State's report of the 10th August, 1933, No. 446 of the 10th June, 1933, was not validly recorded in Section 10 of the 1925 Act, and that the 1933 Act had not been prepared in accordance with the provisions of the 1925 Act.

October, 1938.

W. H. ...
ATTORNEY GENERAL.

TO THE HONOURABLE,
THE SECRETARY OF STATE FOR THE COLONIES,
LONDON.

Through

THE HONOURABLE,
THE ACTING COLONIAL SECRETARY,
NAIROBI,
KENYA COLONY.

The humble petition of Charles Cottar of Nairobi Kenya Colony an American Citizen by birth showeth as follows:-

1. That in October 1922 four base metal claims were registered by Your Petitioner Charles Cottar and his son William Calvin Cottar also of Nairobi aforesaid.
2. These four claims were amalgamated into one claim under the Mining Ordinance 1912 and registered with the District Commissioner at Malindi in the name of Your Petitioner Charles Cottar on the 10th day of February 1923.
3. Development was begun at once and all lawful requirements as to development were fulfilled up to October 1925 at which time the registered owner took up residence on the said claim with other members of his family and with another European and native staff.
Development was actively pursued and ore recovered and the same was shipped which the registered owner was permitted to do under the Mining Ordinance 1912 then in force.
4. The claim in question was subsequently registered under the Mining Ordinance 1925.
5. An export Licence under the Mining Ordinance 1925 was obtained which, coupled with a prospectors Right held by Your Petitioner gave the right to mine and export.
6. Application for a lease was filed at once and payment of rent made but no lease was ever issued.
7. Later it was suggested that a lease be applied for

under the Mining Ordinance 1951 but same was never issued.

8. All development work has been kept up in accordance with the provisions of the various Mining Ordinances in force and generally all the requirements of the Mining Ordinance were complied with.

9. Several mining men were brought from America to this country by Your Petitioner at considerable expense with a view to interest them in this mine but they were dissatisfied with the conditions and refused to invest any money,

10. The natives in the district, through their chiefs, gave permission for a road to be constructed which was accordingly done for a distance of 22 miles at Your Petitioner's expense, and for this he has not received adequate compensation.

This road was the means of opening up the district in question as previously no Administrative or Medical Officer was able to traverse the area owing to the lack of roads. In fact no Poll Tax was ever collected in that district previous to the making of this road.

11. Arrangements were made on or about the 7th day of January 1929 for a preliminary survey by Messrs. Nightingale & Co. Surveyors and certain work was done by Your Petitioner at considerable expense and which was required by the Mining Ordinance but the survey could not be completed without certain data which the Mining Department were unable or unwilling to supply owing possibly to the cost to be incurred.

12. Certain buildings of a permanent nature have been erected upon the property and certain other buildings of a temporary nature have also been erected. In addition to the road above mentioned a tank was constructed for the storage of the necessary water used in mining as well as other improvements costing altogether a considerable sum.

13. Certain mining development was completed and shipments of ore made at considerable expense but without

much return owing to the low price of base metals at the time.

14. Certain mining work has also been done to prove the extent and value of the mine.

15. The Mines Department insisted on Your Petitioner registering under the Mining Ordinance 1935 and subject to the rules thereunder although the right and title of Your Petitioner was preserved under Section 102 of that Ordinance and the rules aforesaid were confiscatory in character.

16. Certain proposals were put forward by Your Petitioner in order to effect a settlement namely that the Government should allot a grant of land in lieu of these Mining claims but such was refused.

17. This mine the first base metal mine in the country to ship ore has been held up from development by increasing demands on the part of the Mining Department which have tended rather to confiscation than to helpfulness.

18. Capital has been available more than once for the development of this mine but it has not been possible to take advantage of it owing to the uncertainty of the position and conditions not being favourable enough for investment.

19. An Exclusive Prospecting Licence was granted on the day of to Lime Limited over this property without any formal notice being served on Your Petitioner.

20. No valuation was made of the improvements on this mine at the time of the issue of the above Exclusive Prospecting Licence the Company above mentioned getting the benefit of the prospectors discovery and the very considerable amount of money and work spent on this property inasmuch as this company took possession of Your Petitioner's mine and which their Exclusive Prospecting Licence, as its name implies, does not make any provision for doing and which at the present price of base metals would make the mine a very valuable one.

21. No formal confiscation of this mine has ever

been made by the Mining Department nor has any compensation been offered or given either for disturbances or as a return of the value of this mine to the owner.

22. No abandonment of this mine has ever been made by Your Petitioner; on the contrary he has always maintained his right to the mine.

23. A caretaker has always been resident on the mine and development is fully up to-date.

24. All the buildings, improvements, or work done on this property have been necessary and expedient for the proper proving working and development of the mine and nothing has been done which was unnecessary or inadvisable towards the proper development and working of this mine, Your Petitioner being a practical miner and having studied in an American School of Mines.

25. Your Petitioner was informed by the Mines Department that he was not at liberty to enter upon the land occupied by the mine as it had been excluded from prospecting but no notice of revocation of this letter has ever been received by him or of the re-opening of this district for mining and as above stated an Exclusive Prospecting Licence has been issued over the land in which the mine is comprised.

26. Your Petitioner was discoverer of base metals in the area in which this mine is comprised but no reward was offered or given to him which is usually done in similar cases.

27. Your Petitioner resided for several years on the mine in question and he and other members of his family suffered severely from sickness then very prevalent in that district and where at that period there was no Medical Officer.

28. Your Petitioner has instituted an action by way of a Petition of Right in the East Africa Courts and joining Lime Ltd. as 2nd Defendant but it has been held that Your Petitioner has shown no cause of action.

29. This action has involved considerable expense and Your Petitioner is unable to provide further funds for litigation.

30. The buildings on this mine have been dismantled and the machinery sold to defray the defendants costs.

31. Your Petitioner has spent many thousands of pounds on this mine and fourteen years strenuous labour.

Wherefore Your Petitioner humbly prays that adequate compensation either by way of land or money be granted to him as he is now destitute in his old age and Your Petitioner will ever pray as in duty bound.

(Signed) Charles Cottar.

In His Majesty's Supreme Court of Kenya at Nairobi.
C.C. No. 82/57.

Charles CottarPlaintiff.

Versus

The Attorney General Defendant.

The above Plaintiff states as follows :-

1. That he is a miner residing at Nairobi Kenya Colony.
2. That the Defendant is the Attorney General and is made Defendant of this action in accordance with the Petitions of Right Ordinance 1910.
3. That the Mines Department is a Department of the Government of Kenya Colony.
4. That the Plaintiff has demanded compensation but the Defendant refuses and neglects to pay same.
5. That in October 1922 four base metal claims were registered by the plaintiff Charles Cottar and his son William Calvin Cottar also of Nairobi aforesaid.
6. These four claims were amalgamated into one claim under the Mining Ordinance 1912 and registered with the District Commissioner at Malindi in the name of the plaintiff Charles Cottar on the 10th day of February 1925.
7. Development was begun at once and all lawful requirements as to development were fulfilled up to October 1925 at which time the registered owner took up residence on the said claims with other members of his family and with another European and native staff.
Development was actively pursued and ore recovered and the same was shipped, which the registered owner was permitted to do under the Mining Ordinance 1912 then in force.
8. The claims in question were subsequently registered

under the Mining Ordinance 1925 although the conditions as to the lease or tenure were not favourable under the new law as they were under the old.

