

1932.

Kenya

1

No. 18112.

SUBJECT

C 0533/423

Segregation in Townships.

Sale of Land Plots.

Previous

17173/32.

Subsequent

3092/33.

for Kenya — Secret — March 1932

DESTROYED UNDER STATUTE

States in reply to No 32 on 17/7/31 that a despatch dealing fully with the whole question of the restrictions imposed on the acquisition by Indians of plots in Townships is in course of preparation.

? There is no necessity to inform I.O. of this but the despatch may be awaited. (see 33 on 17/7/31)

H.S. POSSIBLE

5/4/32

B.v. in a month, if for help

not rec'd.

Director 5/4/32

~~NY~~

India office — 6/7/32

DESTROYED UNDER STATUTE

State of the promised despatch from Kenya has been received

7. I.O. - 2 and - 19 MAY 1932

DESTROYED UNDER STATUTE

~~NY~~

Kenya — Conf 12 — 28/4/32

States the principles upon which Govt has based its action in restricting ownership of plots in certain areas. Encloses memo by Mr Bruce (Ag. A.D.) together with copies of corres with the Commr of Lands, and plans. Discusses the legal aspect of abandonment of restriction & the question of unrestricted ownership and occupation, asking that these questions may be considered by the Legal Adviser.

DESTROYED UNDER STATUTE

Kenya — Secret — 29 April 1932

As this seems a purely legal matter may I send it to you: & if any difficulties the Dept is

necessary perhaps you will let us know  
what should be done. The Green  
the W. Kenya will be available  
as it from Masary report.

J.W. Allen

27/5/32

See the memorandum by Mr. Abrahams attached.

In my view we cannot say that ownership comes  
within the doctrine which we have laid down about  
occupation. None of the leases or conveyances  
contains a covenant against assignment to  
non-Europeans, and the mere fact that the Government  
restricted bids at the auction to Europeans is not  
enough, in my view, to give the purchasers rights,  
inter se or against the Government.

As regards occupation, it is true that  
in respect of areas now under consideration, they  
were not put up for sale as a whole at one time.  
Nevertheless, whenever plots were sold, the  
conveyances contained covenants against non-European  
occupation, and the areas were definitely known  
areas, in which it must have been understood that  
as and when plots were put up, they would be put  
up under similar conditions.

Therefore, I think we should maintain  
our view with regard to restrictions against  
occupation, but I do not think we can extend this  
to restrictions on ownership.

J.W. Allen  
10.6.32.

3  
Drafts herewith for review.

After speaking with Mr. Abrahams I was  
pleased for omission from the memo  
the passage in brackets on page 3.

I understand this matter was  
discussed between Mr. Abrahams &  
MacGregor, A.S. Kenya, before the  
letter left for the Colony.

(The explanatory memo on the  
subject will be found as No. 19 of  
17172/21 - signed H.1)

J.W. Allen

27/6/32

P.L. 23/6/32  
at m.c.

7 To S.O. — 29 June 1932  
8 To Gov. Conf. (2) (w/c 607) Comd } 29/10  
H. Answer  
9 To Gov. Secret (5 Answer) }

DESTROYED UNDER STATUTE

29 JUN 1932

Mr. Poynton:

I am sorry this has been delayed, but the relevant papers were in circulation and have only just returned.

Sir R. Hamilton is, of course, well acquainted with the position as to segregation in townships in Kenya and the limited extent to which it was necessary, on legal grounds, to continue such segregation after the declaration in the 1923 White Paper. But there is a full memo. on the subject in No. 19 of 17173/31. Reference to No. 8 of 18112/18<sup>32</sup> is also invited. The position now is that it is proposed that the ~~re~~ restrictions on ownership should be discontinued, but those on occupation maintained.

The restrictions are against Asiatics: but the only reference to Japanese that I have been able to trace is in No. 16 of 10221/27. In that case a representative of the Japan Cotton Trading Co. was in occupation of a house on a plot in the restricted area. Notice to vacate was given on 28th August, 1925. A breach of covenant was admitted, but justification was pleaded. No further action was taken till Jan. 1927. A second notice to vacate was sent on 22nd Feb. 1927, and was complied with at the beginning of the following April. There is no reference to the Treaty point in the despatch or enclosure dealing with this particular matter.

