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IN THE PRIVY COUNCIL 74047 No. 33 of 1961

O N A P P E A L

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N:

MISTRY AMAR SINGH (Defendant) Appellant

- and -

SERWANO WOFUNIRA KULUBYA (Plaintiff) Respondent

C A S E FOR THE RESPONDENT

RECORD

10 1. This is an appeal by final leave from a judgment of the Court of Appeal for Eastern Africa (the Honourable Vice-President Sir Alastair Forbes, the Honourable Justice of Appeal II Mr. Justice Crawshaw and the Honourable Acting Justice of Appeal Sir Owen Corrie) dated the 25th January 1961 and allowing the Respondent's appeal from the Judgment of Her Majesty's High Court of Uganda at Kampala (the Honourable Mr. Justice Lyon) dated the 3rd August 1960. p.56 p.18

20 2. By the amended Plaintiff in this action, which was brought by the Respondent as Plaintiff against the Appellant as Defendant and was dated the 26th April 1960, the Respondent claimed possession of three plots of land (hereinafter called "the said three plots") being respectively plots numbered "T" "H" and "S" forming part of the land near Nakivubo comprised in the Mailo Register. The amended Plaintiff also included claims for mesne profits, an injunction restraining the Appellant from trespassing on the said three plots, costs, damages and further or other relief, but by his Reply to the Written Statement of Defence the Respondent abandoned his claim for rent, mesne profits and damages. pp. 1-3 p.3

30 3. By his Written Statement of Defence the Appellant pleaded (inter alia) that:- p.7 LL.20-21

RECORD

p.6 LL.1-5

"the Plaintiff was party to illegal agreements. The said agreements are referred to in paragraphs 3, 4 and 5 of the plaint. Therefore the Plaintiff is not entitled to file any action on the said agreements".

p.10 LL.23-26

The written Statement of Defence included a Counter-claim for specific performance, which was later withdrawn.

4. The Respondent is an African who is and has at all material times been the registered proprietor of the said three plots. The Appellant is an Indian. Under three Agreements respectively made in 1946 or 1947 the Respondent leased to the Appellant each of the said three plots in manner hereinafter appearing.

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5. There was no dispute between the Appellant and the Respondent as to the facts, the agreed facts being stated in the High Court of Uganda as follows:-

p.7 LL.33-34

"Plaintiff an African, registered proprietor of Mailo land.

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p.8 LL.1-24

Defendant Indian.

Plot "T" leased for one year on 1st November, 1946 Agreement 21.3.46. Shs: 300/- p.a., payment in advance and yearly.

Plot "H". leased for one year. November 1946, Agreement 29.3.46. Shs: 300/- p.a., payable in advance and yearly.

Plot "S" leased for one year from 1st September, 1947. She: 240/- p.a., payable in advance, and thereafter yearly.

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After one year Plot T rent increased to Shs: 350/- p.a. Non-registered tenancy existed for Plots H, S, and T. Leases were void - Vol. III.

Consent of Governor and Lukiko never obtained although it was sought after the agreements. Lukiko refused 12.11.49. Notice to quit served on Defendant on 13/11/59 for the 31st day of December, 1959 for each of the plots. Rent was paid to the Plaintiff up to and including 31/12/59 for each of the plots.

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The defendant entered into occupation of the three plots in 1946 and 1947, and has remained in occupation contrary to section 2 of the Land Transfer Ordinance. (Section 2, page 1559)."

10 6. Sections 2, 3 and 4(1) of the Land Transfer Ordinance (Cap. 114 of the 1951 Edition of the Laws of Uganda), omitting the provisos to section 2 which are not relevant for the purpose of these proceedings, read as follows :-

20 "2. No non-African 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 an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans 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 of any interest therein other than a security for money:

. . . .

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3. The Governor may refuse the consent mentioned in section 2 of this Ordinance without assigning any reason or may specify terms upon which such consent is conditional.

30 4. (1) Any person who commits a breach of the provisions of this Ordinance or of any terms imposed by the Governor under section 3 shall be guilty of an offence and shall be liable on conviction to a fine not exceeding Shs. 2,000/- or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment".

