

1929

Kenya

No. 15633

SUBJECT

CO 533/387

Segregation in Townships

Sale of Land Plots at Mombasa

Previous

15049/28

Subsequent

15991/30

I. A/Governor's Deputy. 81 7th Feb. 29

States the application for a Mandamus was duly heard in the Supreme Court - the result being that the application was dismissed with costs. A copy of the judgment is attached. The Advocate for the Indian applicant has intimated his intention of appealing.

This is a test case. Its object was to test whether the Government were acting legally in the attempt to sell land in Mombasa by public auction with the restriction that bidding was confined to Europeans.

The case turned on the definition of the word "auction".

Had the case gone against the Government they would have been forced in future to sell plots by tender, as by reason of their previous commitments it was necessary to restrict ~~plots~~ ^{contracts of this nature} to Europeans. ~~But~~ I gather that it would have been impossible by law to prevent them from restricting tenders to Europeans.

No action seems required, at least until the case has come before the Court of Appeal. It seems unnecessary to send anything to the India Office.

Subject to legal objections, ? Put by.

E. Eastwood

18.3.29

APB

11/11/29

18/3/29

18/3

debarre

20/3/29

2. P.T.

W.C.S. 20.3.29

2. INDIANS OVERSEAS ASSOCIATION. 10 JULY 1929.
Quotes telegram received from Indian Assocn,
Mombasa, as to restriction of sales of residential
plots to Europeans. Further appeal in respect of
the point in which the Indians have failed, now
contemplated.

3. India Office. 13 July 1929

The copy comes with Indians Overseas Assocn

House of Commons Question by Major

Graham Pele for written reply

Friday 19th July 1929. See last one

Sub file "A"

it will be sufficient to

ack No 2:1 No 3 write

put.

W. Allen

17/7/29

acclarkman

17-7-29

to C.S.

18-7-29

Mr E. Grigg speaks yesterday
about this: he is v. anxious
that Galt's right of appeal
should not be exercised as it
is to go into the matter on his
return to Kenya.

After Mr. Allen's, who
it seems intended to put
in the form of a message
from Mr E. Grigg. acclarkman
19-7-29

4 To Gov Tel (message from Sir E. Grigg) } 19/7/29
5 To Gov Tel

RESTRICTED UNDER STATUTE

To Indian Overseas Assocn. } 22 JUL 1929
RESTRICTED UNDER STATUTE (Canada)

18 regd. 7.

O.A.G TELEGRAM 221. 26 July 1929.
Outlines position arising out of decisions of
Court of Appeal: application is being made for
leave to appeal; before necessity for further
action arises discussion with Sir Ed. Grigg will
be possible. Despatch with copy Judgment follows.

Mr Allen

Para 2 enclosed Sir E. Grigg's questions

Para 1 contains what we know already

We can only now await the copy of the
judgment and the result of our
application for leave to appeal

W. Allen

24/7/29

HP 1/8

acc

1-8-29

Allen

48 To Gov. 596. Weekly 2 & 6. A.

9 P.T.O.

2. INDIANS OVERSEAS ASSOCIATION. 10 JULY 1929.
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House of Commons Discussion by Major

Graham Pole for written reply

Friday 19th July 1929. See list on

Sub file "A".

It will be sufficient to

ack No 2-1 No 3 write

part.

W. Allen

17/7/29

accl Parkman

17-7-29

to C.S.

18-7-29

Mr E. Grigg shall refer
about this: he is v. anxious
that right of appeal
should be preserved. He wishes
to go into the matter on his
return to Kenya.

Spoken. Benevolent, who
it seems convenient to put
in the form of a message
from Mr E. Grigg.

accl Parkman

19-7-29

4 To Gov Tel (Kenya from Mr E. Grigg) } 19/7/29
7 To Gov Tel

RESTRICTED UNDER STATUTE

To Indians Overseas Assocn. } 22 JUL 1929
RESTRICTED UNDER STATUTE (Contd)

re reqd. 7.

O.A.G TELEGRAM 221. 26 July, 1929.
Outlines position arising out of decisions of
Court of Appeal: application is being made for
leave to appeal; before necessity for further
action arises discussion with Sir Ed. Grigg will
be possible. Despatch with copy Judgment follows.