The Treaty of the 3rd April, 1911, and the Copy herewith. Supplementary Convention of 30th July, 1925, apply to Kenya Colony and Protectorate.

Specific reference is made in the letter to Art. I of the Treaty of 1911 - but Articles 4 and 5 also seem in point. It might, e.g. be possible

to

*It should be noted that the Governor does not wish any publicity given at present even to the fact that a proposal to abolish the ownership restriction is being considered  
H.T.A.*

Requests advice on the general situation which has arisen in connection with Mr. Wright's appln. to transfer his flat and house thereon to Mr. Kuga, the Japanese Consul at Mombasa, for the latter's occupation.

to argue from Art. 4 that Japanese can only own or hire and occupy premises in the same manner as Asiatic British subjects. But I presume Sir R. Hamilton would not wish the whole question explored at this stage. Obviously a good deal more information would be required.

H. T. ALLEN  
27/8/32

Thank you.

I have sent Mr. Wright a private interim reply. H. Allen

5.7.32

to may be paid by sending the receipts of an official communication from the Japanese for - S.W.T. -  
H. S. P. 11/8/32

H. Allen  
6/7

to ch. 6.7.32

12. Mr. Warrant Wright 27/7/32  
Asks receipt of No. 4 + certain copy cases between the High Comm of Land, Nairobi, + the Consul for Japan

Reverend Sir

Noted for 15/7/32  
H. Allen  
20/8/32

1) For action as per min of 22 Aug

2) Sir R. Hamilton to see 18/8/32 below vice min of 15 Aug.

Please see Mr. Allen's minute of 2/7/32 when Mr. Wright wrote to Sir R. Hamilton on the question.

In addition to the Treaty of Commerce and Consular Rights of 1911 and the Supplementary Convention of 1925 that the Japanese Consul cites the Tangi Basin Treaty of 1919 ~~pro~~ article 3 of which provides that nationals of states the signatory Powers of the Convention shall enjoy within the territory <sup>the same</sup> equal treatment as the nationals of the mandating Power in the acquisition of real property.

In the present instance a copy of 13 may be sent to R.O. for obs.

H. S. P. 11/8/32  
21/8/32

(I must accept indirect responsibility for the delay in sending this on. The question raised are undeniably intricate; the matter was not, prima facie, of great urgency, and it has, I am afraid, been put aside for that period of comparative leisure which is always hoped for but never occurs.)

The attached Note (No 14) contains the

Requests advice on the general situation which has arisen in connection with Mr. Wright's appln. to transfer his post and house thereon to Mr. Kuga, the Japanese Consul at Mombasa, for the latter's occupation.

to argue from Art. 4 that Japanese can only own or hire and occupy premises in the same manner as Asiatic British subjects. But I presume Sir R. Hamilton would not wish the whole question explored at this stage. Obviously a good deal more information would be required.

H. P. ALLEN.  
27/8/32.

to Mr. Wright's name  
added to end index

Thank you.

I have sent Mr. Wright a private interim reply.

W.H.A.

5.7.32

to may be put by sending the receipts of an official communication for the Japanese gov. - Sir C. B. ...

H. P. Allen

to ch. 6.7.32

to Mr. Wm. S. Wright — 27/7/32  
Also receipt of the ...  
Copy comes between the ...  
Land, Nairobi, & the Consul for Japan

noted  
for 15/7

Prattis when

W.H.A.

20/8 at all

For action  
as in min  
of 22 Aug

For Hamilton  
to see 18/9/32  
below vice  
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Please see Mr. Allen's minute of 2/7/32 when Mr. Wright wrote to Sir R. Hamilton on the question.

In addition to the Treaty of Commerce and Consular Rights of 1911 and the Supplementary Convention of 1925 ~~that~~ the Japanese Consul with the Tanganyika Treaty of 1919 ~~provides~~ article 3 of which provides that nationals of states the signatory Powers of 5 like Members of the League of Nations to the Convention shall enjoy within the territory ~~the same~~ <sup>equal</sup> treatment as the nationals of the mandating Power in the acquisition of real property.

