

UGANDA / JUDGMENT

Desai v Jiwa (C.C. 251/1932.)

[1932] EACA 37 (1 January 1932)

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COURT

East African Court of Appeal

BEFORE

Gamble. Ag. J. (Kenya)

CASE / FILE NUMBER

C.C. 251/1932.

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ORIGINAL CIVIL.

Before GAMBLE, Acting J.

GULABRAI KHANDUBHAI DESAI

ABDULLA KHAN s/o JIWA.

C. C. \$251/1932\$.

Transfer of Property Act—Mortgage suit—Civil Procedure Rules. Order XXXIII-Summary procedure on a covenant in a simple mortgage to pay, where property not transferred to mortgagee.

\$Held\$ (8-10-32): -That where a mortgage does not embody a conveyance of the property on which the loan is secured. Order XXXIII, Rule 2 (e), of the Civil Procedure Rules does not apply. An application to enter summary judgment in a suit for foreclosure and sale could not therefore be entertained.

Schwartz for Plaintiff (Mortgagee).

Order XXXIII, Rule 2 (e), of Civil Procedure Rules identical to English Order III, Rule 6.

Halsbury, Volume 21, Articles 301 and 349.

Argued that as the suit was for foreclosure and sale, Order 33, Rule 2 (e), justified the application.

Daubuz v. Lavington, 13 Q. B. (1884), at 347.

Hall v. Comfort, 18 Q. B. (1887), at 11.

RULING.—The plaintiff applied under Order XXXIII, Rule- \$2\$ (e), that judgment be entered, there being no defence to this action which is for principal and interest due under a mortgage, and for sale of the premises in default of payment. The Registrar being of the opinion that the suit was not covered by any of the provisions of Order XXXIII referred the application to Court for argument.

I have not the advantage of seeing the mortgage deed, but I am of the opinion, from the wording of the plaint, that it. must be what is described in the Transfer of Property Act as a simple mortgage whereby without delivering possession the mortgagor binds himself personally to pay the mortgagee money, and in default the mortgagee shall have a right to cause the mortgage property to be sold. There is no transfer of ownership.

The cases cited by Captain Schwartze, in support of his argument, refer to English mortgages, where the relationship of landlord and tenant is created by the mortgage deed. In such

\$\overline{v}\$. \$

cases it is settled practice that a writ may be specially endorsed. , I think, however, that in relation to the form of mortgage we are discussing they are entirely inapt.

I would refer to the case of Hill \$v\$. Sidebottom, L. T. 47 at p. 224. This was an action for foreclosure, and the writ was also specially endorsed with a claim for the amount due on the covenant to pay in the mortgage deed. The application was refused by Fry, J., who said that it was easy to give judgment for the money demand only, but difficulty would arise in the effort to segregate a money demand from one of a more complex nature.

I am unable to distinguish that case from the case before me, and as I am further of the opinion that this suit is not covered by Order XXXIII, Rule \$2(e)\$, the relation of landlord and tenant not having arisen, the application to enter final judgment cannot be entertained.

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