

UGANDA / JUDGMENT

Patel v Registrar of Titles (Civil Appeal No. 21 of 1949 .) [1949] EACA 10 (1 January 1949)

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COURT

East African Court of Appeal

BEFORE

Edwards CJ, Gray CJ, Nihill P

CASE / FILE NUMBER

Civil Appeal No. 21 of 1949 .

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR BARCLAY NIHILL, C. J. (Kenya), EDWARDS, C. J. (Uganda), and SIR JOHN GRAY, C. J. (Zanzibar)

SHANTILAL NATHABHAI PATEL, Appellant (Original Plaintiff)

v. REGISTRAR OF TITLES, Respondent (Original Defendant)

Civil Appeal No. 21 of 1949.

(Appeal from decision of H. M. High Court of Uganda—PEARSON, J.)

Assignment of unexpired term of lease owned by a Muganda-Consent of Governor and Lukiko-Registration of Titles Ordinance, 1924-Section 3, Land Transfer Ordinance, 1944—Section 2, Buganda Land (Amendment) Law, 1942.

On 3rd March, 1948, S. W. Kulubya, the registered proprietor of land granted a lease to Chhotalal Kanji for 49 years. The consents of the Governor and Lukiko were duly obtained. On 29th January, 1948, Chhotalal Kanji had transferred the unexpired term of his lease to the appellant without the consent of the Governor and Lukiko. The terms of the original lease made it essential to the validity of the assignment of the lease that the consent of the original Muganda lessor should be first obtained. It appears that he did so consent.

By section 2 (d) of the Buganda Land (Amendment) Law, 1942, "the owner of a 'mailo' shall not permit one who is not of the Protectorate to lease, occupy or use his mailo except with the approval of His Excellency the Governor and the Lukiko".

By section 3 Land Transfer Ordinance, 1944: —

"No non-native shall without the consent in writing of the Governor occupy or enter into possession of any land of which a native is registered as proprietor."

Held (12-7-49) (1) The Buganda Native Government passed a law in due form enacting that the Lukiko's consent was necessary and such law was not inconsistent with the provisions of any Protectorate Ordinance.

- (2) The fact that the original lease does not specifically say that the consent of the Governor and the Lukiko is necessary to an assignment is immaterial, and the additional consents of the Governor and the Lukiko are essential to the validity of the assignment.
- (3) The opening words of section 2 of the Buganda Land Law of 1908 show "Mailo" is synonymous with "land".
- (4) By section 3 of the Protectorate Land Transfer Ordinance, 1944, "land of which (a) By section 5 of the reciberator Land Translet organizes, 1.11, and of minor
a native is the registered proprietor' must mean land in respect of which a final Mailo
certificate has under the provisions of the Registrati a native.

Cases referred to: Bostel Bros. v. Hurlock (1948) 2 A. E. R. 313; Nasanairi Kibuka v. A. E. Bertie Smith (1908) 1 U. L. R. 41; Oswald v. Berwick (1854) 23 L. J. Q. B. 321.

Holcom for the Appellant.

Sheridan for the Respondent.

JUDGMENT (delivered by SIR BARCLAY NIHILL, C. J. (Kenya)).—The point for determination in this appeal is a simple one but it is one of considerable interest and importance to non-Africans in Uganda who, in the province of Buganda, hold a leasehold interest in land of the tenure known as Mailo of which the registered Mailo owner is an African. The question may be put in this way: Can a nonnative registered proprietor of a leasehold estate in Mailo land of which the Mailo owner is an African validly assign the unexpired term of his lease to a non-native without obtaining the consent of the Governor of the Protectorate and of the Lukiko? For the reasons which will be given in the judgment about to be delivered by my brother the learned Chief Justice of Zanzibar and with which I am in full agreement the answer to this question is in the negative. It accordingly follows that this appeal must be dismissed with costs.

EDWARDS, C. J. (Uganda).—I have had the advantage of perusing the judgment prepared by the learned Chief Justice of Zanzibar and I agree with it. A recent case dealing with the legal effect of anything done in contravention of a statute is Bostel Bros. v. Hurlock (1948) 2 All E. R. 313. I would merely add an observation of my own regarding the argument addressed to us on behalf of

the appellant which was that, after the lease had been granted, the Mailo registered proprietor ceased to have any interest other than the freehold Mailo reversion. In my view, the answer to this is that he never ceased to be the "owner of a Mailo" under sec. 2 (d) Buganda Land Law as amended by the Land (Amendment) Law, 1942. While he could permit the lessee to "occupy or use" his Mailo (provided the approval in writing of His Excellency the Governor and the Lukiko had first been had and obtained) he could not permit anyone else who was not of the Protectorate to do so. In other words, he could not accord permission to an assignee of the lease without the necessary consents. I, accordingly, agree that this appeal be dismissed with costs to the respondent.

SIR JOHN GRAY, C. J. (Zanzibar).—The land which forms the subject-matter of this litigation is what is known as Mailo land, that is to say, land in Buganda of a freehold character, which is owned by a Muganda and has certain special characteristics which are not usually attached to land held on a freehold tenure.