In the fresh instance a copy of 13 may be sent to R.O. for obs.

H. P. Allen

21/8/32

I must accept indirect responsibility for the delay in sending this on. The question raised are undeniably intricate; the matter was not, from a point of great urgency, and it has, I am afraid, been put aside for that period of comparative leisure which is always hoped for but never arrives.

The attached Note (No 14) contains the

directly-relevant extracts from the Treaty invoked by the Japanese Consul. Their general effect is to guarantee to Japanese subjects the same rights as pertain to the "nationals" or "native subjects" of the other High Contracting Party.

2. It could therefore be argued that the rights secured to a Japanese subject by the Treaty are no more than would pertain to a person of Japanese extraction who ~~was~~ <sup>was</sup> a British subject by birth ~~or naturalization~~. Such a person would, however, unquestionably be regarded in Kanga as an Asiatic, and subjected to an Asiatic's disabilities as regards residence in a European area. It is difficult to see the basis of the Japanese Consul's contention (accepted by the Acting Attorney General) that the Treaty places Japanese subjects "on the same footing as British subjects of European extraction", unless the phrases in the Treaty "nationals" and "native subjects" necessarily connote European extraction in all contexts.

3. If this argument can be maintained in respect of the St. Germain Convention and Articles 1 and 4 of the Treaty of 1911,

it nevertheless breaks down in respect of Article 6 5 of the latter Treaty. The restriction on acquiring + possessing land in the European quarter of Nanking have never been part of the "laws of the country", nor of the "condition and limitation prescribed in such laws". They are matters of <sup>executive</sup> administrative convenience in the administration of these laws.

But, in any event, S. of S. has already been advised (and has so informed the Governor) that restrictions on ownership by Asiatics cannot be sustained. And the Treaty provisions affecting residence (i.e. occupation), which is still to be restricted), merely ensure to the Japanese Consul the same rights as to a British subject of Asiatic extraction.

4. If the interpretation suggested above is not accepted by the Legal Advisor or by the F.O., or if it is thought undesirable to have recourse to what may possibly be described as verbal quibbling in defiance of the spirit and purpose of the Treaty, it remains to consider the practical consequences to the Kanga Govt. of allowing Mr. Kanga and his staff to occupy a house in the European area of Nanking. The solution

N<sup>o</sup> 8

Go - but we must be careful to bear in mind that the public refer to the words as if present

1911?

para 2 of dup

pronounced by the Council himself (viz. to exclude Japanese from the definition of "Asiatic") is rightly rejected by the Governor.

5. In para. 8. the Governor discusses the possibility of securing consent in writing from the neighboring leasees to the Council's occupying the plot. He apprehends, however, that it will be quite impossible to obtain such consent, and that claims for damages could be made against Goot.

The Wright however, says "I have not moved to obtain the consent of the other plot-holders, as I am not sure that the consent would be unanimous, though I know that most would consent."

The number and volume of potential claims for damages would obviously be reduced if steps were taken to obtain such written consents as are likely to be forthcoming.

6. In the same letter, the Wright says "In the European Residential Area... several houses are vacant and have been vacant for some time, the previous occupants having migrated outside the Area; and there is in fact no market for houses in

the European Residential Area today." It may be supposed that no Court could award heavy damages in respect of deterioration to property for which there is no market. It seems doubtful, therefore, whether the financial charge against Goot from claims sustained would be of a very large order.

7. But the Governor in the last paragraph of his despatch, seeks to repudiate any liability against Kenya funds, implying that the damages should be paid by H.M.G., who was responsible for the Treaty. Sir J. Byrnes has overlooked

the fact that his predecessors in 1911 and 1925 were given, and rejected, the opportunity of requesting that the Treaty of 1911, and the Convention prolonging it, respectively, should not be made applicable to <sup>E.A. Part</sup> Kenya. (The St. Germain Convention says nothing about "wisdom").

8. If, therefore, it is decided that the Japanese Court must be allowed to own & occupy the Wright's house, the Governor should be advised to take such measures as may be possible to secure the written consent of neighbors, and

p. 3 of N<sup>o</sup> 10

p. 4 of N<sup>o</sup> 10



should be warned that any pecuniary damage which may be awarded in respect of claim put forward by those who do not consent must be accepted as a charge by the Government of Kenya.

