

*Privy Council Appeal No. 17 of 1959*

**Sheik Mohamed Bashir** - - - - - *Appellant*

v.

**The Commissioner of Lands** - - - - - *Respondent*

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

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**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 1ST DECEMBER, 1959**

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*Present at the Hearing:*

LORD COHEN  
LORD DENNING  
LORD JENKINS

[*Delivered by* LORD JENKINS]

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This case concerns a Crown Grant dated the 8th January, 1953, and made by the Governor of Kenya (acting by the respondent Commissioner of Lands) whereby a town plot in Nairobi was granted by the Governor to the appellant, Sheik Mohamed Bashir, for the term of 99 years from the 1st September, 1952, subject to the progressive rent therein mentioned and subject also to the provisions of the Crown Lands Ordinance (Ch. 155) and to a number of stipulations referred to in the Grant as, and therein set out under the heading of, "Special Conditions".

The "Special Conditions" comprised twelve numbered paragraphs of which the first was in these terms:—

"1. The Grantee shall erect complete for occupation within thirty-six months of the commencement of the term an hotel building of approved design on proper foundations constructed of stone burnt-brick or concrete with roofing of tiles or other permanent materials approved by the Commissioner of Lands and shall maintain the same (including the external paintwork) in good and substantial tenable repair and condition. The building shall be of at least six storeys and the cost of construction shall be at least Shillings seven million."

The Grant was made by the Governor in exercise of his powers under the Crown Lands Ordinance of 1915 (Ch. 155) and was in the form prescribed for a Crown Grant of land for a term of years by section 21 of and form B (1) in the First Schedule to the Registration of Titles Ordinance of 1919 (Ch. 160). The form so prescribed is that of a Deed Poll as distinct from a Deed *inter partes*, but it is not now disputed that, albeit made in this form and executed only by the Governor and not by the appellant, the Grant constituted in law a lease from the Governor to the appellant for the term and at the rent therein mentioned, and was subject to all provisions of the relevant Ordinances applicable to such leases.

The appellant admittedly failed to erect any buildings on the plot within the period of thirty-six months prescribed by paragraph 1 of the "Special Conditions", and founding himself on this default the Commissioner by a Plaint dated the 16th November, 1955, began the present proceedings claiming (in effect) possession of the plot and mesne profits on the ground that the stipulation contained in paragraph 1 of the Special Conditions was a condition of the lease constituted by the Grant, the non-fulfilment of which entitled him to treat the lease as avoided; or

alternatively, in case it should be held contrary to his contention that the stipulation in question was a covenant as distinct from a condition, a declaration of forfeiture of the lease and damages for breach of covenant.

In order to appreciate the materiality of the distinction between these alternative claims, it is necessary to consider section 83 of the Crown Lands Ordinance. That section provides as follows :—

“ 83. If the rent or royalties or any part thereof reserved in a lease under this Ordinance shall at any time be unpaid for the space of thirty days after the same has become due, or if there shall be any breach of the lessee’s covenants, whether express or implied by virtue of this Ordinance, the Commissioner may serve a notice upon the lessee specifying the rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the Supreme Court for the recovery of the premises, and, on proof of the facts, the Supreme Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the Commissioner may re-enter upon the land.

In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity.”

It will be seen that if the stipulation contained in paragraph 1 of the Special Conditions was a covenant within the meaning of this section, it was open to the Commissioner at any time after one month from the service of the prescribed notice (which he had in fact served on the 29th September, 1955) to take proceedings under this section for a declaration of forfeiture of the lease ; but that if he took that course his claim was liable to be defeated by a successful prayer for relief on the part of the appellant. It will be seen further that on the footing that the stipulation in question was a covenant within the meaning of section 83 it was only by invoking that section that the Commissioner could assert a claim to forfeiture for its breach.

On the other hand, if the Commissioner could succeed in making good his primary contention that the stipulation in question was a condition, as distinct from a covenant within the meaning of section 83, he was in a far stronger position. He had then no need to ask the Court for a declaration of forfeiture of the lease, for that was automatically brought about through the non-fulfilment of the condition, without any need for an express proviso for re-entry, and the Court would have no jurisdiction to grant the appellant relief under section 83, inasmuch as that section would be inapplicable.

