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Held \$(28.11.52)\$ —(1) The nature of the appellant's application was for the withdrawal of a caveat: and was not an appeal against the decision of the Registrar and it was not possible to say whether an order for the withdrawal of a caveat would be an order appealable as of right under the Kenya Civil Procedure Code and Rules.

- (2) The right of appeal was a municipal right of the territory from which the appeal emanates. It was for the appellant to satisfy the E. A. C. A. that it had jurisdiction and he had failed to do this.
- (3) Applications to Court should bear a clear indication of the section of the Ordinance or Rules under which it is made.

Case cited: Phillips v. Copling, (1935) 1 K. B. 21.

Appeal dismissed.

O'Brien Kelly for appellant.

A. B. Patel, D. D. Doshi with him, for respondent.

JUDGMENT.—On this appeal coming on for hearing we reserved judgment on a preliminary point as to whether a right of appeal lay. The point was not taken as a preliminary objection by the respondent, but was raised by the Court itself. As was said by Scrutton, L. J., in **Phillips v. Copling**, (1935) 1 K. B., p. 21: "It is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it." The jurisdiction of this Court to entertain an appeal derives from the municipal law of the Territory from which the appeal emanates. Where that law provides for an appeal to this Court, either by leave or as of right, it is the duty of this Court to hear and determine the appeal, but in cases where no such right has been expressly conferred or can be inferred, this Court has no jurisdiction. In this case therefore we invited learned counsel for both the parties to address us.

This appeal purports to be an appeal from what is termed "a ruling" by a Judge of the Supreme Court of Kenya on a matter which came before him in the following way. The appellant, who is the registered proprietor of two plots of land numbered 924 and 925 of section 1, Mainland North, Mombasa, by a chamber summons, prayed the Supreme Court of Kenya to order the removal from the register of a caveat lodged by the respondent. A learned Judge of the Supreme Court, after hearing the parties, delivered a written judgment which he termed "a ruling" in which he gave his reasons for ordering the removal of the caveat on certain terms.

There is no reference, either in the chamber summons or in the ruling, as to under which section of the Registration of Titles Ordinance the matter had come before the Supreme Court, but we are prepared to assume that both the Judge and the parties considered it as an application made under section 57 (5) of the Ordinance (Cap. 160, 1948 Laws of Kenya). We again take the opportunity of impressing on advocates the need in any summons or motion for a clear indication of the section of the Ordinance or of the Civil Procedure Code or Rules under which it is made. Much subsequent trouble is avoided when this is done. Section 57 (5) of the Registration

of Titles Ordinance reads as follows: \$-\$

"(5) The proprietor or other person claiming land may, by summons, call upon the caveator to attend before the Court to show cause why the said caveat should not be withdrawn, and it shall be lawful for the Court, upon proof that the caveator has been summoned, and, upon such evidence as the Court may require, to make such order in the premises, either ex parte or otherwise, as to the Court shall seem fit. And where a question of right or title shall require to be determined, the proceedings shall be as nearly as may be in conformity with the Rules of Court in relation to civil causes."

The first difficulty that arises is to know what is meant by the expression "the court" used in this section. There is no definition of the word "court" in the definition in section 2 of the Ordinance, nor can any help be got from either the Kenya Interpretation Ordinance or the Courts Ordinance. Mr. O'Brien Kelly has asked us to assume that the Legislature must have meant the Supreme Court and much can be said for this assumption. Yet it is by no means clear. We are inclined to agree with him that "court" when used in this Ordinance cannot mean the Land Registration Court, which is a court of special jurisdiction subordinate to the Supreme Court set up by section 6 of the Land Titles Ordinance (Cap. 159). This is a court presided over by an officer known as the Recorder of Titles or the Deputy Recorder of Titles. The Ordinance was enacted in 1908 and received its last amendment in 1927. The general scheme of the Ordinance suggests that this special court was set up to adjudicate on claims to land then unregistered and with power to grant certificates of title, and we note that by section 3 of the Land Registration Ordinance, which was enacted in 1919 with subsequent amendments to 1941, the registration provisions of the earlier Ordinance ceased to apply in respect of all lands comprised in any certificate of title issued by the Land Registration Court after 20th October, 1919. The expression "Land Registration Court" used in section 3 of Chapter 160 is defined in section 2 thereof as meaning the Court constituted under the Land Titles Ordinance, but apart from section 3, the expression does not again occur in Chapter 160. We hope it is safe to assume that the draftsman would have continued to use the expression "Land Registration Court" whenever his subsequent use of the word "court" was meant to refer to that special body.