9. An Export Licence under the Mining Ordinance ¹⁹²⁵ ~~1923~~ was obtained which, coupled with a Prospectors Right, held by your suppliant gave the right to mine and export.

10. Application for a lease was filed at once and payment of rent made but no lease was ever issued.

11. Later it was suggested that a lease be applied for under the Mining Ordinance 1931, but same was never issued.

12. All development work has been kept up in accordance with the provisions of the various Mining Ordinances in force and generally all the requirements of the Mining Ordinance was complied with.

13. Several mining men were brought from America to this country by the plaintiff at considerable expense with a view to interest them in this mine but they were dissatisfied with the conditions and refused to invest money.

14. The natives in the district, through their Chiefs gave permission for a road to be constructed which was accordingly done for a distance of 22 miles at the plaintiff expense, and for this has not received adequate compensation.

15. Arrangements were made on or about the 7th day of January 1929 for a preliminary survey by Messrs. Nightingale & Co. and certain work was done by the plaintiff at considerable expense and which was required by the Mining Ordinance but the survey could not be completed without certain data of which details were not available.

16. Certain buildings of a permanent nature have been erected upon the property and certain other buildings of a temporary nature have also been erected, in addition to the road above mentioned, also the construction of a tank for the storage of the necessary water used in mining as well as

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other improvements costing altogether a considerable sum,
17. Certain mining development was completed and shipments of ore made at considerable expense but without much return owing to the low price at the time of base metals.

18. Certain mining work has also been done to prove the extent and value of the mine.

19. As the conditions under the Mining Ordinance 1935 were unduly onerous the plaintiff did not register under that Ordinance.

20. Certain proposals were put forward by the plaintiff in order to effect a settlement namely that the Government should allot to him a grant of land in lieu of these mining claims but such were refused.

21. This mine, the first base metal mine in the country to ship ore, has been held up from development by increasing demands on the part of the Mining Department which have tended rather to confiscation than to helpfulness.

22. Capital has been available more than once for the development of this mine but it has not been possible to take advantage of it owing to the uncertainty of the position and conditions not being favourable enough for investment.

23. An Exclusive Prospecting Licence was granted on or about the 15th day of June 1936 to Lime Limited over this property without any formal notice being served on the plaintiff.

24. No valuation was made of the improvements on this mine at the time of the issue of the above Exclusive Prospecting Licence, the Company above mentioned getting the benefit of the prospectors discovery and the very considerable amount of money and work spent on this property and which at the present price of base metals would make the mine a very valuable one.

25. No formal confiscation of this mine has ever been made by the Mining Department nor has any compensation been offered or made either for disturbance or as a return of the value of this mine to the owner.

26. No abandonment of this mine has ever been made by the plaintiff; on the contrary he has always maintained his right to the mine.

27. A caretaker has always been resident on the mine and development is fully up-to-date.

28. All the buildings, improvements, or work done on the property have been necessary and expedient for the proper proving, working and development of the mine, and nothing has been done which was unnecessary or inadvisable towards the proper development and working of this mine.

29. The Plaintiff was informed by the Mines Department that he was not at liberty to enter upon the land occupied by the mine as it had been excluded from prospecting but no notice of revocation of this letter has ever been received by him or of the re-opening of this district for mining and as above stated an Exclusive Prospecting Licence has been issued over the land in which the mine is comprised.

30. The plaintiff was discoverer of base metals in the area in which this mine is comprised but no reward was offered or given to him which is usually done in similar cases.

31. The plaintiff resided for several years on the mine in question and he and other members of his family suffered severely from sickness then prevalent in that district and where at that period there was no medical officer.

The plaintiff therefore humbly prays that the said mining claims be declared to be his property and that all the right title and interests in the said claims is his as of

right, or

2. That adequate compensation be granted to him for the loss of his right title and interest in the above claims and

3. That an order and injunction be granted by this Honourable Court to restrain Lime Limited or other the person or persons at present in possession of these claims and each of their officers, contractors, servants, workmen and agents from working, proving or prospecting on the area comprised in the claims viz: 16 to 20 Vitiangeni or from using the buildings, machinery or tools on these claims or for disposing of the ore extracted from this mine and now lying on grass or otherwise interfering with the mine or any part thereof until the hearing of this petition or until further order be issued by The Supreme Court of Kenya and

4. That an account be submitted by Lime Limited as to the amount and value of the ore shipped by them from these claims since their occupation.

5. That costs of this suit be granted.

6. That such other or further relief be granted as to this Honourable Court may seem fit.

It is intended to serve this plaint on:-

1. Lime Limited
2. The Mines Department through the Honourable The Attorney General, Nairobi.
3. Such other or others as may be directed.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.

CIVIL CASE NO. 88 of 1957.

between

CHARLES COTTAR PLAINTIFF

versus

- 1. THE ATTORNEY GENERAL and
 - 2. LIME LIMITED
- } DEFENDANTS.

AMENDED PLAINT DELIVERED PURSUANT TO THE ORDER OF THIS HONOURABLE COURT MADE THE 15th DAY OF SEPTEMBER 1957.

1. The PLAINTIFF WAS A MINING ENGINEER RESIDING AT NAIROBI IN KENYA COLONY AND HIS ADDRESS FOR SERVICE IS C/O R. BLACK MALCOMSON, ADVOCATE, GOVERNMENT ROAD, NAIROBI.

2. THE FIRST DEFENDANT IS THE ATTORNEY GENERAL OF THE COLONY AND IS MADE A DEFENDANT TO THIS ACTION IN ACCORDANCE WITH THE PETITIONS OF RIGHT ORDINANCE 1910. THE SECOND DEFENDANT IS A LIMITED COMPANY HAVING ITS PLACE OF BUSINESS IN GOVERNMENT ROAD, NAIROBI.

3. IN OCTOBER, 1922, FOUR BASE METAL CLAIMS WERE REGISTERED BY THE PLAINTIFF AND HIS SON WILLIAM CALVIN COTTAR ALSO OF NAIROBI AFORESAID AND THE SAID CLAIMS WERE AMALGAMATED INTO ONE CLAIM UNDER THE MINING ORDINANCE 1912 AND REGISTERED AT MALINDI IN THE NAME OF THE PLAINTIFF ON THE 10th DAY OF FEBRUARY 1925. THE SAID FOUR CLAIMS SO AMALGAMATED AND REGISTERED ARE SITUATE AT VITIGINI IN THE COAST PROVINCE OF THE COLONY AND PROTECTORATE OF KENYA.