By his defence, the appellant admitted the alleged breach of covenant, but contended that the “ Special Conditions ” were, and were to be construed as, covenants. He alleged various facts and circumstances on which he relied as disqualifying the Commissioner from claiming forfeiture (a contention not now maintained) and claimed that the action should be dismissed or alternatively that he should be granted relief under section 83.

Rudd J. who tried the case at first instance in the Supreme Court of Kenya, held (by a judgment dated 4th March, 1957) that the “ Special Conditions ” were covenants within the meaning of section 83, and accordingly that he had jurisdiction to grant relief under that section, which (by a decree dated 2nd May, 1957,) he proceeded to do.

On appeal by the Commissioner to the Court of Appeal for Eastern Africa (Sir Kenneth O’Connor P., Sir Ronald Sinclair C.J. Kenya, and Forbes J.A.) that Court by an order dated the 24th March, 1958, allowed the appeal, set aside Rudd, J.’s decree of the 2nd May, 1957, and substituted therefor a declaration that the title of the appellant to the land in question had been extinguished as from the 16th November, 1955 (the date of the plaint), with consequential directions as to possession and mesne profits.

From that order of the Court of Appeal for Eastern Africa the appellant now appeals to this Board.

As appears from the foregoing, the substantial question in the appeal is whether the "Special Conditions" set out in the Grant were, as the appellant contends, "covenants" within the meaning of section 83, so as to give the Court power to grant relief from forfeiture under that section, or were, as the Commissioner contends, conditions of defeasance as distinct from "covenants" and were therefore outside the scope of section 83; the Commissioner being accordingly entitled to assert the forfeiture entailed under the general law by breach of a condition of defeasance, without thereby exposing himself to a claim for relief on the part of the appellant under section 83.

By the expression "condition of defeasance" their Lordships mean a condition of the kind described, and contrasted with a covenant, in the following passage from the Judgment of Sir Kenneth O'Connor P., which their Lordships are content to adopt:—

At common law, a condition is a qualification annexed to an estate, whereby the latter shall either be created (condition precedent), enlarged, or defeated (condition subsequent), upon its performance or breach. The main distinction between a condition subsequent for the cesser of the term of a lease upon the happening of a certain event and a lessee's covenant is that (subject to any right of relief from forfeiture given to the lessee) upon breach of a condition the lessor may re-enter, because the estate of the lessee is determined; whereas a breach of covenant only gives him the right to recover damages (or to obtain an injunction) unless the right to re-enter is expressly reserved to him by the lease. *Foa Landlord and Tenant* 7th Edition, pages 311, 312.

The Special Conditions were clearly not conditions precedent. They all related to things which the Grantee was to do or refrain from doing after the Grant had been made. The question is whether they were conditions subsequent, the non-fulfilment of which brought the term to an end without any necessity for an express proviso for re-entry, or were obligations in the nature of covenants the breach of which (in the absence of any express proviso for re-entry) could only afford the Commissioner grounds for relief in the shape of damages or injunction unless he chose to avail himself of the statutory provision for forfeiture contained in section 83 and succeeded in repelling any claim to relief under that section.

To these alternatives must be added the third possibility that the Special Conditions might combine in themselves the dual character of covenants and conditions of defeasance, as being agreements not only enforceable as such against the lessee but also constituting conditions on the due performance of which the continuance of the term was made to depend. This combination of covenant and condition is commonly brought about by the usual express proviso of re-entry, with which this case is not directly concerned, as the Grant contains no such proviso. It would however also be brought about by any form of words importing an intention that a given stipulation should possess this dual character.

Their Lordships will later revert to this third possibility, in the meantime treating the classification of covenants on the one hand and conditions of defeasance on the other as exhaustive.

The point at issue turns upon the true construction of the Grant, which must be construed in the light of the relevant legislation.

The Ordinances immediately relevant are the Crown Lands Ordinance (Ch. 155 of 1915) and the Registration of Titles Ordinance (Ch. 160 of 1919). But it is also proper to refer to the earlier Crown Lands Ordinance of 1902 which though replaced by the Ordinance of 1915 was relied on in argument by Mr. Cross (for the Commissioner) as showing that while the appellant's argument might well have prevailed under the Ordinance of 1902, the Ordinance of 1915 made a radical change in the law, with

the effect of investing stipulations such as the "Special Conditions" with the character of conditions of defeasance as distinct from the character of "covenants" which they previously bore.