By a lease dated 3rd March, 1948, Serwano Wefunira Kulubya, the registered proprietor of the land in question, granted the same to one Chhotalal Kanji, who will hereinafter be referred to as the lessee, for a term of 49 years. This lease was in the form set out in the Eighth Schedule of the Registration of Titles Ordinance. The lease was granted "subject to the covenants and powers implied under the Registration of Titles Ordinance" and declared that "the following covenants by the lessee are to be construed according to section 102 of the Registration of Titles Ordinance". One of these covenants was that "the lessee shall not transfer or sublet". As the Ninth Schedule to this Ordinance shows this covenant in its expanded form reads as follows: -

"The lessee, his executors, administrators, or transferees will not during the said term transfer, assign or sub-let the premises hereby leased or any part thereof or otherwise by any act or deed procure the said premises or any part thereof to be transferred, assigned or sub-let without the consent in writing of the lessor or his transferees first had and obtained."

By reason of certain legislation, which will be referred to later, the consents of the Governor and the Lukiko of Buganda had to be obtained to the granting of this lease. These consents were obtained and the lease was duly registered under the Registration of Titles Ordinance.

By a transfer dated the 29th January, 1948, the lessee transferred the unexpired term of his lease to the appellant. In accordance with the covenant contained in the original lease the consent of the lessor was obtained to this assignment, but not the consents of the Governor and Lukiko.

The respondent, who is Registrar of Titles, contends that the consents of the Governor and the Lukiko are also essential to the validity of the assignment. The appellant contends that neither of these two consents is necessary and that all that is required is the consent of the lessor in accordance with the covenant contained in the original lease.

The relevant legislation on the subject must be set out.

The Registration of Titles Ordinance, 1924, is the earliest of these laws. As perusal of that Ordinance shows, it deals with two classes of freehold land, namely, ordinary freehold and land, which is comprised in a final Mailo Certificate and commonly known as "Mailo land".

Section 2 of the Ordinance defines "proprietor" as meaning (inter alia) "the owner whether in possession, remainder, reversion or otherwise of land or of a lease or mortgage whose name appears or is entered as the proprietor thereof in the register book".

Section 99 reads as follows: —

"The proprietor of any freehold land under the operation of this Ordinance may, subject to the provisions of any law or agreement for the time being in force, lease the same for a term exceeding three years by signing a lease thereof in the form in the Eighth Schedule."

Section 137 enacts that "Notwithstanding anything in this Ordinance contained, the Registrar shall not register any instrument effectuating a transaction which under the provisions of the Land Transfer Ordinance, requires the consent in writing of the Governor unless such consent be endorsed upon the instrument or otherwise evidenced".

Section 179 need not be set out in extenso. It empowers the Registrar of Titles to require the correction of any instrument presented for registration, if such instrument "is erroneous or defective".

The Land Transfer Ordinance, 1906, is the Ordinance referred to in section 137. It was repealed and replaced by the Land Transfer Ordinance, 1944. The relevant section in the repealed Ordinance is section 2, which enacted that—

"No land in the occupation of, or held by, any native of the Protectorate, or any right, title or interest in or over any immovable property so occupied or held, shall be transferred, either *inter vivos* or by will, either in perpetuity or for a term of years, to any person not a native of the Protectorate without the consent in writing of the Governor."

\$\cdot\$,

It is to be noted that the section makes no reference to the obtaining of the consent of the Buganda Lukiko to a transaction between a native of Buganda and a non-native. But in view of the decision of this Court in *Nasanairi Kibuka v. A. E. Bertie Smith* (1908) 1 U. L. R. 41 it is clear, and it is not disputed, that if the Buganda Native Government, in exercise of the legislative powers conferred upon it by Clause II of the Uganda Agreement, 1900, and subsequent agreements ancillary thereto, passes in due form a law which enacts that the Lukiko's consent to such a transaction shall be obtained and such law is not inconsistent with the provisions of any Protectorate Ordinance, such consent is essential to the validity of the transaction notwithstanding the silence of the relevant Protectorate Ordinances on the subject.

The Land Transfer Ordinance of 1906 has been repealed and replaced by the Land Transfer Ordinance, 1944. Omitting certain provisos which are not relevant to this case section 3 of the 1944 Ordinance reads as follows:-

"No non-native or any person acting as his agent shall without the consent in writing of the Governor occupy or enter into possession of any land of which a native is registered as proprietor (otherwise than by receiving rents and profits payable by non-natives who have gone into occupation or possession with the consent of the Governor) or make any contract to purchase or to take on lease or accept a gift inter vivos or a bequest of any such land or any interest therein other than a security for money."

Nasanairi Kibuka v. Bertie Smith (supra) was decided under the provisions of a Buganda Land Transfer Law of 1904. This law was repealed and replaced by a Land Law of 1908. Section 2 \$(d)\$ of this later law was repealed and replaced by section 2 of the Land (Amendment) Law, 1942, which (omitting a proviso which is not relevant to this case) reads as follows: —

"The owner of a Mailo shall not permit one who is not of the Protectorate to lease, occupy or use his Mailo except with the approval in writing of His Excellency the Governor and the Lukiko."