4. THE PLAINTIFF PROCEEDED FORTHWITH TO PROSPECT AND DEVELOP THE SAID CLAIM AND HAS CONTINUED TO DEVELOP THE SAID CLAIM AND TO EXPEND MONIES THEREON AND ERECT

BUILDINGS MACHINERY AND MINING EQUIPMENT THEREON UP TO THE OCCURENCE OF THE EVENTS HEREINAFTER NAMED.

5. THE SAID DEVELOPMENT, ERECTION OF BUILDINGS AND EXPENDITURE OF MONIES WAS MADE WITH THE FULL KNOWLEDGE OF THE FIRST DEFENDANT AND/OR OF THE MINING DEPARTMENT OF THE COLONY OF KENYA.

6. AN EXPORT LICENCE UNDER THE MINING ORDINANCE 1925 WAS OBTAINED BY THE PLAINTIFF AND ALSO A PROSPECTOR'S RIGHT AND UNDER THE SAID LICENCE AND RIGHT THE PLAINTIFF WAS ENTITLED TO MINE ON THE SAID CLAIM AND TO EXPORT MINERALS DERIVED THEREFROM.

7. ALL DEVELOPMENT WORK REQUISITE UNDER THE OBLIGATIONS OF THE VARIOUS MINING ORDINANCES HAS BEEN DONE AND MAINTAINED ON THE SAID CLAIM UNTIL THE OCCURENCE OF THE EVENTS HEREINAFTER MENTIONED.

8. NO LEASE AT ANY TIME HAS BEEN ISSUED TO THE PLAINTIFF IN RESPECT OF THE SAID CLAIM ALTHOUGH THE PLAINTIFF HAS APPLIED FOR THE ISSUE OF SUCH LEASE.

9. ON THE 20th DAY OF OCTOBER 1936 NOTICE WAS GIVEN TO THE PLAINTIFF BY THE ACTING COMMISSIONER OF MINES ON BEHALF OF HIS MAJESTY'S GOVERNMENT THAT HE WAS LIABLE TO PENALTIES FOR PROSPECTING AND MINING ON THIS PROPERTY AND THEREAFTER THE PLAINTIFF CEASED FROM PROSPECTING AND MINING ON THE SAID PROPERTY BUT HAS AT ALL TIMES MAINTAINED HIS BUILDINGS THEREON AND HAD THEM SUPERVISED BY A CARETAKER.

10. ON OR ABOUT THE 25th DAY OF MARCH 1937 AN EXCLUSIVE PROSPECTING LICENCE IN RESPECT INTER ALIA OF THE PLAINTIFF'S AREA AT VITINGINI WAS GRANTED TO THE SECOND DEFENDANT AND THE SECOND DEFENDANT HAS TAKEN POSSESSION OF THE SAID AREA AND THE PLAINTIFF'S BUILDINGS AND IMPROVEMENTS THEREON.

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AND OF ORE ALREADY WON BY THE PLAINTIFF FROM THE SAID AREA AND REFUSES AND NEGLECTS AND CONTINUES TO REFUSE AND NEGLECT TO ABANDON THE SAID AREA AND TO ALLOW THE PLAINTIFF TO OCCUPY OR WORK THE SAME WHEREBY THE PLAINTIFF HAS SUFFERED DAMAGE:

11. NO PROSPECTING HAS BEEN DONE OVER THE SAID AREA BY THE SECOND DEFENDANT.

THE PLAINTIFF CLAIMS:-

1. AS AGAINST BOTH DEFENDANTS A DECLARATION THAT HE IS ENTITLED TO A LEASE OF THE SAID MINING CLAIM AND TO POSSESSION OF THE SAME AND AN ACCOUNT OF ALL ORE OR MINERALS WON FROM THE SAID CLAIM SINCE HE WAS DISPOSSESSED AS AFORESAID AND AGAINST THE FIRST DEFENDANT OF THE REASONABLE VALUE TO THE PLAINTIFF OF SUCH MINERALS AS COULD HAVE BEEN WON BY THE PLAINTIFF FROM SUCH CLAIM FROM THE twentieth DAY OF October 1936 UNTIL THE PLAINTIFF SHALL HAVE BEEN REINSTATED IN POSSESSION OF SUCH CLAIM.
2. ALTERNATIVELY THAT AN ACCOUNT BE TAKEN OF THE VALUE OF THE PLAINTIFF'S BUILDINGS AND IMPROVEMENTS ON THE SAID CLAIM AND OF THE VALUE OF THE PLAINTIFFS PROSPECTING WORK AND DISCOVERIES THEREON AND OF THE VALUE TO THE PLAINTIFF OF THE SAID CLAIM HAD HE BEEN PERMITTED TO CONTINUE IN POSSESSION OF AND WORK THE SAME AND AN ORDER THAT THE PLAINTIFF BE PAID THE VALUE OF THE SAID BUILDINGS IMPROVEMENTS DISCOVERIES AND MINING RIGHTS AS AND WHEN THE SAME

SHALL HAVE BEEN SO ASCERTAINED.

8. THE COSTS OF THIS ACTION.

(Signed) R. Black Malcolmson.

FILED

by R. Black Malcolmson

Advocate for the Plaintiff.

This twenty first day of
September, 1937.

IN HIS MAJESTY'S SUPREME COURT OF KENYA
AT NAIROBI.

CIVIL CASE NO. 82 of 1937.

CHARLES COTTAR PLAINTIFF

v e r s u s

- 1. THE ATTORNEY GENERAL and
 - 2. LIME LIMITED
- DEFENDANTS.

O R D E R.

The Plaintiff in his amended Plaint sets out that in October 1922 he registered four mining claims which were amalgamated into one under the Mining Ordinance 1912 and registered in his name on 10.2.1925, that he has worked and developed the same with the knowledge of the 1st. Defendant, and that he obtained an Export Licence and Prospecting Licence under the Mining Ordinance 1925. As owner of a mineral claim he had by Section 35 (c) of Cap. 148 a preferential right to a Mineral Lease and in the meantime the sole right to mine and the ownership of the minerals found. Cap. 148 was repealed by the Mining Ordinance 1925 and it by the Mining Ordinance 1951 which was itself repealed by the Mining Ordinance 1955, but in each repeal existing rights and interests appear to have been preserved. The Plaint goes on to state "no lease at any time has been issued to the Plaintiff in respect of the said claim although the Plaintiff has applied for the issue of such lease" and then alleges that in October 1936 the Plaintiff was warned to cease work on the claim by the Commissioner of Mines, and that in 1937 an Exclusive Prospecting Licence was given to the 2nd. Defendants, who have taken possession of the area and the ore thereon won by the Plaintiff, and the Plaintiff claims a declaration that he is entitled to a lease of the claim, an account of ore etc. won since

he was dispossessed of the value of thereof, or alternatively an account of the value of his buildings and improvements and work and discoveries thereon and the value of the claim and payment of the sum so ascertained.