The Ordinance of 1902 provided for the inclusion of implied covenants in leases of Crown Lands. Some of these covenants were to be included in all Leases (see sections 12 and 13). These were ordinary covenants by lessor and lessee which no doubt were regarded as universally appropriate. Other lessees' covenants which might not be appropriate in all cases were to be implied in all leases except where expressly varied or excepted (see section 14). By section 15 the covenants by the lessee therein set out were to be implied in all building leases unless expressly varied or excepted. By section 16 a similar provision was made for the implication of certain lessees' covenants in leases of agricultural land.

Section 18 (1) was in terms closely resembling those of the present section 83, omitting the second paragraph which was introduced in 1915.

Under the 1902 Ordinance the difficulties which have now arisen with respect to the application of section 83 could hardly have arisen with respect to section 18 (1), for effect would have been given to stipulations such as the "Special Conditions" by means of express or implied covenants indubitably falling within section 18 (1).

The Crown Lands Ordinance of 1915, however, wholly repealed the 1902 Ordinance and introduced new and different provisions with respect to leases.

Section 3 of the 1915 Ordinance empowers the Governor (by paragraph (i)) to "grant, lease or otherwise alienate . . . any Crown lands for any purpose and on any terms and conditions as he may think fit"; (by paragraph (ii)) to "wholly or partially remit . . . all or any of the covenants agreements or conditions contained in any lease agreement or licence . . ."; and (by paragraph (iii)) to "extend . . . the time to the purchaser lessee or licensee for performing the conditions contained in any agreement lease or licence liable to revocation for such period and upon such terms and conditions as he may think fit."

Section 5 provides for the appointment of a Commissioner of Lands to administer the Ordinance.

Part III of the Ordinance deals with the letting of town plots, to which category the plot now in question belongs. Section 13 provides that leases of town plots may be granted for any term not exceeding ninety-nine years. By section 15 it is provided that leases of town plots shall, unless the Governor shall otherwise order in any particular case or cases be sold by auction. By section 14, before any town plot is disposed of under section 15, the Commissioner is required to "determine (a) the rent which shall be payable in respect of such plot; . . . (c) the building conditions to be inserted in the lease of the plot; and (d) the special covenants, if any, which shall be inserted in the lease."

Section 16 requires notice to be given of the place and time of sale, and such notice is required to state (inter alia) "(e) the building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot;" . . .

The lease in the present case was not in fact sold by auction, but the sections dealing with that method of disposal were relied on by Mr. Cross for their use of the expression "Building conditions" in contrast to the expression "special covenants". On the other hand section 17 (also dealing with sales by auction) uses the expression "terms and conditions of the sale" in which "conditions" clearly does not mean "conditions of defeasance". Section 21 provides that in every lease of a town plot there is to be implied "a covenant by the lessee not to divide the plot and assign any portion thereof". It is interesting to note that an express stipulation to the same effect appears as number 5 of the Special Conditions in the present case. Sub-section (2) of section 21, which enables applications for leave to subdivide to be made, provides that "no such application shall be entertained unless the building conditions (if any) in the lease have been complied with." Sub-section (3)

of the same section provides that new leases granted under sub-section (2) shall be granted "on the same terms and conditions as the original lease." Other examples of implied covenants are to be found in various sections which need not to be referred to in detail. See, for example, sections 36, 37, 38 and 39. Section 47 under the heading of "Part V—Disposal of Land for Special Purposes" implies covenants (a) not to assign, sub-let etc. without previous consent, and (b) not to use the land leased for any purpose other than the purpose or purposes specified in the Lease. It is not clear that the plot now in question falls within Part V, but there is some significance in the fact that here again the "Special Conditions" include (as No. 4) a stipulation restricting user of the premises to "hotel purposes only except that shops may be constructed on the ground floor", and (as No. 7), a stipulation against disposal of the land until Special Condition No. 1 has been complied with. Sections 63 and 64 contain references to the grant of leases "upon such conditions as may be specified in such leases or as may be prescribed" (section 63) and "upon such conditions as" the Governor "may deem expedient" (section 64).