40 7. Paragraphs (d) and (k) of Section 2 of the Possession of Land Law (Cap 25 of the 1957 Revised Edition of the Native Laws of Buganda), omitting the proviso to paragraph (d) which is not relevant for the purpose of these proceedings) read as follows :-

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"2. (d) 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 the Governor and the Lukiko:

.....

(k) The owner of a mailo who contravenes any provision of paragraph (c) or (d) of this section shall be liable on conviction to a fine not exceeding Shs: 500/- or to imprisonment not exceeding six months or to both such fine and imprisonment."

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8. It was further stated in the High Court of Uganda that it was agreed between the Appellant and the Respondent for the purpose of the present proceedings that

p.8 LL.22-24

(1) the Appellant had remained in occupation of the said three plots as aforesaid contrary to Section 2 of the Land Transfer Ordinance;

p.8 LL.26-30

(2) the Appellant in so doing was guilty of an offence under the said Section 4 of the Land Transfer Ordinance and was accordingly liable to a fine of 2,000 shillings or imprisonment not exceeding 12 months, or to both such fine and imprisonment;

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p.8 LL.31-38

(3) the Respondent in permitting the Petitioner to take leases as aforesaid was guilty of an offence under the said Section 2(d) of the Possession of Land Law, punishable under the said Section 2(k) with a fine of 500 shillings or imprisonment not exceeding 6 months or to both such fine and imprisonment.

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9. At the final hearing before the Honourable Mr. Justice Lyon on the 2nd August 1960, Counsel appearing respectively on behalf of the Petitioner and the Respondent informed the learned Judge that the facts and matters set out in paragraphs 5 and 8 above were agreed between them and that in the circumstances it was necessary to place the following issues before the Court:-

p.9 LL.1-17

" 1. Are the parties not in pari delicto being each in turn guilty of an offence in permitting and taking a lease?

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2. If yes, can the plaintiff recover possession on the strength of the illegality of the lease to which he was a party?

3. Has any possession or property been transferred by the illegal agreements?

4. Having pleaded illegality in order to support his claim and seeking to found his claim on the illegal Contracts, can the Plaintiff recover possession or obtain an injunction to restrain the alleged trespass?"

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10. The issues having been placed before him in this manner the Honourable Mr. Justice Lyon in his judgment, having set out the relevant facts, said as follows :- "The main contest here is, are the parties in pari delicto? And that is the crux of the case because, if so, as I understand the law, the defendant must win, as the plaintiff's case in these circumstances would not be at all. - This settled law rests upon the principle that no court will entertain any suit brought by a wrongdoer or one who does not come to court with clean hands....." The learned Judge then referred to certain authorities and found that on the issues, as framed and agreed by Counsel, the Appellant and the Respondent were "in pari delicto" and answered issues 2, 3 and 4 referred to in paragraph 9 above in the negative. He accordingly dismissed the Respondent's claim for possession with costs.

p.13 LL.33-40

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p.17 LL.12-16

p.17 LL.20-22

11. The Respondent appealed to the Court of Appeal for Eastern Africa (the Honourable Vice-President Sir Alastair Forbes the Honourable Justice of Appeal II Mr. Justice Crawshaw and the Honourable Acting Justice of Appeal Sir Owen Corrie) and on the 25th January 1961 judgment was delivered unanimously allowing the Appeal and ordering that the Appellant should pay to the Respondent his taxed costs of the said appeal and further ordering that the said decree of the Honourable Mr. Justice Lyon should be set aside insofar as it related to the Respondent's claim for possession and that a decree should be substituted providing that

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p.56

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(a) the Appellant should grant to the Respondent possession of the said three plots of land and the Appellant should be evicted therefrom;

RECORD

(b) the Appellant should pay to the Respondent the costs of the suit insofar as his claim for possession of the said plots of land and eviction therefrom of the Respondent was concerned;

(c) any costs in the High Court which might have been paid by the Respondent in respect of the said claim for possession and eviction of the Appellant should be refunded.

p.19 LL.6- 31 12. The grounds of the last-mentioned appeal, as set out in the Respondent's notice of appeal, were as follows:- 10