Defendants object that the Plaintiff shows no cause of action, i.e. no right to the relief claimed, which, I note, does not include any claim for ore won by the Plaintiff and alleged to have been taken by the 2nd. Defendants. In effect the Defendants say that there is a hiatus between the Plaintiff and the claim in that it is not shown what right the Plaintiff had to obtain a lease and whether such right arises by contract or under the Ordinances, or one of them.

In this I think the Defendants are right. If the Plaintiff's claim is for breach of contract then his pleading should set out the terms of the contract, its date, the parties to it and the breach with all necessary details. If on the other hand the Plaintiff relies on some breach of a statutory duty arising independently of contract the statute (or Ordinance) should be referred to and the facts which bring the case within it sufficiently pleaded (*Bullen v Leake* 9 Ed. 37). As the Plaintiff stands I am unable to see how the Defendants could plead to it, they cannot deny a contract where no contract is alleged, nor can they set up facts, if such there are, disentitling the Plaintiff to a lease under some one or other of the Ordinances when the Plaintiff has not shown how nor under which of them he asserts that he has or had a right to obtain a lease. This consideration seems to me to dispose of the contention that the Defendants' proper course was to have applied under Order 6 Rule 27 because such an application could only be made after the pleadings have been closed. I am therefore of opinion that the Defendants are entitled to succeed in this application, but as I am unwilling that any litigant should think that he has been debarred of his rights on any formal point I am willing to consider any

application that may be made for leave to amend. Failing such application the order will be that the amended plaint be struck out and the action dismissed and that the Plaintiff pay to the Defendants their respective costs in the action. Stay for one week granted.

(Signed) A.H. Webb.

13.10.37.

Mr. Ross states that he does not make any application to this Court for leave to amend.

(Signed) A.H. Webb.

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

CIVIL APPEAL NO. 21 of 1957.

(From original Judgment in Civil Case No. 82 of 1937 of
H.M. Supreme Court of Kenya at Nairobi).CHARLES COTTAR APPELLANT
(Original Plaintiff)

versus

1. THE HON. THE ATTORNEY GENERAL FOR
THE COLONY OF KENYA; and2. LIME LIMITED RESPONDENTS
(Original Defendants)J U D G M E N T.

I will take the following passage from Mr. Justice Webb's Judgment and then proceed to examine the merits of the appeal in the light thereof:- "Defendants object that the plaint shows no cause of action, i.e. no right to the relief claimed In effect the defendants say there is a hiatus between the plaint and the claim in that it is not shown what right the plaintiff had to obtain a lease and whether such right arises by Contract or under the Ordinances or one of them. In this I think the defendants are right. If the plaintiff's claim is for breach of contract then his pleading should set out the terms of the contract, its date, the parties to it and the breach with its necessary details. If on the other hand the plaintiff relies on some breach of a statutory duty arising independently of contract the Statute (or Ordinance) should be referred to and the facts which bring the case within it sufficiently pleaded (Bullen & Leake 9 Ed. 57). As the plaint stands I am unable to see how the defendants could plead to it; they cannot deny a contract where no contract is alleged; nor can they set up facts, if such there are, disentitling the plaintiff to a lease under some one or other of the Ordinances when the plaintiff has not shown how nor under which of them he asserts that he has or had a right to obtain a lease. This consideration seems to me to

dispose of the contention that the defendants' proper course was to have applied under Order 6 Rule 27 because such an application could only be made after the pleadings have been closed." Mr. Ross for the Appellant quoted to us many cases which seemed to me to bear on the applicability of Order 6 Rule 29 to frivolous and vexatious suits. They do not to my mind help for what we have to consider is the disjunctive proposition contained in the rule whether the plaint "discloses no reasonable ground of action." It has been stressed that a principle of pleading is that facts only are to be stated. This submission requires some analysis. In a case of contract it is well-settled that the statement of claim may in general be regarded as in effect consisting of two principal parts, viz: the statement of contract or right and the statement of the breach or violation of the right and in the case of actions for wrongs independent of contracts "the right is frequently an existing fact which is implied by law without there being any necessity to show the origin or creation of such right. Thus certain rights are implied in law and are inseparably annexed to the person of the plaintiff, as the right to security of life and limb, liberty and reputation; and these it is unnecessary to allege. In such cases the pleading states only the violation of the right, as that defendant assaulted and beat the plaintiff, or that the defendant imprisoned the plaintiff, or that the defendant spoke of the plaintiff certain defamatory words. Similarly, in ordinary claims for injuries to property the right is, in general, sufficiently implied by law from the mere statement that the property was the plaintiff's, as for instance in actions for trespass to lands or goods, where the statement of claim alleges that the land was the plaintiff's and the defendant broke and entered or

31

trespassed upon it; or that the goods were the plaintiff's and the defendant seized and carried them away"
(Bullen & Leake 6th Ed. 45 and 46). From this we see that what is important in considering whether a cause of action is revealed by the pleadings is the question as to what right has been violated. In the present case Mr. Ross says his claim is not in contract or in tort, his submission being that he has complied with the rules of pleading by stating the material facts. I understand his answer to the passage quoted by Webb J. from Bullen & Leake reading "If on the other hand the plaintiff relies on some breach of a statutory duty arising independently of contract the Statute (or Ordinance) should be referred to and the facts which bring the case within it sufficiently pleaded" to be twofold - firstly that the opinion is merely the authors unsupported by authority and secondly that it appears under a commentary on actions in tort. I regard neither contention as convincing. In the first place the proposition requires no other authority than to say that until Mr. Ross discloses the foundation of his right his cause of action does not become apparent and as to the commentary appearing where it does, I observe that in the 6th Edition it appears under the heading "The body of the Statement of Claim". It is but common sense and as I construe the rules of pleading the requisite procedure to plead in such a way that the other side may be in a position to know what they have to answer, and where there is no defendant appearing, the Court before pronouncing upon the claim must have clearly before it in the pleadings the cause of action, i.e., in a case like the present a reference to the right that has been violated. Mr. Ross put an ingenious argument before us when he submitted that the Mining Laws are part of the law of the land and

consequently the Court must take judicial notice of them. True they are part of the law of the land but that does not in a case like the present abrogate the necessity of his pleading which law of the land (section and Ordinance) constituting the right has been violated. Apart from his obligation to plead it, we have not been informed of his reasons for not doing so. He was given an opportunity of amending for the second time his plaint and elected not to do so, as I understand, because it would have made his client responsible for the costs. In the view I take of the case, the acceptance of this offer would have been the less expensive course. I am in complete agreement with the construction put upon the relevant rules by Webb J. and would accordingly dismiss this appeal with costs.

(Signed) Joseph Sheridan.

19.2.58.

19.11.58. Judgment read by President with which I concur.

(Signed) C.C. Francis.

JUDGMENT.

The appellant is asking that the judgment of Webb J. should be reversed; that judgment passed under Order VI rule 29 decided that no reasonable cause of action was disclosed in the amended plaint and ordered that the amended plaint be struck out and the action dismissed in default of an application for leave to amend on the part of the appellant (Plaintiff). No such application was made and the action was accordingly dismissed with costs to the Defendants.