Section 76 provides for an implied covenant for quiet enjoyment for the benefit of the lessee "paying the rent and fulfilling the conditions" contained in the Lease. Section 77 provides for implied covenants and conditions in every lease or licence by the lessee or licensee (putting it shortly) (a) to pay the rent and royalties thereby reserved and (b) to pay the taxes charged on the land or the buildings thereon.

Their Lordships have already referred to the terms of section 83. By section 84 provision is made for the forfeiture of a licence for (inter alia) any breach of the conditions of the licence express or implied. By section 86 the acceptance by or on behalf of the Crown of any purchase money or any rent or other payment is not to be held to operate as a waiver by the Crown of any forfeiture accruing by reason of the breach of any covenant or condition annexed to any sale lease or licence of or respecting Crown land. Section 157 provides procedure under which possession may be obtained against any person in occupation of Crown land whose right title or interest has expired or been forfeited, but this clearly cannot have been intended to override section 83.

Having considered all the various references to "covenants", "conditions" and "terms" which are to be found in the 1915 Ordinance their Lordships are unable to hold that this enactment draws any clear cut or consistent distinction between the word "covenant" as meaning an obligation laid on the lessee which he is to be contractually bound to observe or perform and the word "condition" as meaning a stipulation which the lessee may fulfil or not as he chooses but which if not fulfilled is to operate as a condition of defeasance. Mr. Cross did not seek to maintain that the word "conditions" was throughout the Ordinance used in the sense just stated, and admitted that it was sometimes simply used as equivalent to "terms". But he argued that in sections 14 and 16 "the building conditions to be inserted in the lease" contrasted as it was with "special covenants" did mean "conditions" in the technical sense of conditions of defeasance, so that the "building conditions" when inserted in the Lease could only be framed as "conditions" in that sense and could not be imposed as obligations in the nature of covenants. Their Lordships find it impossible to accept this view. It appears to them that the expression "building conditions" means simply conditions as to building in the sense of the terms, or requirements, or stipulations, as to building which the lessee is to be bound to observe and perform under the Lease. In their Lordships' judgment clear words would be necessary to justify the imputation to the legislature of an intention that the "building conditions" should not take effect as covenants but merely as conditions of defeasance, which would involve a radical departure from the commonly accepted practice. Their Lordships find no words in the Ordinance clearly enjoining acceptance of this construction of the Ordinance, and they decline to adopt it.

Accordingly, as the law stood between the enactment of the 1915 Ordinance and the enactment of the Registration of Titles Ordinance 1919 there was nothing to prevent "building conditions" under sections 14 and 16 of the former from being so framed as to operate as covenants on the part of the Lessee. It is to be observed, however, that the special conditions in the present case were not strictly "building conditions" within sections 14 and 16, because the Lease was not sold by auction, and moreover that the "special conditions" were not confined to building. But this, if anything, assists the Appellant's case, for it is not suggested that it was not open to the Governor (apart from any restriction to be spelt out of sections 14 and 16 of the Ordinance where applicable) to impose such stipulations (whether by way of condition or covenant) as he thought fit.

On the other hand, their Lordships find it impossible to collect from the various references to covenants and conditions in other parts of the Ordinance any sufficient indication to justify the view that the words "Lessee's covenants" in section 83 mean Lessee's covenants and conditions so as to bring within its scope mere conditions of defeasance. But they see no reason for excluding covenants which are also conditions, as constituting agreements or promises by the Lessee to perform given stipulations and at the same time making their performance a condition of the continuance of the Lease. Indeed (as Rudd J. has pointed out) the provision for forfeiture in section 83 itself has the effect of turning all covenants into conditions in this sense.

Their Lordships should next state that in their opinion it is plain that under the Ordinance of 1915 the proper form of Lease was an ordinary Lease *inter partes*.

The next stage in the inquiry is to consider whether the "special conditions" in the present case if inserted just as they stand in a Lease of the plot granted between 1915 and 1919 would have operated as Lessee's covenants or merely as conditions of defeasance.

This depends on the true construction of the hypothetical document. One must assume that the words of demise expressed the demise to be made "subject to the following special conditions" and that the lease went on to set out under the heading "special conditions" the twelve numbered paragraphs set out in the actual Grant with which this case is concerned, but, like the actual Grant, contained no statement in so many words that the Grantee covenanted, or agreed, or promised to perform or observe such conditions.