Another possibility is that the word "court" as used in Part XI of the Registration of Titles Ordinance, that is, the part dealing with "caveats" which contains sections 57, means a subordinate court in the registration districts in which the land is situated.

This brings us to Part XIV of the Ordinance, which is headed, "Special Jurisdiction of Court". Section 62 provides for an appeal to "the Court" at the instance of any person dissatisfied with any act, omission, refusal, decision, direction or order of the Registrar-General or a registrar by way of mandamus. The clue to the meaning of the word "court" as used in this section is contained in the proviso to section 33 which reads as follows:—

"Provided that the registrar shall have power to reject any instrument appearing to be unfit for registration. Any person who is dissatisfied with a decision of a registrar made under this section may appeal to the Registrar General, whose decision shall be final, subject to any further appeal to the Supreme Court as provided for in section 62 of this Ordinance."

We are at last on firmer ground, for it can, we think, be said with certainty that where an application is made by way of mandamus it can only be made to the Supreme Court. Whether a reference to the court on legal points (see marginal note to section 63) means also the Supreme Court is again, however, not certain. The form Q in the First Schedule which relates to section 63, if anything, suggests the contrary, for the heading is: "In the court of ...".

We have still not reached our greatest difficulty which is section 65, under which Mr. O'Brien Kelly claims he has a right of appeal to this Court. This section reads as follows: —

"RULES OF PROCEDURE AND RIGHT OF APPEAL

65. In the conduct of proceedings under this Ordinance there shall be the same rights of appeal, and the same rules of procedure and practice shall apply, as are in force or exist for the time being in respect of proceedings of a similar nature in the court in which such proceedings may be taken, and the said court shall have power to make such additional or altered rules and new or altered forms of proceedings, and from time to time repeal, alter or vary the then existing rules, and to make new rules and forms of proceedings for the practice and procedure of the said court in regard to matters under this Ordinance."

We know nothing of the source from which the draftsman derived this section, but we do say with confidence that in relation to the other provisions of this ill-drafted Ordinance it defies construction. It is in striking contrast to the clear and precise provisions relating to appeals in sections 7 and 67 of the Land Titles Ordinance (Cap. 159). A rough approximation of its meaning could amount to this; that a court when dealing with a proceeding which reaches it under this Ordinance shall observe its usual procedure and practice, subject to any new rule which it may like to make; but the section provides no answer to the question, does the word "court" wherever used in the Ordinance mean the Supreme Court? Indeed, the words "in respect of the proceedings of a similar nature in the court in which such proceedings may be taken", rather suggest that some proceedings might be taken in the Supreme Court and some in a subordinate court.

Mr. Patel who has long experience in the Courts of Kenya, has told us that representations were made to Government 26 years ago pointing out the drafting defects in this Ordinance. We trust that as a result of this case they will be renewed, and will at last bear fruit. As it is, we must hold that the section contains no comfort for Mr. O'Brien Kelly. The nature of the application made by the appellant, assuming it was made to the proper Court, was for the withdrawal of a caveat; it was not an appeal against a decision by the Registrar, for the Registrar had done nothing save to note the caveat in the register as by law he was bound to do under section 57 (3). Mr. O'Brien Kelly has sought

to call in aid the judgment of this Court in Civil Appeal No. 51 of 1950, but the case is not in point. In that case the point of jurisdiction considered was whether a second appeal to this Court lay from a decision of a Rent Control Board established by the Kenya Rent Restriction legislation, since the Ordinance provided no express right of appeal beyond the Supreme Court. This Court entertained the second appeal for the following reason which I cite from the judgment of Mr. Justice Lockhart-Smith:-

"It may be regarded as well settled that once a matter has arrived at an established court by way of appeal, the ordinary legislation dealing with further appeals from that court must be held to apply, unless extended by special legislation."

In the instant case we are not dealing with the question as to whether a second appeal lies from a decision of some quasi-judicial tribunal, but as to whether an appeal lies as of right from a particular kind of order made by the Supreme Court. By reason of the obscurity of section 65 of the Registration of Titles Ordinance, we are quite unable to say whether an order for the withdrawal of a caveat would be an order appealable as of right under the Kenya Civil Procedure Code and Rules. We add here that no leave to file this appeal was either sought or obtained. Mr. O'Brien Kelly therefore has failed to satisfy us that we have jurisdiction to entertain and determine this appeal, but even if he had succeeded in demonstrating that Mr. Justice Connell's "ruling" was an order appealable as of right under the provisions of the Civil Procedure Code, he would still have failed, because on the record before us appears no order as defined by section 2 of that enactment.

For the above reasons we have no alternative save to dismiss this appeal with costs. We direct that a copy of this judgment be sent to the Registrar-General.

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