The judgment found that the amended plaint had failed to disclose what right if any the appellant (Plaintiff) had to obtain a lease (to which he had claimed a Declaration that he was entitled) and whether such right

arose by contract or under one or other of the Mining Ordinances.

The argument is that the judgment was wrong in that the amended complaint had complied with the rules of pleading laid down in Order VI Rule 1, and that the complaint had contained all the necessary elements to set up a cause of action. The appellant's case is that he was not bound to plead law and that to have stated that he claimed a Declaration by virtue of a right conferred by one or other of the Ordinances would have been to plead law, and not fact, The appellant says that he relies upon the law of the land and that he has stated in his amended complaint all that is necessary to set up a reasonable cause of action.

The case for the respondents is that the judgment of Webb J. is correct in that there is a hiatus or lacuna between what is stated in the complaint and what is claimed; that what the appellant had failed to set out were part of the facts, i.e., facts connecting his past operations under the Mining Ordinances with any alleged rights arising from the provisions of the various Mining Ordinances and disclosing any grounds for the rights claimed.

It appears to me that there is weight in the respondents' contention that these were material facts which had to be pleaded to establish a reasonable cause of action, and that the appellant did not know what his cause of action was and was relying on the respondents' defences to indicate a cause of action. The learned Judge in the Court below could not upon the complaint, supposing there had been no defence, have entered judgment for the appellant without further proof of facts or hearing further argument. It was necessary for the appellant to plead as a fact the Statute or Statutes on which he relied in order to show that the rights which he claimed came within that Statute or Statutes. That connecting link was omitted in the complaint. It is said

in Bullen & Leake 6th Edition page 10 - "And even in the case of relying on those things of which the Court takes judicial notice it is necessary to allege any facts which are required to apply them to the Plaintiff or Defendant or to the facts on which the right of action or defence rests". This appears to apply to the present case where the Court takes judicial notice of the different Mining Ordinances and where the appellant has not alleged the facts which are required to apply them to the appellant's claim. I would therefore dismiss the appeal with costs.

(Signed) C.A.G. Lane.

19.2. 58.

COPY

ANNEXURE VI
(41) of 148/14/2.

York House,

R. Black Malcomson.

Government Road,

NAIROBI.

10th May, 1958.

The Honourable
The Attorney General,
Nairobi.

Sir,

Civil Appeal No. 21 of 1957
Original Civil Case No. 83 of 1957.
C. Cottar vs. The Attorney General and Lime Ltd.

I have the honour to inform you that it is proposed to file a petition in the above case with the Privy Council in accordance with Rule 29 of the Privy Council Order in Council 1921.

I have the honour to be,

Sir,

Your obedient Servant,

(Signed) R. Black Malcomson.

G. O.

Mr. Cobden White 2/19
Mr. Rankin Luning 2/19, 60.

Amid. 3

27 Sept '38

Sir H. Moore.
Sir G. Tomlinson.
Sir C. Bottomley.
Sir J. Shuckburgh.
Parlt. U.S. of S.
Parly. U.S. of S.
Secretary of State.

C. D.
R 22 SEP
D 29

DRAFT.

Kenya
No 565
Gn

Sir I have etc to acknowledge

(1) the receipt of your despatch No 466 of the 1st of August transmitting a Petition by Mr Charles Colton in connexion with the forfeiture of his mining claims.

Before considering Mr. Colton's petition...

But I may be furnished with the evidence & then will be your legal advisors on

I have to request that the legal point raised in the sixth para of the envelope to the latter American Consul letter to you of the 29th of April ^{is} ~~is~~ commented upon in the 4th & 5th pages of the Memo by the Acting Attorney General and

FURTHER ACTION.

and, Acting Comm- of Mines (a copy of which was
included in your despatch), may
be referred to your Legal Advisers
for a considered opinion of an
the legal point involved, and
that a copy of their report may
be forwarded to me in due course.

~~reference to the~~
~~documents~~
~~with the former~~
~~to find out~~
~~the~~
~~pages of the~~
~~document~~

I have etc.

reference to the former
in the former and further pages
of the document.

(Signature)

KENYA
No. 466



37
GOVERNMENT HOUSE
NAIROBI
KENYA

RECEIVED

23 AUG 1938

C. O. REGY

18 AUGUST, 1938.

Sir,

7 a 1936 file

With reference to correspondence terminating with your predecessor's despatch No. 458 of the 27th June, 1936, on the subject of the forfeiture of Mr. Charles Cottar's mining location, I have the honour to forward a further Petition addressed to you by Mr. Cottar.

2. The history of this case was summarized in the memorandum by the then Commissioner of Mines which was furnished under cover of Sir Joseph Byrne's despatch No. 250 of the 15th May, 1936, and it appears necessary for me only to allude to events which have occurred since that date.

Howard (2)

3. The matter has recently formed the subject of legal proceedings, for in July, 1937, Mr. Cottar filed a suit against the Government and the fiat was granted under the Petitions of Right Ordinance (chapter 17 of the Revised Edition of the Laws of Kenya).

Mr. Cottar then made an interlocutory application to the Court praying for an injunction to restrain Lime Limited (to whom an Exclusive Prospecting Licence had been granted over the property the subject matter of the suit) from operating upon or in any way developing the property pending a decision of the suit. Lime Limited were not joined as Defendants in this application but were served with the papers and appeared

THE RIGHT HONOURABLE
MALCOLM MACDONALD, M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,

LONDON. S.W. 1

by their Advocate Mr. Harrison of Messrs. Hamilton, Harrison and Mathews. The Attorney General submitted to the Court that it was impossible to grant such an application which would have the effect of prejudicing Lime Limited, unless Lime Limited were a party to the suit, whereupon Mr. Ross (Advocate for Mr. Cottar) asked the Court for leave to join Lime Limited as Defendants and leave was granted.

The application for an injunction was refused chiefly on the grounds that the applicant was guilty of laches.

Messrs. Malcolmson and Ross (Advocates for Mr. Cottar) then amended the plaint and served the amended plaint on the Attorney General and the (now) second Defendant Lime Limited.

On perusal of the plaint the Attorney General and Mr. Harrison (Advocate for the second Defendant) came to the conclusion that the Plaintiff did not know what was his cause of action- that is to say- whether it was based on tort (in which case no action lies against the Crown), whether it was for breach of contract, or whether it was breach of a statutory obligation, and that he was therefore exploring and endeavouring to draw the defence. Accordingly application was made to the Supreme Court to have the plaint struck out on the grounds that it disclosed no cause of action.

Mr. Justice Webb, who heard the case, agreed, but in granting the application intimated that, as he did not wish any litigant to feel that he had been deprived of any remedy to which he might think he was entitled, he (Webb J) was prepared to consider any application which Mr. Cottar might care to make with regard to amendment. Mr. Ross (Mr. Cottar's Advocate) refused to take advantage of the offer to make an application to amend, stating that the order

was appealable as of right, whereupon the Court had no option but to order that the plaint be struck out. The Acting Solicitor-General intimated to the Court that the corollary to striking out the plaint was to dismiss the suit; the Court agreed and the suit was accordingly dismissed with costs to both Defendants.