Mr Allen

Two 2 copies Sir E. Grigg's judgment

One 1 copy what we have already

We can say we await the copy of the
judgment and the result of an
application for leave to appeal

sent by

C. C. Cluff

W. Allen

21/7/29

H.P. 1/8

accl

1-8-29

above

To Gov. 596. 24-6-29

7. P.T.O.

9.

O.A.G 497.

8 AUGUST, 1929.

Trs. copy Judgment and copy notice of sale from wh. will be seen the decision of the Court. Proposes not to take any further steps until after Sir E. Grigg's return.

*You will be interested to see
this - Lt no action seems
called for
in view*

*6/9 1/2 Ho
6.6.29 9.9.29
etc*

Parliamentary question by Major Graham Pele for written reply on Monday 18th. November 1929 No.3. on P.Q. file.

Trs. copy Judgment and copy notice of sale from wh. will be seen the decision of the Court. Proposes not to take any further steps until after Sir A. G. G. 's return.

*You will be interested to see
to - It is rather news
called for
written*

*6/9 17
6.6.29
9.7.29
at all*

Parliamentary question by Major Graham Pele
for written reply on Monday 18th. November 1929
No. 3. on P.Q. file.

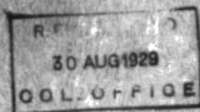
KENYA.

No. 497



4
9
GOVERNMENT HOUSE,
NAIROBI,
KENYA.

8th August, 1929.



My Lord,

Nov 5 1929

I have the honour to refer to your Lordship's telegram of the 19th. July and my telegraphic reply of the 26th. July with reference to the sale of Mombasa residential plots and the recent Appeal Case.

2. A copy of the Judgment is appended, together with a copy of the notice of sale as published in the Official Gazette, from which it will be seen that the decision of the Court is -

- (1) That no power exists to limit the bidding to Europeans only when township plots are being sold by auction under the Crown Lands Ordinance, and
- (2) That a condition that a township plot sold by auction shall be occupied by Europeans only may lawfully be inserted in the lease giving effect to the result of the auction.

As the grounds on which this Judgment was given are clearly stated in the respective findings of the Appeal Court Judges I refrain from offering any comment on the legal aspects of the case.

3. When the original application to the Supreme Court for a rule was threatened, the Acting Attorney General, Mr. Bruce, advised that Condition No. 1 under the heading "General Conditions of Sale" was ultra

vires....

THE RIGHT HONOURABLE LORD PASSFIELD, P.C.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON.....S.W.

vires the Crown Lands Ordinance (Cap.140) and that Government would not succeed in upholding its claim to have this condition enforced. The reasons advanced by him for this opinion were similar to those on which the Appeal Court Judges based their findings. As regards Special Condition No. 5, Mr. Bruce was of the opinion that the applicant's contention was not sound. This view has also been confirmed by the Judgment of the Court of Appeal.

Mr. Bruce further advised that the plots should be withdrawn from the auction sale in exercise of the proviso to Section 19 of the Crown Lands Ordinance, and reoffered on the same conditions under Section 18 in conjunction with Section 6 (1) of the Ordinance. (Section 18 provides that leases of town plots shall be sold by auction "unless the Governor shall otherwise order".)

As the principle involved was of considerable importance Sir Edward Grigg considered that the case should be contested, and as Mr. Amery was informed in my despatch No. 81 of the 7th. February last, the application in the Supreme Court was dismissed with costs.

4. After consultation with the Executive Council an application has been filed by Government in the Supreme Court for leave to appeal to the Privy Council. The Appellant has also asked leave to appeal. These applications will be heard at Zanzibar on or about the 10th. September, 1929. Before that date there will be an opportunity for Sir Edward Grigg to review the position and consider whether it is desirable to proceed with the Appeal if leave be granted.

5. As the plots concerned lie within the area

in.....