But first (subject to legal opinion) the question of Treaty obligation should be put to F.O. on the lines suggested in para 1. of this minute.

LS Freestone  
23/11/51.

As I do not wish to expand the minutes needlessly I confine myself to stating <sup>the</sup> ~~these~~ points briefly:

(1) In considering this matter it is necessary to bear in mind that the principle affects the "Highlands", which <sup>also</sup> opens a wider and <sup>more</sup> ~~more~~ difficult issue.

(2) As regards the provisions of the 1911 and St. Germain Treaties relating to equality with British nationals the Government does not treat all its nationals on a footing of equality. Can the Japanese claim most favoured national treatment? If so since, e.g. <sup>Anglo</sup> natives do not pay education tax and will not pay income tax, would a Japanese national claim exemption from those imposts?

(3) As regards Art. 5 of the 1911 Treaty

27 Feb 51.  
(copy herewith)

x In the 1915  
Ordce.  
A. x In the 1902  
Ordce. or  
amending Ordce.

(19) Am Wright - see notes

A1 Treaty not see  
para 8 a para 3  
of the...  
23/11/51

Treaty it has to be borne in mind that the recent Privy Council judgment has determined in favour of the Government the issue whether the law admits of the placing of restrictions on the disposal of both urban and agricultural land.

4. It may be possible - if it is in any way material - to shew that the provisions on which the Privy Council relied were actually in force prior to the Treaty.

5. The relevant covenants in this case are stated to have been entered into in 1918 i.e. subsequent to the 1911 Treaty but prior to the 1919 Convention. On the other hand they may have been the consequence of other and much earlier covenants. But the original declaration of policy as regards the Highlands was earlier than the 1911 Treaty.

H. P. Allen.

24.11.52.

The Convention, being later than the date when these estates were laid out, seems to me to give no difficulty.

The 1911 Treaty is a different matter. After a good deal of thought, I have come to the conclusion that we cannot raise the technical points mentioned by Mr. Freestone. After all, this Treaty was one between Japan and the United Kingdom, and Kenya only came into it with a number of other Colonies by means of accession.

On the other hand, I certainly do not think that Kenya ought to pass the Ordinance which is suggested; nor do I think it ought deliberately to break

It seems likely that  
the point has come  
of... 1951

break these Covenants. I think we must reject the representations, but we shall have to do so on rather broad sweeping lines. We have got to carry the Foreign Office with us in this, and, subject to their views, I would suggest a reply on the following lines. This Treaty cannot, of course, mean that any nationals of Japan are entitled to acquire any particular piece of land any more than British subjects are entitled to acquire any particular piece of land; whether they can do that must depend on the terms of the lease or the covenants on the title. What the Treaty means is that the Statute Law of Kenya must not place the nationals of Japan in any disadvantage in regard to acquiring land as compared with British subjects. The law does not do so, and the difficulty in this case is simply due to the fact that this particular piece of land happens to have been sold with covenants providing for European occupation. These covenants the Government are under a contractual obligation to observe. No land in future will be sold subject to such covenants, and therefore the Japanese will see that, subject to one or two areas where the Government is committed by old covenants, there is nothing in the law of Kenya or in the policy of the Government which places any restriction on the Japanese as compared with British subjects.

HB 11.32.