Mr. Cottar then appealed to the Court of Appeal for Eastern Africa against the order of Webb J. and the appeal was dismissed with costs to both Defendants.

Mr. Cottar then made an application to the Court of Appeal for Eastern Africa for leave to appeal to the Judicial Committee of the Privy Council in forma pauperis from the Judgment of the Court of Appeal and this application was refused with costs.

Mr. Malcomson (Mr. Cottar's Advocate) subsequently intimated that he proposed to petition the Privy Council direct for leave to appeal and from the legal point of view there the matter rests for the time being.

4. I myself have received representations on Mr. Cottar's behalf from the American Consul, and I take this opportunity of enclosing, for your information, copies of the relevant correspondence, and of a memorandum on Mr. Malcomson's letter of the 29th April by the Acting Attorney General and the Acting Commissioner of Mines.

5. Mr. Cottar himself has also approached Government with requests for compensation in the form of a grant of land or money.

6. In the light of consultation with my advisers and after full consideration of this case, I am of the opinion that only the legal aspect of this claim merits consideration, having regard to the past history of Mr. Cottar in his relations with the Government.

I have the honour to be,
Sir,

Your most obedient humble servant,

R. Brooke-Napier

G O V E R N O R. AIR CHIEF MARSHAL.

TO THE HONOURABLE,
THE SECRETARY OF STATE FOR THE COLONIES,
LONDON.

Through

THE HONOURABLE,
THE ACTING COLONIAL SECRETARY,
NAIROBI.
KENYA COLONY.

The humble petition of Charles Cottar of Nairobi Kenya Colony an American Citizen by birth sheweth as follows:-

1. That in October 1922 four base metal claims were registered by Your Petitioner Charles Cottar and his son William Calvin Cottar also of Nairobi aforesaid.

2. These four claims were amalgamated into one claim under the Mining Ordinance 1912 and registered with the District Commissioner at Malindi in the name of Your Petitioner Charles Cottar on the 10th day of February 1923.

3. Development was begun at once and all lawful requirements as to development were fulfilled up to October 1923 at which time the registered owner took up residence on the said claim with other members of his family and with another European and native staff.

Development was actively pursued and ore recovered and the same was shipped which the registered owner was permitted to do under the Mining Ordinance 1912 then in force.

4. The claim in question was subsequently registered under the Mining Ordinance 1925.

5. An export License under the Mining Ordinance 1925 was obtained, which coupled with a Prospectors Right held by Your Petitioner gave the right to mine and export.

6. Application for a lease was filed at once and payment of rent made but no lease was ever issued.

7. Later it was suggested that a lease be applied for under the Mining Ordinance 1931 but same was never issued.

41
8. All development work has been kept up in accordance with the provisions of the various Mining Ordinances in force and generally all the requirements of the Mining Ordinances were complied with.

9. Several mining men were brought from America to this country by Your Petitioner at considerable expense with view to interest them in this mine but they were dissatisfied with the conditions and refused to invest any money.

10. The natives in the district, through their chiefs, gave permission for a road to be constructed which was accordingly done for a distance of 22 miles at Your Petitioner's expense, and for this he has not received adequate compensation.

This road was the means of opening up the district in question as previously no Administrative or Medical Officer was able to traverse the area owing to the lack of roads. In fact no Poll Tax was ever collected in that district previous to the making of this road.

11. Arrangements were made on or about the 7th day of January 1929 for a preliminary survey by Messrs Nightingale & Co Surveyors and certain work was done by Your Petitioner at considerable expense and which was required by the Mining Ordinance but the survey could not be completed without certain data which the Mining Department were unable or unwilling to supply owing possibly to the cost to be incurred.

12. Certain buildings of a permanent nature have been erected upon the property and certain other buildings of a temporary nature have also been erected. In addition to the road above mentioned a tank was constructed for the storage of the necessary water used in mining as well as other improvements costing altogether a considerable sum.

13. Certain mining development was completed and shipments of ore made at considerable expense but without much return owing to the low price of base metals at the time.

14. Certain mining work has also been done to prove the extent and value of the mine.

15. The Mines Department insisted on Your Petitioner registering under the Mining Ordinance 1933 and subject to the rules thereunder although the right and title of Your Petitioner was preserved under Section 102 of that Ordinance and the rules aforesaid were confiscatory in character.

16. Certain proposals were put forward by Your Petitioner in order to effect a settlement namely that the Government should allot a grant of land in lieu of these mining claims but such was refused.

17. This mine the first base metal mine in the country to ship ore has been held up from development by increasing demands on the part of the Mining Department which have tended rather to confiscation than to helpfulness.

18. Capital has been available more than once for the development of this mine but it has not been possible to take advantage of it owing to the uncertainty of the position and conditions not being favourable enough for investment.

19. An Exclusive Prospecting Licence was granted on the day of to time limited over this property without any formal notice being served on Your Petitioner.

20. No valuation was made of the improvements on this mine at the time of the issue of the above Exclusive Prospecting Licence the Company then mentioned getting the benefit of the prospectors discovery and the very considerable amount of money and work spent on this property. Further this company took possession of Your Petitioner's mine and which their Exclusive Prospecting Licence as its name implies does not make any provision for doing and which at the market price of base metals would make the mine a very valuable one.

21. No formal confiscation of this mine has ever been made by the Mining Department nor has any compensation been offered or given either for disturbance or for reduction of the value of this mine to the owner.

22. No abandonment of this mine has ever been made by Your Petitioner; on the contrary he has always maintained his right to the mine.

23. A caretaker has always been resident on the mine and development is fully up to date.

24. All the buildings, improvements, or work done on this property have been necessary and expedient for the proper proving working and development of the mine and nothing has been done which was unnecessary or inadvisable towards the proper development and working of this mine, Your Petitioner being a practical miner and having studied in the American School of Mines.

25. Your Petitioner was informed by the Mines Department that he was not at liberty to enter upon the land comprised by the mine as it had been excluded from prospecting. At no notice of any restriction of this nature has ever been received by him from the Department of the Interior of this district. He has been allowed to prospect on the land in which the mine is comprised.

26. Your Petitioner was discovered by the Department in the land in which this mine is comprised but no notice was offered or given to him which is usually done in similar cases.

27. Your Petitioner resided for several years on the mine in question and he and other members of his family suffered severely from sickness then very prevalent in that district and where at that period there was no Medical Officer.

28. Your Petitioner has instituted an action by way of a Petition of Right in the West Africa Courts and joining Lime Ltd as 2nd Defendant but it has been held that Your Petitioner has shown no cause of action.