"(a) That the learned judge erred in holding that the parties were in pari delicto in that he failed to take into account that

(i) the maximum fine and period of imprisonment permitted for a breach of the Land Transfer Ordinance are respectively four times and twice those permitted by the Possession of Land Law; 20

(ii) the object of the Land Transfer Ordinance and the possession of Land Law was and is to protect African landowners against non-African tenants;

(b) That if (which is denied) the parties were in pari delicto the learned Judge erred in holding that the doctrine in BROWNING v. MORRIS 98 E.R. 1364 did not apply;

(c) That the learned Judge erred in not holding that the Plaintiff was entitled to possession as against the Defendant as (i) the latter had no estate or interest in the land concerned of which the Plaintiff was the Registered Proprietor and (ii) the Plaintiff had withdrawn his consent to the occupation by the Defendant of the land concerned with effect from the 1st day of January 1959; 30

(d) That the learned Judge erred in holding that the Plaintiff was suing on an illegal Contract". 40

17. The Honourable Vice President Sir Alastair Forbes based his Judgment principally on the following grounds (shortly summarised):-

(a) He stated that the principle applicable was that stated by Lord Mansfield in BROWNING v. MORRIS 2 Cowp. 90; 98 E.R. 1364: p.47 LL.44-49 p.48 LL.1-7

10 "Where Contracts or transactions are prohibited by positive statutes for the sake of protecting one set of men from another set of men; the one from their situation and condition being liable to be oppressed or imposed upon by the other; there the parties are not in pari delicto; and in furtherance of these statutes the person injured after the transaction is finished and completed, may bring his action and defeat the Contract".

20 (b) Though he did not accept the Respondent's submission that the mere fact that a different penalty was incurred by the different parties to an illegal transaction was itself a reason for saying that the parties were not in pari delicto, he pointed out the Court of Appeal of Uganda had already held in MOTIBHAI MANJI v. KHURSID BEGUM (1957) E.A. 101 that the Land Transfer Ordinance had been enacted for the protection of Africans as a class (as was in the opinion of the learned Judge clear on the construction of that Ordinance) and held (for reasons set out in detail in his Judgment) that the Buganda Possession of Land Law should not be construed as derogating from the African landowner's position as a member of such protected class. p.44 LL.31-35 p.46 LL.23-25 p.46 LL.39-40 p.47

30 (c) In these circumstances, the learned Judge held that the relevant legislation, being clearly intended to protect Africans as a whole from being imposed upon by non-Africans, the principle laid down in BROWNING v. MORRIS applied. p.47 LL.44-46

40 (d) Finally the learned Judge stated that if he should be wrong in the conclusion referred to above, he considered that the Respondent was entitled to succeed on the basis of the principle (stated by du Parcq L.J. in BOWMAKERS LTD. v. BARNET INSTRUMENTS LTD. (1944)) p.48 LL.42-47 p.49 LL.1-30

RECORD

p.52 LL.31-42
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2 All. E.R. 579) that an owner is entitled to recover his own property, so long as his claim was not founded on an illegal Contract. The learned Judge pointed out that the Respondent had pleaded that he was the registered proprietor of the said three plots and that the Appellant could only seek to set up in defence to the claim for possession a lease which was prohibited by express legislation and which passed no property in the land to the Appellant. In these circumstances he held that the whole property in the land remained vested in the Respondent who need do no more in support of his claim than rely on his registered title and that the appeal should be allowed with costs. 10

p.53 LL.15-20
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18. The Honourable Justice of Appeal II Mr. Justice Crawshaw agreed with the application by the Honourable Vice-President of the principles expressed both in the case of BROWNING v. MORRIS (supra) and in the case of BOWMAKERS LTD. v. BARNET INSTRUMENTS LTD. (supra) and that in the circumstances of the case the Respondent was entitled to recovery of the said three plots. 20