Gov. 21328724

in which Mr. Amery agreed that the principle of European ownership and occupation must, on legal grounds be maintained, and as the plots clearly fall within category 3 (d) of Mr. Thomas's despatch No. 507 of the 22nd. May 1924, it is perhaps unnecessary again to submit the reasons prompting the restrictions. There are 35 present plot holders within the general area affected. It is probable that some of these owners would take no exception to a relaxation of the restrictions on ownership. Others, however, will probably protest against unrestricted ownership in future grants in the area and against a relaxation in respect of existing leases. Whether such protest would proceed to legal action is uncertain. In the circumstances it is proposed to take no further steps in the matter until after Sir Edward Grigg's return.

I have the honour to be,

My Lord,

Your Lordship's most obedient,
humble servant,



ACTING GOVERNOR.

IN HIS MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

Civil Appeal No. 3 of 1929.

(From original Decree in Civil Case No. 83 of 1928 of H.M. Supreme Court of Kenya, District Registry at MOMBASA).

Abdulhusein Kaderbhai..... Appellant
 (Original Applicant),
 versus
 The Commissioner for Local Government)..... Respondent
 Lands and Settlement.) (Original Respondent).

J U D G M E N T.

This is an appeal from a Judgment of the Supreme Court of Kenya sitting at Mombasa. In connection 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 Condition 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 shew 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 be 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

signed.....

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 these 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 restricting 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 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 applicant'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 the special covenants, if any, which shall be inserted in the lease. This Section in my view is sufficiently wide to authorise 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.

(Sgd.) Joseph Sheridan.

6th. July, 1929.

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.

6th. July, 1929.

J U D G M E N T.

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 Ch. 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 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 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 Mombasa 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 vs. Crazebrook 3 Mor. 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 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 authorise a sale by private treaty Daniel vs. 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 unauthorised by the Ordinance.

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 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....

J U D G M E N T .

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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 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.

J U D G M E N T.

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 view the conditions general and special are within the Commissioner's powers, if the word

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"auction does not, as Mr. Burke presses upon me, connote a "public auction".

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 to the Commissioner to include in an auction of Town plots restrictive or 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 direction of the Secretary of State the Governor may alienate on any terms and conditions he thinks fit.....

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1. Subject to direction of the Secretary of State the Governor may alienate on any terms and conditions he thinks

fit.....

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.

16. I can not find that there is anything in Section 6 to confine the power to insert special conditions of sale at 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 - 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.

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 restrictive covenant in all agricultural leases shews 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. 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.

22. 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 2nd prayer can not have added appreciably to the costs. I therefore consider that the appellant having succeeded on the chief ground of appeal he should receive his costs both of the appeal and in the Court below.

6th July, 1929.

(Sgd.) K.J. Muir Mackenzie.

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6th July, 1929.

(Sgd.) K.J. Muir Mackenzie.

GENERAL NOTICE NO. 714

CROWN LANDS ORDINANCE

(Chapter 140, *Laws of Kenya*).

NOTICE

Mombasa Island Residential Plots.

NOTICE is hereby given that grants in respect of the plots at Mombasa specified in the Schedule hereto will be sold by auction in the Jubilee Hall, Mombasa, on Saturday, 11th August, 1928, commencing at 10 a.m.

Plans of the plots may be seen at the offices of the Survey and Registration Department at Nairobi and Mombasa, or may be obtained on application on payment of Shs. 5, post free.

The right to withdraw any plot from the auction is reserved to the Commissioner for Local Government, Lands and Settlement.

GENERAL CONDITIONS OF SALE

1. Europeans only will be allowed to bid and purchase, and no person will be allowed to purchase more than one plot.

2. Each plot will be auctioned separately.

3. The amount of the advance of each bid will be regulated by the auctioneer, and no bidding shall be retracted.

4. The highest bidder will be the purchaser, but if any dispute arise as to any bid, the plot will be reoffered at the last undisputed bid.

5. Each purchaser shall pay to the auctioneer immediately on the fall of the hammer a deposit of 25% of the purchase money. In default of such payment the plot may be immediately reoffered for sale and any subsequent bid by the person who has made default may be ignored or refused.

6. Each purchaser shall on paying the deposit inform the auctioneer of the name or names of the person or persons on whose behalf the plot is purchased; the grant will be issued in accordance with this information.