29. This action has involved considerable expense and Your Petitioner is unable to provide further funds for litigation.

30. The buildings on this mine have been dismantled and the machinery sold to defray the defendants costs.

31. Your Petitioner has spent many thousands of pounds on this mine and fourteen years strenuous labour.

Wherefore Your Petitioner humbly prays that adequate compensation either by way of land or money be granted to him as he is now destitute in his old age and Your Petitioner will ever pray as in duty bound.

Chas Cottar.

COPY.

AMERICAN CONSULAR SERVICE,

American Consulate,
Nairobi, Kenya.

April 29, 1938.

Excellency:

Referring to our conference of yesterday, in re the Cottar case, I have the honor to state that I have just received a communication from Mr. Cottar's attorney, Mr. R. Black Malcomson, regarding details of Mr. Cottar's claim and am enclosing a copy thereof.

Assuring you of my deep appreciation for the time and attention you are giving to this case.

I have the honor to be, Excellency,

Your obedient servant,

(Sgd.) E. TALBOT SMITH.

American Consul.

His Excellency

The Governor,

NAIROBI, Kenya Colony.

COPY.

R. BLACK MALCOMSON.

York House,
Government Road,
Nairobi.
Kenya Colony.

29th April, 1938.

The Honourable,
The American Consul,
Stanley House,
NAIROBI.

Sir,

RE: COTTAR.

As requested by you I am writing to put as clearly as I can the facts which show the difference between the Mining Ordinance of 1933 and that of 1925 and wherein Cottar has or would have suffered.

1. The new claims would be 600,000 square yards but under the old Ordinance they would have been 774,400 square yards a reduction of 174,400 or a difference of between $1/4$ and $1/5$ th thus being confiscatory in character. See Part III Rule 13 (1) (b) Mining Ordinance 1933.

2. There is no Royalty on base metals in the 1925 Ordinance. Under Section 12 Ordinance 1933 all minerals are liable to royalties.

3. Rule 42 of the Mining Ordinance 1933 requires applicant to show sufficient capital whereas there is nothing in the 1925 Ordinance to that effect.

4. According to Section 44 of the Mining Ordinance 1933 duration of lease is to be for 5 but not more than 21 years according as the Governor may think proper. In 1925 Ordinance the term is 10 years at the least.

5. Compensation is allowed under Section 87 of Mining Ordinance 1933 but has not been offered to Cottar.

6. Any right or title granted under the Mining Ordinance 1925 is reserved in the 1933 Mining Ordinance and to insist that Cottar should register subject to the

rules under the Mining Ordinance 1933 is to confiscate certain of his rights.

7. The ownership of a claim confers the preferential right to an expert permit, and a lease was only refused under the 1925 Ordinance because the Survey Department had not surveyed the district; in fact Cottar opened it up by a road.

8. The rent under a lease is raised in the 1933 Ordinance above that in the 1925 Ordinance.

9. Although all the requirements under the Mining Ordinance of 1925 under which Cottar holds have been fulfilled the Commissioner of Mines forbade him to re-enter on his property and further granted an Exclusive Prospecting License to Lime Ltd. who so far from doing any prospecting have simply jumped Cottar's mine under the cloak of this Exclusive Prospecting License and for which purpose it was not intended.

10. The claims were first taken up in 1922.

Yours faithfully,

(Sgd.) R. BLACK MALCOMSON.

COPY.

C. MIN. 4/1/1/1/II/104.

9th July, 1938.

Sir, With reference to your letter No. 310 of the 29th April addressed to His Excellency the Governor on the subject of Mr. Charles Cottar, I am directed by His Excellency to inform you that he has carefully perused the enclosure to your letter and that, after full consideration of the points raised therein, His Excellency regrets that he is unable to intervene on Mr. Cottar's behalf.

I have the honour to be,
Sir,
Your obedient servant,

A. de V. WADE.

CHIEF SECRETARY.

THE AMERICAN CONSUL,
NAIROBI.

COPY.

THE FOREIGN SERVICE OF THE UNITED
STATES OF AMERICA,

American Consulate,
Nairobi, Kenya.

July 9th, 1938.

Excellency:

I have the honour to refer to the Cottar mining claim, concerning which you were kind enough to grant me a personal interview some two months ago.

Since then I have interviewed Mr. Mortimer, the chief of the Lands Department, who tells me that the various plots of land that Mr. Cottar suggested be granted him in settlement of his case are too large and that he would personally not approve of their being given to Mr. Cottar.

I am quite sincere in my belief that Mr. Cottar has a valid claim. But he is scarcely in a position financially to go on fighting indefinitely. And his age is such that I believe something should be done for him soon. If it is not too presumptuous of me, may I respectfully suggest that, if the Government does not wish to make a settlement by a grant of land, he be offered a small percentage of the gross revenue of the mine or mines which he himself opened and operated for a period of years. Five percent of the gross revenue for the duration of his life only would, it seems to me, be a fair offer of settlement, would end the claim, legally and equitably, would not involve any reflection on the Mines Department, and would take care of Mr. Cottar for the few years he will still be with us.

As the case has been dragging on for many months, may I ask your Excellency to do whatever is possible to expedite a favorable decision, as I do not wish to be obliged to suggest to the Department of State, Washington, that the case be made the subject of a diplomatic claim.

I have the honour to be, Excellency

Your obedient servant,

(Sgd.) E. WALBOT SMITH.

American Consul.

COPY.

C.Min.4/1/1/1/III/124.

15th August, 1938.

Sir,

I am directed to refer to your letter No.310 of the 9th July addressed to His Excellency the Governor on the subject of Mr. Charles Cottar, in which you suggest that Mr. Cottar should be offered five per cent of the gross revenue of the mine or mines concerned.

2. A Petition addressed to the Secretary of State for the Colonies by Mr. Cottar has now been received, through his advocate, Mr. Malcomson, and, since the subject of the Petition is a request for compensation, it will be appreciated that a final reply to your letter cannot be sent pending the receipt of the Secretary of State's decision on the Petition.

3. I am to add that a copy of your letter under reference has been forwarded to the Secretary of State together with Mr. Cottar's Petition.

I have the honour to be,

Sir,

Your obedient servant,

A. de V. WADE.

The American Consul,
NAIROBI.

27th May, 1938.
Ref.No.M/419/III/112.

Your Excellency.

Through the Hon.Colonial Secretary,
NAIROBI.

Through the Hon.Attorney General,
NAIROBI.

RE MR. CHARLES COTTAR.

VITENGANI MINE.

As directed at an interview with Your Excellency on the 15th May, 1938, I submit hereunder a memorandum (prepared by the Hon. Acting Attorney General and myself) giving the answers to the points raised in the enclosure to the American Consul's letter to Your Excellency dated 29th April, 1938, the original of which and the enclosure thereto are returned herewith.

.....

Paragraph 1 of Mr. Black Malcomson's letter of the 29th April to the American Consul reads as follows:-

"1. The new claims would be 600,000 square yards, but under the old Ordinance they would have been 774,400 square yards, a reduction of 174,400 square yards, or a difference of between $\frac{1}{4}$ and $\frac{1}{5}$ th thus being confiscatory in character. See Part III, Rule 13(1)(b), Mining Ordinance, 1933".