Mr. Bushe

I had some further conversation with you about this and you agreed that if it were possible to show that the <sup>real</sup> European research area at Mombasa were actually laid out prior to the Treaty of 1911, that would simplify matters. In this connection I would invite attention to pages 3 to 5 of the memorandum of the Commissioner of Lands in 2132/24 and to paragraphs 4 to 6 of the Governor's despatch of the 19th of August, 1927. The plot now in question, No. 39, is one of those mentioned in paragraph 4 (c) of that despatch. I am afraid, however, that the evidence in these papers and passages referred to <sup>do not</sup> ~~do not~~ tend to show that there was no formal lay out prior to 1911, though <sup>Mr. H. H. Lewis's opinion indicates a possibility</sup> ~~to it with a pl. 1 copy~~. As regards the terms of your suggested reply, we cannot well say that no land in future will be sold subject to such covenants since, while this is perfectly true of township plots, the restrictive policy in regard to agriculture in the Highlands has not been abandoned and there <sup>is</sup> ~~has been~~ no intention of abandoning it. In fact, the Carter Commissioner has been asked "to define the area generally announced as Highlands, within which persons of European descent are to have a privileged position in accordance with the White Paper of 1923". I put up a copy of that White Paper and the question of the Highlands is dealt with on pages 8, 9 and 15 to 17. You will see that the policy dates from 1906, i.e. prior to the Treaty of 1911, and, although it may be better to deal with this question as a purely township matter for the moment, <sup>as you</sup> ~~we~~ think it <sup>might</sup> ~~was~~ possible in the case

No. 13 on  
10221/27.

16. Aug. in 41583/20

In the light of  
these and

of the Highlands to rely on the consideration that the area had been reserved and covenants entered into prior to the conclusion of that Treaty.

✓ Mr. Allen

1/12/32

Mr. Allen.

I quite agree that it would assist matters if we could show that this plot is part of an area laid out prior to 1911, with covenants against Asiatic occupation, which, under the principles we have laid down, insure not only for the benefit of the Government but for the benefit of the plot holders inter se. I looked through the papers from this point of view, and came to the conclusion that we could not show that, as I gather that the area had been laid out in 1918, but I may be wrong, and in all the circumstances I think it is worth clearing up by means of a telegram. I am sorry I made a mistake about the Highlands, but I was under the impression that the whole policy had gone. This is going to be an awkward question, but we can leave it for the moment.

I think that the area has been laid out before 1918 and probably not later than 1911

Off tel herewith

Mr. Allen

24/12/32

at once

Tel 263 Capt to General Hamilton - 24/12

16 Sir R. Hamilton 7 \_\_\_\_\_ 22<sup>nd</sup> Nov 32.

State has received a further letter from Wright regarding the disposal of his house to the Taharua Council & enquires how the matter stands.

19 To Sir R. Hamilton 7 \_\_\_\_\_ 16<sup>th</sup> Nov \_\_\_\_\_ 24<sup>th</sup> Nov 32

India Office \_\_\_\_\_ 18<sup>th</sup> Dec 32.

Enquires when further communication promised in No 7

1509/32  
apparently inserted  
R. Hamilton  
see memo of 25/10,  
& note attached  
on this file

DESTROYED UNDER STATUTE

India Office \_\_\_\_\_ 1<sup>st</sup> Dec 32

Enquires when further communication promised in No 7

maybe expected

20 Governor Byrne (per mail) \_\_\_\_\_ 25 Nov 32

Enquires whether a reply can now be given to No 10.

DESTROYED UNDER STATUTE

18-19 ? Reply that a reply has not yet been received from the former

of Kanya who is being asked when he reports to him

a proposal to formalize his name

an answer may be expected

20 ? In view of 15 no reply is necessary at present

J.S. P. 10/12/32

7/12/32

Trace: see p. 10/20

Mr. Allen

19/12/32

DESTROYED UNDER STATUTE

To I.O. (19<sup>th</sup> Nov)

20/12/32

21. Governor Byrnes Tel 2406/15 Dec 32  
Provides further details of plots which were sold subject to restrictive occupation covenant, & that before 1913 area was generally regarded as reserved for European occupation but no legally binding covenants were made.

Then ? to 70, for insurance in  
line of reply suggested by Mr. Burke in  
his minute of 2<sup>nd</sup> Dec

A. Hamilton  
10/12

Assessing that we cannot now  
rely on the Treaty argument:  
& that we should not write to  
his P.O. as suggested. I attach a

synopsis to the draft. I presume  
we shall explain the position

fully but (6) is perhaps  
unnecessary - the British way  
does think (9) may be left out,  
though I also prefer to retain it.

24/12/32

I agree to all of the 8

H/B

29

12

set me one draft

As Treaty rights are concerned

G.D. should know of the  
I will be kind to show the draft  
through them.

Wed 19.12.32

alter

I have based the draft, as I think  
we can get F.O. views before they go  
on further.