The special conditions in question as set out in the present Grant (omitting No. 1 to which reference has already been made) were in these terms:—

#### SPECIAL CONDITIONS

2. The building shall not be erected until plans (including block plans showing the positions of the buildings and a system of drainage for disposing of sewage surface and sullage water) drawings elevations and specifications thereof shall have been approved in writing by the Local Authority and the Commissioner of Lands.

3. The Grantee shall properly connect the drainage and sewage systems with any town systems when in the opinion of the Commissioner of Lands and the Local Authority the latter systems are so far completed as to enable the Grantee so to do.

4. The land and buildings shall be used for hotel purposes only except that shops may be constructed on the ground floor.

5. The Grantee shall not subdivide the land.

6. The buildings shall conform to a building line prescribed by the Local Authority.

7. The Grantee shall not sell transfer sublease or otherwise alienate or part with the possession of the land nor enter into any charge (other than with the consent of the Commissioner of Lands for the raising of a loan for building purposes) or agreement of sale in respect thereof until Special Condition Number 1 has been complied with.

8. The Grantee shall pay to the Commissioner of Lands on demand such sum as the Commissioner may estimate to be the proportionate cost of constructing all roads drains and sewers serving the land.

9. The Grantee shall pay such rates taxes charges duties assessments or outgoings of whatever description as may be imposed charged or assessed by any government or local authority upon the land or the buildings erected thereon including any contribution or other sum paid by the Governor in lieu thereof.

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

11. The main entrance to the building shall be set back to provide for the setting down of vehicular passengers on the land and similar provision shall be made for tradesmen's vehicles.

12. The water supply system of the building shall include storage for at least twenty-four hours' requirements.

These conditions must be construed as a whole, and the mere fact that they are described as conditions is by no means conclusive of their character. It will be seen that they relate to a number of different matters of varying importance, all of which according to ordinary conveyancing practice would be made the subject of covenants with a suitable proviso for re-entry on breach. It will be seen further that they are for the most part expressed in such a way as to impose an imperative obligation on the Lessee to perform and observe them. Paragraph 1 provides that "The Grantee shall erect . . ." "and shall maintain . . ." Paragraph 2 is in the passive, but imposes restrictions on the doing of that which the Grantee is obliged to do under No. 1, i.e. the erection of the building. Then by No. 3 "The Grantee shall connect . . ." No. 4 is expressed in the passive as is usual in the case of a restriction as to user.

Then comes No. 5 "The Grantee shall not subdivide the land". No. 6 relates to the building line, and may be said to concern the way in which the Grantee is to carry out his obligation under No. 1. By No. 7 "The Grantee shall not sell . . .". By No. 8 "The Grantee shall pay to the Commissioner . . .". By No. 9 "The Grantee shall pay such rates taxes" etc. By No. 10 ". . . the Grantee shall not erect" etc. Nos. 11 and 12 again refer to the characteristics of the building which the Grantee "shall erect" under No. 1. Their Lordships therefore construe the special conditions as plainly designed to make it obligatory on the Grantee to observe and perform them, as distinct from merely providing a list of stipulations which the Grantee could comply with if he chose, but non-compliance with which would work a forfeiture. This view is strongly re-inforced by the inclusion of the provisions in Nos. 8 and 9 for the payment of the sums therein mentioned. It could hardly be intended that these provisions were not to give the Commissioner the right to sue the Grantee for the amount mentioned in No. 8, or any sum which the Commissioner might have had to spend in respect of the matters mentioned in No. 9. Again, it would be surprising if the Commissioner was not to be entitled to restrain by injunction a subdivision of the land in breach of No. 5. The same observation applies to the restriction as to user contained in No. 4. The provision as to the repair of the building in No. 1 calls for similar comment. It would be surprising if the Commissioner was to be unable to sue for damages in the event of the Grantee's failure to repair.

All in all, this set of stipulations appears to their Lordships to include provisions wholly unsuitable for treatment merely as conditions of defeasance as distinct from covenants; and, inasmuch as the question turns



on the intention of the parties to be collected from the document as a whole, this is a circumstance of considerable importance.

For these reasons their Lordships are of opinion that in a lease *inter partes* under the 1915 Ordinance and before 1919 the special conditions would have constituted covenants within the meaning of section 83 of that Ordinance.