7. The balance of the purchase money, together with the rent due to the 31st December, 1928, the survey fees, the fees payable for the preparation and registration of the grant (Shs. 110), and the stamp duty payable in respect of the grant and all other expenses, if any, shall be paid to the Resident Commissioner, Mombasa, within seven days from the date of the sale, and upon such payments being duly made the purchaser shall, subject to the provisions of the Crown Lands Ordinance, 1912, and if the conditions of sale have been complied with, be entitled to a grant of the plot, which grant shall be presented to him duly executed as soon as conveniently may be. Provided that the balance of the purchase money shall not be payable within the time stated or thereafter unless and until the Commissioner for Local Government, Lands and Settlement can present to the purchaser the grant of the plot duly executed.

8. Subject to the proviso contained in Condition No. 7 if the amounts therein mentioned are not paid to the Resident Commissioner, Mombasa, within seven days from the date of sale, the Commissioner for Local Government, Lands and Settlement may order the deposit made by the purchaser to be forfeited, and the purchaser shall have no further claim to a grant of the plot.

9. The Government or such person or authority as may be appointed for the purpose shall have the right to enter upon any plot and lay and have access to water mains, service pipes, telegraph or telephone wires, and electric mains of all descriptions whether overhead or underground and the grantees shall not erect any building in such a way as to cover or interfere with any existing routes, main, or service pipes or the telegraph or telephone wires and electric mains aforementioned.

10. No building shall be erected on any plot unless plans (including block plans showing the position of the buildings), drawings, elevations and specifications thereof shall have been previously approved by the Commissioner for Local Government, Lands and Settlement or such other person as he may appoint. Such plans, etc., shall be submitted in triplicate to the Resident Commissioner for necessary action.

11. The term of each grant will be 99 years from the 1st September, 1928.

SPECIAL CONDITIONS

1. In these special conditions the term "The Authority" means the Resident Commissioner, Mombasa, or such other municipal authority as may be hereafter established by law.

2. Each grantee shall erect within two years of the commencement of his grant a dwelling-house with suitable outbuildings of approved design suitable to the locality.

3. The grantee shall in addition enclose his plot with a fence or wall of suitable design to be approved by the Authority.

4. No building shall at any time during the term of the grant be used for any purpose other than a dwelling-house.

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 Asian or African who is not a domestic servant employed by him.

6. At no time during the term of the grant shall more than one dwelling-house with the necessary offices and outbuildings be erected on any plot without written consent of the Governor, and the grantee shall not without such written consent subdivide the plot or assign or sublet any portion of the plot.

7. The grantee shall not at any time during the term of the grant erect any building or buildings so as to cover more than one-third of the area of the plot.

8. Any building erected shall conform to a building line approved by the Authority.

9. All outbuildings, offices, etc., shall be properly sited and screened from view to the satisfaction of the Authority, and shall be kept so screened during the term of the grant.

10. The grantee shall maintain and keep in good and substantial repair at all times during the term of his grant all buildings, fences, drains, and works of every description erected or constructed by him, and shall deliver up the same in such repair at the expiration or sooner determination of his grant.

11. Each grantee is liable to be held responsible by the Authority for the proportionate cost of the construction of roads and drains on which his plot fronts or abuts when construction is completed.

SCHEDULE
MOMBASA ISLAND SOUTHERN RESIDENTIAL AREA.
SECTION XXVI.

Plot No.	Area.	Rent per annum.		Upper Price.	Survey Fees.	Prop. Rent from 1st Sept. to 31st Dec. 1928.	
		Shs.	Shs.			Shs.	Shs. cts.
92	1.121	1,076	4,434	100/-	358	66	
91	1.160	1,114	4,640	100/-	371	33	
90	1.160	1,114	4,640	100/-	371	33	
89	1.130	1,086	4,520	100/-	361	66	
82	0.852	815	3,405	67/50	272	66	
81	0.920	883	3,690	67/50	294	33	
80	0.915	881	3,672	67/50	293	66	

NAIROBI,
30th June, 1928.

C. E. MORTIMER,
*for Commissioner of Local Government,
Lands and Settlement.*

GENERAL NOTICE NO. 68.