[As regards the draft lands, it  
will be for cover, after the time  
comes, whether the implied covenants  
are as different there as in these  
town areas.]

Wed 12.1.33

alter

22 1/2 F.O. (as amended) cons. 14/1/33

S. R. Hamilton 30

Remind regarding 17.

submitted a draft. It may be considered  
desirable to invite S.O. to P.O. on 22  
explaining that before we were in a position  
to put the deal to them we had already had  
a reminder from the Japanese (20) and that  
we are being pressed by Sir R. Hamilton: that  
we fully appreciate the fact that P.O. has  
had little time to examine this intricate subject.

DESTROYED UNDER REVISION

but that we should be grateful for  
an expression of their views as early as possible.

H.S. P. M. S. H. C.

2/2/33

Plenary

3.2.33

*[Signature]*

W.S. 3.2.33

24 To Sir R. Hamilton (23 mins.) etc 7/2/33

25 C. Dodd (F.O.) etc. 27/2/33

26 Sir R. Hamilton 5/0 \_\_\_\_\_ 9 Feb 33

Acks. No 24.

27. Governor Byrnes. 12 Conf. \_\_\_\_\_ 24 Jun 33.

States that final proposals regarding restrictions  
on the acquisition of Township plots by Indians will  
be submitted in the near future.

No 27 ? Convey the gift to I.O. reference 19.

H.S. P. M. S. H. C.

14/2/33

*[Signature]*

28 To I.O. \_\_\_\_\_

16/2/33

*[Signature]*

*[Large scribbled signature]*

DESTROYED UNDER REGULATION

Mr. *Pooly* *17/11/33*  
 Mr. *Water* *18/11/33*  
 Mr. Parkinson.  
 Mr. Tomlinson.  
 Sir C. Bottomley.  
 Sir J. Shuckburgh.  
 Perm. U.S. of S.  
 Parly. U.S. of S.  
 Secretary of State.

*Get*  
 16 February, 1933.

**DRAFT.**

The Under Secretary of State,  
 India Office.

(No. 19)

Sir,

With reference to your letter, No. E. & O. 4553/32, of the 1st December, 1932, I am etc. to request you to inform Secretary Sir Samuel Hoare that he has now received a despatch from the Governor of Kenya explaining that the delay in furnishing ~~the~~ ~~promised~~ further information regarding the restrictions on the acquisition of township plots by the Indians has been caused by the illness of the ~~of~~ Surveyor who was expected to prepare a revised layout of the Mombasa residential area.

2. The Governor states that this work is now in hand, and that he anticipates that ~~the revised design~~ will have been considered by the

various authorities concerned

and that he will be in a position

*in the matter*  
to submit final proposals in the

near future.

I am, etc.

(Signed) J. E. W. FLOOD

KENYA.

No. 12

CONFIDENTIAL.



27  
13  
GOVERNMENT HOUSE  
NAIROBI,  
KENYA.

RECEIVED  
13 FEB 1933  
COL. OFFICE

24<sup>4</sup> January, 1933.

Sir,

No 20 B.

I have the honour to refer to your Confidential Despatch of the 20th December, 1932, on the subject of restrictions on the acquisition of Township Plots by Indians. The delay in submitting my reply has been caused by the illness of the Surveyor who was expected to prepare the revised layout of the Mombasa residential area. The work is now in hand, and I anticipate that the revised design will have been considered by the various Authorities concerned and that I shall be in a position to submit final proposals in the near future.

I have the honour to be,

Sir,

Your most obedient, humble servant,

BRIGADIER-GENERAL.  
G O V E R N O R .

THE RIGHT HONOURABLE  
MAJOR SIR PHILIP CUNLIFFE-LISTER, P.C., G.B.E., M.C., M.  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W.1.



Kenya 290  
114

C. O.

- Mr. Priestman to 12/33
- Mr. ~~Cherry~~ /o. 2. 33
- Mr. ~~Franklin~~ 1)
- Mr. Parkinson.
- Mr. Tomlinson.
- Sir C. Bottomley.
- Sir J. Shuckburgh.
- Permt. U.S. of S.
- Parly. U.S. of S.
- Secretary of State.