It remains to consider whether this conclusion as to the effect of the "special conditions" if they had appeared in a lease *inter partes* between 1915 and 1919 holds good with respect to those same conditions when included as they actually are in the Grant now under consideration, being a Grant operating as a Lease but made as a Deed Poll in the form B (1) prescribed by the Registration of Titles Ordinance of 1919.

This Ordinance provides by section 1 (2) that "except so far as is expressly enacted to the contrary no Ordinance in so far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Ordinance".

By section 2 "Grant" is defined as meaning (inter alia) "any . . . lease . . . for a period exceeding one year made by and on behalf of the Crown".

By section 20 "all land which is comprised in any grant issued subsequent to the commencement of this Ordinance shall be subject to this Ordinance and shall not be capable of being transferred . . . or otherwise dealt with except in accordance with the provisions of this Ordinance and every attempt to transfer . . . or otherwise deal with the same except as aforesaid shall be null and void and of no effect".

By section 21 "Grants shall be issued in duplicate in form B (1) or B (2) in the first schedule as the case may be . . . The grant in duplicate shall be delivered out of the Land Office to the registrar of the registration district in which the land is situated who shall register the grant . . . and thereafter deliver one of the duplicates to the Commissioner of Lands for issue to the grantee, and retain the other to be bound up in the register as hereinafter directed".

As has already been stated form B (1) is the form prescribed for a grant of land by the Crown for a term of years, or in other words a Crown Lease, and the present grant was made in that form, viz. as a Deed Poll and not as a Deed *inter partes*.

It is argued on the Commissioner's side that a Deed in this form (the use of which is made obligatory by section 21 of the 1919 Ordinance) could not contain any covenants on the part of the Lessee, inasmuch as he not only did not execute but was not even expressed to be a party to the Grant. The effect of this argument, were it to prevail, would be far-reaching. It would be impossible for the Commissioner to impose any express covenants on a Lessee of Crown land, although the 1915 Ordinance clearly authorises this. By parity of reasoning it would be impossible for any covenants on the part of such Lessee to be implied. If it is indispensably necessary that the Lessee should be a party to and execute the lease in order to be fixed with a covenant or obligation to do or abstain from doing what the Lease expressly says he shall do or abstain from doing, then it must surely be equally necessary that he should be a party to and execute the Lease in order to be fixed with a covenant to do or abstain from doing what the Lease by statutory implication says he shall do or abstain from doing. Section 83 of the 1915 Ordinance would thus in effect be wholly abrogated, except in cases of non-payment of rent.

The abolition of covenants and substitution of conditions of defeasance would prevent the Commissioner from enforcing the terms of the Lease except by forfeiture, which might well be against his interest.

On the other hand the Lessee would be liable to suffer forfeiture without any claim for relief, however trifling the breach of condition and however valuable to him the Lease might be.



Their Lordships would not, unless constrained to do so, attribute these sweeping and untoward changes in the law to a form scheduled to what may be described as a procedural Ordinance.

It will be remembered that the form of Grant B (1) is expressed to be subject to "the provisions and conditions contained in the said Ordinance" (i.e. for present purposes the Ordinance of 1915). The effect of that language is reproduced in the present grant by the words "and subject also to the provisions of the Crown Lands Ordinance (Chapter 155)". These words appear to their Lordships to import into the document itself a reference to section 83 of the 1915 Ordinance, and also to the covenants implied by sections 21 (1) and 77 the implication of which postulates a document in which covenants are capable of being implied. It would appear further that there are no express covenants in the document to which section 83 could apply unless the special conditions are treated as covenants for the purposes of that section.

Their Lordships' conclusion on this by no means easy question is that on accepting the Lease and going into possession under it (as he undoubtedly did) the Appellant contracted obligations to observe and perform the special conditions which amounted to covenants for the purposes of section 83.

Reverting to the possibility that the special conditions might be regarded as possessing the dual character of covenants and conditions their Lordships would say that in their opinion a stipulation of that combined character would nevertheless be a covenant within the meaning of section 83 and the remedy by way of forfeiture (subject to relief) conferred by section 83 would (quoad forfeiture) be exhaustive and exclude any other mode of enforcing forfeiture for breach of the stipulation in question.

It follows in their Lordships' view that Rudd J. did have jurisdiction to make the Decree of the 2nd May, 1957, relieving the appellant from forfeiture.