The answer to this is:-

Under the 1925 Ordinance, 4 mineral claims could have covered an area of 160 acres (774,400 square yards), vide section 34(d) of the 1925 Ordinance, whereas, under the 1935 Ordinance, 13 claims would be required to cover the

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same area (160 acres) vide Mining Regulations, 1934, Regulation 13(1)(b), but as there was no provision limiting the number of claims that could be pegged, there was nothing to prevent Mr. Cottar from covering the same area. S. 017 - 1931 - 0100

Paragraph 2 of the letter reads as follows:-

"2. There is no Royalty on base metals in the 1925 Ordinance. Under section 12, Ordinance, 1933, all minerals are liable to royalties."

The answer to this is:-

This statement is inaccurate, as all minerals, under both the Ordinances mentioned, are liable to royalties as and when prescribed by the Governor in Council, vide section 106 of the Mining Ordinance, 1925, and section 11 of the Mining Ordinance, 1933, but in fact no Royalty was prescribed under the 1925 Ordinance.

Paragraph 3 of the letter reads as follows:-

"3. Rule 42 of the Mining Ordinance, 1933, requires applicant to show sufficient capital, whereas there is nothing in the 1925 Ordinance to that effect."

The answer to this is:-

This statement, as regards leases, is correct.

Paragraph 4 of the letter reads as follows:-

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"4. According to section 44 of the Mining Ordinance, 1933, duration of lease is to be for five but not more than 21 years according as the Governor may think proper. In the 1925 Ordinance the term is 10 years at the least".

The answer to this is:-

This statement is inaccurate.

Under section 52 of the 1925 Ordinance, a lease shall be for a term not exceeding ten years and shall provide for renewal for further periods of ten years each upon proof by the lessee of compliance with the terms and conditions of the lease, but any renewal so granted will be subject entirely to the law existing at the date of renewal.

Under the 1933 Ordinance, sections 44 and 45, a lease may be granted for not less than five or more than 21 years, as the Governor may think proper, and may be renewed for further periods of 21 years each upon the conditions which are then generally applicable to new leases. A longer lease could, therefore, be obtained under the 1933 Ordinance.

Paragraph 5 of the letter reads as follows:-

"5. Compensation is allowed under section 67 of the Mining Ordinance, 1933, but has not been offered to Cottar."

The answer to this is:-

This section does not apply, as

Government have not compulsorily acquired any land alleged held by Cottar, and furthermore, Mr. Cottar maintains that he never came under the 1933 Ordinance.

Paragraph 6 of the letter reads as follows:-

"6. Any right or title granted under the Mining Ordinance, 1925, is reserved in the 1933 Mining Ordinance, and to insist that Cottar should register subject to the rules under the Mining Ordinance, 1933, is to confiscate certain of his rights."

The answer to this is:-

This is the crux of the whole situation; if Mr. Malcomson is correct in this contention Mr. Cottar has a case, if he is incorrect Mr. Cottar has no case. The Mining Ordinance, 1933, came into operation on the 6th February, 1934, and under section 102 it is provided that any right or title granted under the Mining Ordinance, 1925, may continue to be of full force and effect as prescribed by that Ordinance until the 5th February, 1935. While it is quite clear that by this section it was intended to extinguish any rights granted under the 1925 Ordinance if the holder thereof did not register under the 1933 Ordinance it is arguable if the rights are, in fact, extinguished thereby and it is just possible that having regard to the fact that if the Legislature proposes to extinguish rights it should do so in clear and unequivocal language a Court might hold that the claims held under the 1925 Ordinance were not in fact extinguished.

In the plaint which was before the Court this point was not specifically raised and it was for that reason that we applied to have it struck out as it was impossible to draw a defence until we knew on what grounds Mr. Cottar based his claim.

Paragraph 7 of the letter reads as follows:-

"7. The ownership of a claim confers the preferential right to an export permit, and a lease was only refused under the 1925 Ordinance because the Survey Department had not surveyed the district, in fact, Cottar opened it up by a road."

The answer to this is:-

The statements in this paragraph are incorrect. Under section 38(a) of the Mining Ordinance, 1925, the ownership of Mr. Cottar's mineral claims only conferred the preferential right to a mining lease, and conferred no right to an export permit, but by the amending Ordinance of the same year (No. XIV of 1925, section 3) the Commissioner of Mines could permit export from a claim.

The Director of Surveys confirms that there was no reason why the area of the mining claims could not have been surveyed by a licensed Land Surveyor for lease purposes when Cottar was requested to get a survey made. Mr. Cottar refused the offer of the usual lease under the Mining Ordinance, 1925, but was informed that, although Government could not consider the issue of a lease upon the terms indicated by Mr. Cottar as

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application for a lease under the 1925 Ordinance, on the usual terms could still be applied for, and would be given due consideration by Government.

Paragraph 8 of the letter reads as follows:-

"8. The rent under a lease is raised in the 1933 Ordinance above that in the 1925 Ordinance."

The answer to this is:-

It is true that the rent is increased from Shs.2/- to Shs.2/50 per acre.

Paragraph 9 of the letter reads as follows:-

"9. Although all the requirements under the Mining Ordinance of 1925 under which Cottar holds have been fulfilled, the Commissioner of Mines forbade him to re-enter on his property and further granted an Exclusive Prospecting Licence to Lime, Ltd., who so far from doing any prospecting have simply jumped Cottar's Mine under the cloak of this Exclusive Prospecting Licence and for which purpose it was not intended".

The answer to this is:-

The correctness of the statement in the first part of this paragraph is not admitted. The Commissioner of Mines, in October, 1936 (after Cottar's claims had lapsed) did write to Cottar (in reply to a letter from him in which he (Cottar)

intimated that he intended to do further development work on the claims) pointing out to him the provisions of section 6 of the Mining Ordinance, 1935, which prescribes a penalty for prospecting or mining contrary to the provisions of that Ordinance.

Paragraph 10 of the letter reads as follows:-

"10. The claims were first taken up in 1922".

The answer to this is:-

Two claims were taken up in 1922, and two more in January, 1923, and all four claims were amalgamated in February, 1923.

2. As requested, I append for Your Excellency's approval a draft reply to the American Consul which it is suggested should be sent by Your Excellency's Private Secretary. This draft reply has been prepared by the Hon. Acting Attorney General.

"Sir,

Re Mr. Charles Cottar.
Reference Your letter of the 29th of April, 1935.

I am directed by His Excellency to inform you that he has carefully perused the enclosure to your letter under reference and that

after full consideration of the points raised therein he regrets that he is unable to accede to your representations on Mr. Cottar's behalf.

I have the honour to be,
Sir,
Your obedient servant,

PRIVATE SECRETARY."

H. Izard

ACTING COMMISSIONER OF M. I. S.

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Sd/- T. D. Wallace
A. A. S.

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Subject

Administrative Department Staff
Vacancies for Cadets.

(Not available at time of transfer)