NOTICE.

FIREWOOD IN FOREST RESERVE BETWEEN UPLANDS AND LIMURU.

TENDERS are invited for the right to cut approximately 200,000 cubic feet of firewood in the Bibizoni Compartment of the Kakuya Encampment Forest Reserve situated about 3 miles from Limuru and Uplands Railway Stations.

2. The heap extends over 220 acres and contains mainly hardwood fuel. It is to be clear felled southwards from the northern boundary of the compartment within a maximum period of 18 months from the date of issue of the licence.

3. The area also contains some Murri and Podo timber which will not be included under the terms of the licence and for the separate disposal of which the Acting Conservator of Forests reserves the right.

4. The basis of tender to be a royalty payment per 100 stacked cubic feet.

5. A sum of Shs. 500 to be deposited with the Acting Conservator of Forests at the time of entering into the contract and before any cutting can take place (to be held as security for the performance and observance of the terms of the contract and to be liable for forfeiture as liquidated damages in the event of any breach thereof).

6. Full details of the terms of the contract may be had on application to the Acting Conservator of Forests.

1. The position and boundaries of the compartment are indicated on maps in the office of the Forester, East Forest Station Uplands, and of the Acting Conservator of Forests, Nairobi and the compartment may be inspected by arrangement with the Forester, East.

2. Tenders will be received up to noon on July 24th and should be addressed to the Acting Conservator of Forests, Nairobi, marked "Tender for Fuel East."

3. The highest or any tender will not necessarily be accepted.

Nairobi,
30th June, 1928.

N. V. BRASNETT,
Acting Conservator of Forests.

GENERAL NOTICE NO. 721.

KENYA AND UGANDA RAILWAYS AND HARBOURS

NOTICE.

Rates on Sisal Fibre.

THE following rates on fibre (sisal) flax, fax low and hemp, country produce pressed to not less than 2½ lbs. per cubic foot, consigned to Kilindini Harbour or Mombasa Old Port, in one ton lots or over for export will operate on and from Monday, the 9th July, 1928.

	From	Rate per Ton.	
		Shs.	Cts.
Voi	8	51
Ndi	9	86
Masingalen	10	13
Kibwazi	16	58
Moshi	16	80
All stations between Makindu and Nairobi (both inclusive)	26	00
Rudra and Thika	27	56
Kikuyu	27	80
All stations between Limuru and Nakuru (both inclusive)	80	00
All stations between Nakuru Junction and Kiambu (both inclusive)	85	00
All stations between Nakuru Junction and Malaba (both inclusive)	85	00
Lake Victoria Ports	40	00

1. The above rates apply at Owner's Risk.

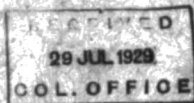
2. The pressure of bales to be entered on the consignment note.

3. A reduction of 5% is given on flax, if marked "K" (the official Government mark for graded flax). This mark should be quoted on the consignment note to obtain the reduction.

Not applicable to Kitale Branch, Lake Soga Branch and Thika-Nyeri section, or stations and ports beyond Mombasa Port.

Nairobi,
7th July, 1928.

O. I. N. FELLING,
General Manager.



Telegram from the O.A.G. of Kenya to the Secretary of State for the Colonies.

Dated 26th July, 1929.

(Received Colonial Office 5.44 p.m. 26th July, 1929.)

No. 5 No. 221. 26th July. Your telegram of 19th July. Sale of Mombasa plots. Position is that Court of Appeal is unanimously agreed that (1) no power exists to limit bids to Europeans only when township plots are being sold by auction under Crown Lands Ordinance and (2) a condition that a township plot sold by auction shall be occupied by Europeans only may lawfully be inserted in lease giving effect to result of Auction.

On the advice of the Executive Council application is being made to Court for leave to appeal. Before necessity arises for a further action discussion with the Governor will be possible. Despatch with copy of judgment follows.

*Checked and
7/20/29 19/7/29*

Mr. Allen 19/7/29

X Mr. Bushe (has agreed) 19/7/29

Mr. Parkinson 19.7.29

Mr. Batemey 19/7/29

Sir E. Harding

Sir J. Shuckburgh

Sir G. Grindie

Sir C. Davis

Sir S. Wilson

Mr. Grady Galt

*W. H. ...
L. S. ...*

3/7/29

Code Telegram

DRAFT. conon.