The same section adds a new sub-section \$(k)\$ to section 2 of the Land Law of 1908 making it a criminal offence for the owner of a Mailo to contravene the provisions of the new sub-section \$(d)\$.

The right of the Kabaka and Lukiko to make laws which are binding upon all natives of Buganda is to be found in Article II of the Uganda Agreement, 1900. as read with the Buganda Agreement (Native Laws), 1910, and the Buganda (Declaratory) Agreement (Native Laws), 1937, and statutory recognition of this right is to be found in section 4 of the Native Law Ordinance. The effect of such a law may be, as the case of *Nasanairi Kibuka v. Bertie Smith* shows, indirectly to bind non-natives in their dealings with natives. As said in that case, where under a Buganda law the consent of the Lukiko is necessary to a transaction between a native and a non-native relating to land, specific performance of the agreement will not be enforced when such consent is shown not to have been given.

This is a case of an assignment of a lease and the question to be decided is whether the consent of the Governor and the Lukiko is required to such assignment. Admittedly, those two consents are essential to the granting of the original lease, but it is contended that, when once a non-native has become the lawful registered proprietor of a leasehold interest in land, those two consents are not essential to the transfer of his leasehold interest to another non-native. By reason of the definition of "proprietor" in section 2 of the Registration of Titles Ordinance the non-native lessee is to be regarded as the proprietor of the land for the purposes of section 3 of the Land Transfer Ordinance, 1944.

In this case the terms of the original lease made it essential to the validity of the assignment of the interest created by such lease that the consent of the Muganda lessor should be first obtained. Clearly, if the Muganda lessor has an unfettered discretion in regard to the granting of such

consent, that is enough. But if either a Protectorate Ordinance or a Buganda law fetters that discretion by requiring him to obtain the consent of others to the giving of a consent by himself. then equally clearly those consents must be obtained. The fact that the original lease does not specifically say that the consent of the Governor and Lukiko is necessary to an assignment appears to me to be immaterial. As said by Pollock, C. B., in *Oswald v. Berwick* (1854) 23 L. J. Q. B. 321 at p. 331, "every contract, which does not expressly provide to the contrary, must be considered as made with reference to the existing state of the law". Again, as said by Bowen, L. J., in *Mellis v. Shirley Local Board* (1885) 16 Q. B. D. 446 at p. 453, 454, "the established rule of law is, and has always been, that no action can be maintained on a contract which is prohibited either by the common law or by statute If you can find out that the act is prohibited, then the principle is that no man can recover in an action founded on that which is a breach of the provisions of a statute".

It is to be noted that section 2 \$(d)\$ of the Native Land Law, 1908, as amended in 1942, does not confine itself to the use of the word "lease". The prohibition imposed upon the Mailo owner is against the permitting by him of "one who is not of the Protectorate to lease, occupy or use his Mailo" except with the written approval of the Governor and Lukiko. Similarly, section 3 of the Land Transfer Ordinance, 1944, does not confine itself to the use of the word "lease". It also forbids (*inter alia*) a non-native "to occupy or enter into possession of any land of which a native is registered as the registered proprietor".

Now it is to be noted that both these laws deal with the permitting of the use or occupation of, or entry upon, land by a non-native. As the opening words of section 2 of the Buganda Land Law of 1908 show, "Mailo" is synonymous with "land". In its context in section 3 of the Protectorate Land Transfer Ordinance, 1944, "land of which a native is the registered proprietor" must in my opinion mean land in respect of which a final Mailo certificate has under the provisions of the Registration of Titles Ordinance been issued to a native.

In my opinion the words "occupy or enter into possession of any land" and "occupy or use his Mailo" are very wide indeed and it seems clear to me that both legislatures have intentionally made them as wide as possible so as to prevent evasion of the law by a non-native occupying, entering into possession of, or holding land by omitting to go through the formality of obtaining a lease or other instrument which is binding as a lease.

Turning to consider the position of a Muganda lessor under section 2 (d) of the Buganda Law, 1908, as amended in 1942, if he consents to an assignment by a non-native lessee of his leasehold interest to another non-native, what else can he be held to be doing but permitting a non-native "to occupy or use his Mailo", which is the very act which he is prohibited from doing without the written consent of the Governor and the Lukiko?

Similarly, if a non-native obtains an assignment to himself of the residue of a term of years, what else is he doing but obtaining the right to "occupy or enter into possession" of the land comprised in the lease? If that land is land "of which a native is the registered proprietor", section 3 clearly prohibits a non-native from so occupying or entering into possession without the written consent of the Governor.

I am therefore of the opinion that in Buganda, where a non-native has obtained a lease of land of which a native is the registered proprietor under the Registration of Titles Ordinance and he is by the terms of such lease prohibited from assigning or sub-letting without the consent of the native lessor, the additional consents of the Governor and the Buganda Lukiko are essential to the validity of such assignment and that without evidence of such consents the Registrar ought not to register such assignment.

I would therefore dismiss this appeal with costs to the respondent.

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