There remains the question whether, given the jurisdiction to grant relief, the learned Judge was right in holding that this was a case in which relief from forfeiture should be granted and if so whether the terms on which he granted relief were terms on which he could properly grant it in the exercise of his discretion.

This aspect of the case was included in grounds 2, 3 and 4 of the Commissioner's Memorandum of Appeal to the Court of Appeal for Eastern Africa but as that Court decided in his favour on ground 1 (want of jurisdiction) it was unnecessary for it to consider grounds 2, 3 and 4, and it refrained from doing so. In connection with these grounds the Commissioner applied to the Court of Appeal to adduce further evidence bearing upon the question whether or not it would be just to grant relief, and tending to show that the present Appellant was no longer financially able to build an Hotel.

There was some discussion before their Lordships as to the principles upon which the Court should exercise its discretionary jurisdiction to grant relief against forfeiture in cases in which (subject to any relief the Court may think fit to grant) the Commissioner is shown to be entitled to a declaration of forfeiture under section 83. This turns on the words "subject to relief upon such terms as may appear just" in the first paragraph of the section, in conjunction with the second paragraph which provides that "In exercising the power of granting relief under this section the Court shall be guided by the principles of English law and the doctrines of equity".

It appears to their Lordships that the effect of the second paragraph of section 83 is that where a case for forfeiture (subject to any relief the Court may think fit to grant) has been made out under the first paragraph of the section, the Court, in determining whether relief should be granted and if so on what terms, is to be guided by the principles upon which the English courts exercised their power of granting relief as between subject and subject under the relevant English statute law in force at the date

when the Ordinance came into operation, and by the doctrines of equity. In their Lordships' opinion the reference to English law must extend to statute law, inasmuch as relief from forfeiture is virtually the creature of statute, and the statute law referred to must be the statute law in force at the date when section 83 became law, inasmuch as there are no words in the second paragraph to give the reference an ambulatory effect, and *prima facie* a Kenya Ordinance could hardly be taken, in the absence of some indication to the contrary, to adopt in advance future English legislation of unknown content. This means, in effect, that the Court is to be guided (which does not mean necessarily bound) by the principles laid down by section 14 (2) of the Conveyancing Act, 1881, and the decisions of the English Courts under that section, so far as applicable to a case under section 83, which (apart from requiring a bare notice of the breach) does not include the preliminary steps prescribed by section 14 (1) as necessary in order to make the forfeiture enforceable; and that the Court should also have regard to the doctrines of equity. This accords with the view expressed in the case in the Court of Appeal for Eastern Africa of *Dedhar v. Commissioner of Lands* (1957) *E.A.* 104, a case which is also noteworthy in that it was assumed without argument that a "special condition" in a post 1919 Crown Lease of a town plot was a covenant within the meaning of section 83. For the reasons given in the judgment of Sir Kenneth O'Connor P. (at pages 152 and 153 of the Record) their Lordships cannot accept the argument that the second paragraph of section 83 does not import a reference to section 14 of the Act of 1881 because that Act did not bind the Crown in England.

The view their Lordships have taken as to the application of section 83 makes it unnecessary for them to discuss the question whether the Appellant could otherwise have made good a claim to relief under the pure doctrines of equity on the ground of accident or surprise.

Their Lordships would express their indebtedness to the full and careful judgments of Sir Kenneth O'Connor P. and Rudd J. from which they have derived much assistance.

For the reasons above stated their Lordships are of opinion that this appeal should be allowed, and the Order of the Court of Appeal for Eastern Africa dated 24th March, 1958, should be discharged and that the case should be remitted to the Court of Appeal for Eastern Africa to hear and determine the grounds of appeal contained in 2, 3 and 4 of the Commissioner's Memorandum of Appeal to that Court, and also the Commissioner's application to adduce fresh evidence bearing upon these grounds.

Their Lordships will humbly advise Her Majesty accordingly.

The Commissioner must pay the costs of this appeal and of the hearing in the Court of Appeal. The order as to costs made in the Supreme Court will not be disturbed.

The costs of the further hearing will be in the discretion of the Court of Appeal.



**In the Privy Council**

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**SHEIK MOHAMED BASHIR**

**v.**

**THE COMMISSIONER OF LANDS**

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**DELIVERED BY LORD JENKINS**