IMPORTANT

Gov. Nairobi.

*Make this copy ...
we argued ...
19-7-29
Senta ...
15/7/29*

df

5 July Following from Ori...
begins Times reports that Court of
Appeal has ruled Government not
empowered to restrict sale of
plots in Mombasa to Europeans but
that they are entitled to restrict
residence to Europeans. I am
very anxious Government right of
appeal in regard to sale should not
be allowed to lapse. Is there any
reason why the necessary steps
should not be taken to enter appeal
or if leave to appeal is necessary
to obtain leave, as I ~~wish~~ *wish*
my return to have an opportunity of
going fully into the matter and
considering whether appeal should
be prosecuted. *Wds.*

Seen

Communications on this subject should be addressed to—

THE UNDER SECRETARY OF STATE,
E & O. DEPT.,
INDIA OFFICE,
LONDON, S.W. 1,

and the following number quoted—

E & O. 4977/29.

Reference to previous correspondence:

Letter ^{to} the India Office of the 7th August, 1928
~~from~~ No. 15079.



The Under Secretary of State for India presents his compliments to The Under Secretary of State for the Colonies and begs to transmit to him copy of the papers noted below.

The Under Secretary of State,
Colonial Office.

Origin	Date	Subject
From Indians Overseas Association.	10.7.29.	Restriction on acquisition by Indians of certain township plots at Mombasa.
To - do -	13 7.29.	

Copy also sent to—

5012 5000 528

COPIES.

INDIANS OVERSEAS ASSOCIATION,
42, 47 & 48, DANES INN HOUSE
265, STRAND, LONDON, W.C.2.

10th July, 1929.

The Under Secretary of State for
India in Council,
India Office,
Whitehall, S.W.1.

Sir,

I have the honour to advise you of the receipt by my Association of the following telegram, dated the 6th instant, from the Secretary of the Indian Association, Mombasa:-

"JUDGMENT SEGREGATION CASE APPEAL DELIVERED TODAY STOP JUDGES UNANIMOUSLY HELD COMMISSIONER HAD NO POWER TO RESTRICT SALES OF RESIDENTIAL PLOTS TO EUROPEANS ONLY BUT HAD POWER TO INTRODUCE CONDITION IN LEASE THAT INDIANS AND AFRICANS (EXCEPT AS DOMESTIC SERVANTS OF EUROPEANS) COULD NOT RESIDE IN HOUSES ERECTED THEREON STOP APPEAL ALLOWED WITH COSTS COMMANDING COMMISSIONER TO THROW OPEN SALES TO ALL COMMUNITIES STOP ON SECOND POINT APPEAL TO PRIVY COUNCIL CONTEMPLATED".

The litigation has apparently risen out of the circumstances that the Government of Kenya in advertising

the sale of plots of Government land in what is known as the "European residential area" of Mombasa, at public auction attached two conditions, namely, that bidding was to be confined to Europeans only, and the residence on the plots sold of Asiatics and Africans, save as domestic servants, was to be prohibited.

The Indian community have all along contended that neither restriction was authorised in Law. The East African Appellate Court it would seem has now decided in their favour of the one point, and against them on the other, and they are now contemplating a further appeal to the Privy Council in respect of the point in which they have failed. I am requested to bring this matter to the notice of the Secretary of State in Council for his information and such further action as may be required.

I have &c.,

(Sd) H.S. Inhab.

Hon. Secretary.

Economic &
Overseas

19

E & O. 4077/29.

13 JUL 1929

July, 1929.

Sir,

I am directed by the Secretary of State for India to acknowledge the receipt of your letter of the 10th July transmitting copy of a telegram from the Indian Association, Bombay, regarding the judgment of the East African Appellate Court relating to restrictions imposed in regard to the acquisition by Indians of certain township plots at Bombay.

I am, Sir,

Your obedient servant,

(Sd.) C. H. SILVER.

for Secretary,
Economic & Overseas Department.