P.55 L.16
p.55 LL.8-10
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p.54 LL.28-32
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p.55 LL.3-8
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19. The Honourable Acting Justice of Appeal Sir Owen Corrie agreed that the appeal should be allowed. He did not find it necessary to express any opinion on the question whether the Appellant and the Respondent were or were not in pari delicto, since in his view the Respondent was bound to succeed in his claim for possession, in that his claim for recovery of possession was simply a claim by a registered owner for recovery of possession from an occupier whose only title to possession rested upon the appellant's permission, which had been terminated by the said notices to quit. The learned Judge referred to the following passage from the Judgment of du Parcq L.J. in BOWMAKERS LTD. v. BARNET INSTRUMENTS LTD. 1944 2 A.E.R. 579 at pages 582-583, stating that he knew of no reason why a different rule should apply to possession of land: 30

p.54 LL.36-48
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"In our opinion a man's right to possess his own chattels will as a general rule be enforced against anyone who, without any claim of right, is detaining them, or has converted them to his own use even though it may appear either from the

pleadings or in the course of the trial, that the chattels in question came in to the Defendant's possession by reason of an illegal contract between himself and the Plaintiff, provided that the Plaintiff does not seek and is not forced either to found his claim on the illegal contract or to plead its illegality to support his claim".

10 20. By Order of Her Majesty's Court of Appeal for Eastern Africa dated the 5th July 1961 the Petitioner was granted final leave to Appeal from the said Judgment of the Court of Appeal for Eastern Africa. p.57

21. On behalf of the Respondent it will be contended that the said Judgment of the Court of Appeal for Eastern Africa was right and should be upheld for the following and other

R E A S O N S

- 20 (1) BECAUSE the Respondent is the registered proprietor of the said three plots and is accordingly prima facie entitled to possession of the said three plots.
- (2) BECAUSE, any permission given by the Respondent to the Appellant to occupy the said three plots having been terminated by the above-mentioned notices to quit, the Appellant can defeat the Respondent's claim for possession of the said three plots only by relying on leases or tenancies thereof granted to him by the Respondent.
- 30 (3) BECAUSE any leases or tenancies of the said three plots upon which the Appellant may rely are void by virtue of Section 2 of the Possession of Land Law and Sections 2 and 4(1) of the Land Transfer Ordinance and accordingly pass no estate or interest in the said three plots to the Appellant.
- 40 (4) BECAUSE the principle stated by du Parcq L.J. in BOWMAKERS LTD. v. BARNET INSTRUMENTS LTD. 1944 2 A.E.R. 579 at pages 582-583 and set out in paragraph 19 above should be applied to claims for possession of land, as much as to claims for possession of chattels, and should in the premises be applied in the present case, to the Respondent's claim for possession.

RECORD

- (5) BECAUSE, though the said three plots came into the Appellant's possession by reason of illegal contracts between himself and the Respondent, the Respondent is not forced either to found his claim on the illegal contracts or to plead their illegality to support his claim, but may merely rely on his registered title as proprietor of the said three plots.
- (6) BECAUSE, even if (contrary to his contention) the Respondent is forced either to found his claim on the illegal Contracts or to plead their illegality to support his claim, he is not debarred from so doing in that the Respondent and the Appellant are not in pari delicto and the principle stated by Lord Mansfield in BROWNING v. MORRIS 2 Cowp. 90; 98 E.R. 1364 and set out in paragraph 17(a) above applies. 10
- (7) BECAUSE the Respondent and the Appellant are not in pari delicto since the statutes above referred to, which render the said contracts illegal, were passed for the purpose of protecting Africans (such as the Respondent) from non-Africans (such as the Appellant). 20
- (8) AND upon the further grounds stated in the reasons for judgment of the Honourable Vice-President Sir Alastair Forbes and The Honourable Justice of Appeal II Mr. Justice Crawshaw and the Honourable Acting Justice of Appeal Sir Owen Corrie in Her Majesty's Court of Appeal for Eastern Africa.

CHRISTOPHER SLADE

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No. 33. of 1961
IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL FOR EASTERN
AFRICA

B E T W E E N:

MISTRY AMAR SINGH (Defendant) Appellant

- and -

SERWANO WOFUNIRA KULUBYA
(Plaintiff) Respondent

C A S E FOR THE RESPONDENT

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