The Honorary Secretary,
Indian Overseas Association,
42, 47 & 48, Dames Inn House,
260, Strand,
London, W.C.2.

Chairman of Executive Committee:
M. H. THE AGA KHAN.

Deputy Chairman:
Sir M. M. BHOWNAGGREE,
K.C.I.E.

Hon. Secretary and Treasurer:
Hy. S. L. POLAK.

2

Indians Overseas Association

Telegrams: Kaloph, Estrand, London.
Cables: Kaloph, London.
Bentley's Code.
Telephone: General-Office
HOLBORN 3405.

RECEIVED
11 JUL 1929
COL. OFFICE

& 48, Danes Inn House,
265, Strand, London, W.C.2.

10th July, 1929

The Under Secretary of State for the Colonies,
Colonial and Dominions Office,
S.W.1.

302

Sir,

I have the honour to advise you of the receipt by my Association of the following telegram, dated the 6th instant, from the Secretary of the Indian Association, Mombasa: "JUDGMENT SEGREGATION CASE APPEAL DELIVERED TODAY STOP JUDGES UNANIMOUSLY HELD COMMISSIONER HAD NO POWER TO RESTRICT SALES OF RESIDENTIAL PLOTS TO EUROPEANS ONLY BUT HAD POWER TO INTRODUCE CONDITION IN LEASE THAT INDIANS AND AFRICANS (EXCEPT AS DOMESTIC SERVANTS OF EUROPEANS) COULD NOT RESIDE IN HOUSES ERECTED THEREON STOP APPEAL ALLOWED WITH COSTS COMMANDING COMMISSIONER TO THROW OPEN SALES TO ALL COMMUNITIES STOP ON SECOND POINT APPEAL TO PRIVY COUNCIL CONTEMPLATED."

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Cops. Ser. 596-7
Recd 22 July 1929

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I have the honour to be,

Sir,

Your obedient servant,



Hon. Secretary.

KENYA.

No. 81



122
GOVERNMENT HOUSE,
NAIROBI,
KENYA.

RECEIVED
4 MAR 1929
COL. OFFICE

7th February 1929.

Sir,

(No. 12. rev.
15879
28)

I have the honour to refer to Kenya despatch No. 560 of 12th. October, 1928, on the subject of the sale of residential plots at Mombasa.

2. The application for a Mandamus to which reference was made in the final paragraph of that despatch was duly heard in the Supreme Court at Mombasa on the 8th. of December. The result was that the application was dismissed with costs. A copy of the judgment is attached.

The Advocate for the Indian applicant has intimated his intention of appealing to the East African Court of Appeal, for which a period of 90 days is allowed.

If an appeal is entered it cannot be heard until the March Session of the Appeal Court. Meanwhile, no steps are being taken to dispose of the plots in question.

I have the honour to be,

Sir,

Your most obedient servant,

J. M. ...
ACTING GOVERNOR's Deputy

THE RT. HON. LIEUT. COLONEL L. C. M. S. AMERY, P. C., M. P.
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S. W.

IN HIS MAJESTY'S SUPREME COURT OF KENYA AT MOMBASA.
DISTRICT REGISTRY.

Civil Case No.83 of 1928.

Abdulhassen Kaderbhai.....Applicant.
versus
The Commissioner for Local Government Lands),.....Respondent,
and Settlement.

8.12.28

J U D G M E N T :-

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 LL.K. 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 authorized 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 Ordinances. 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).

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 equal 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".

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 Vol. 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. 105 Revised Laws of Kenya which have not been referred to during the case, in Section 5 defines an Auctioneer thus: "Every person who sells or offers for sale any movable 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 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 shewn 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 auction, or whereby the highest bidder is deemed to be the purchaser. The instance quoted by Lord Eldon 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 anyone 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.

Three adjoining town plots are held No.1 by A No.2 by the Crown and No.3 by B. The business 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 Sections 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

27
END

(5)

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".

Holding this view, the Applicant fails. Costs to the Respondent.

(Sgd) Eric T. Johnson.
10. 12. 28.

10. 12. 28.

Judgment read.

(Sgd) Eric T. Johnson.