Sta. for Mr. Freese's sig.

Downing Street,

13 February, 1933.

*Dear Sir*

On the 14th January, we sent  
 (No. 18112/32)  
 you an official letter about the  
 right of a Japanese subject to purchase, for occupation, a plot in an  
 at Mombasa  
 area in Kenya Colony reserved for  
 occupation by Europeans.

Before we were in a position  
 to put the case to you, we had already had from the Government of  
 Kenya a reminder on behalf of the  
 Japanese Consul, and in addition we  
 are being pressed for a decision by  
 Sir Robert Hamilton, on behalf of the  
 prospective seller of the plot. We  
 fully appreciate that you have had  
 very little time for the examination

DRAFT.

C. Dodd Esq  
Fo

of this intricate question, but we  
should be grateful to have your views  
as quickly as is possible.

*[Handwritten signature]*  
Yours sincerely,

(signed) J. E. W. FLOOD

(I am for a union in the E.A. Act.)

C. O.

- Mr. ~~Pratt~~ 3/2
- Mr. ~~Crosby~~ 3/2/33
- Mr. ~~Franklin~~ 3
- Mr. ~~Parkinson~~
- Mr. ~~Tomlinson~~
- Sir C. ~~Bottomley~~ 3
- Sir J. ~~Shuckburgh~~
- Permt. U.S. of S.
- Party. U.S. of S.
- Secretary of State.



18112/32 Kenya 15

JH

Q to for sig. by Sir C Bottomley

8 Feb. 1933

Dear Sir Robert.

The position as regards the proposed  
 sale of Mr. Warren Wright's land in  
 Mombasa to the Japanese  
 Government in their work in  
 consultation with the Foreign  
 Office regarding the question  
 of the in the fortification of the British

I am sorry that there  
 is no further development  
 for which Mr. Wright can be  
 informed in reply to his  
 inquiries mentioned in your  
 letter of the 1<sup>st</sup> February. I  
 will see what can be done to  
 answer a request the Foreign Office  
 reply which is in answer

(23)

Yours faithfully,  
 W. G. BOTTOMLEY.

22

*Z. ...*



3092/53

*Answered by NO 1 on 31/1/33*

14 January, 1938.

- Mr. Priestman 2/28/38
- Mr. C. B. ... 3.1.33
- Mr. ... 4.1.33
- Mr. ...
- Mr. Parkinson
- Mr. Tomlinson
- Sir C. Battonley 12.1.33
- Sir J. Shackburgh
- Form. U.S. of S.
- Parly. U.S. of S.
- Secretary of State.

**DRAFT.** *Unsent / minute*

THE U. S. OF STATE,  
FOREIGN OFFICE.

*Copy to Gov. on 30/2/33*

FR. GOV. KENYA 29th April, '38  
(No. 13)

Cmd. 1922

To GOV. KENYA 29th June, '38  
(No. 8)

FR. SIR N. DOUGLAS (DEPT.) 28.7.37  
(with encl.) (16-10-37/37)

Isl. CORRESP. Nov. 16 and 21

*taken 5/11/38 in 1933*

I am etc. to transmit to you,  
to be laid before Secretary Sir John

(13) Simon, the accompanying copy of the marginally noted despatch from the Governor of Kenya, which raises the question of the right of a Japanese subject to purchase for occupation a plot in an area in Kenya reserved for occupation by Europeans.

*As regards the general question*  
2. The reasons for the adoption of segregation of European and non-European races in townships in Kenya, and the present policy of His Majesty's Government on the question,

*I am to invite reference*  
as indicated on page 15 of Cmd. 1922 "Indians in Kenya", a copy of which is enclosed for ease of reference.

3. The decision to abandon

*Sach*  
segregation of ~~the nature~~ in townships

was communicated to the Governor of Kenya; but, as was stated in reply

*Enfaced*

to a Parliamentary Question on the subject by Colonel Wedgwood on the 10th June, 1926, the transition

from the policy of segregation to one of non-segregation necessarily involved some difficulties, and it

was pointed out by the Governments concerned that in certain cases the

land was ~~legally~~ subject to restrictive covenants entered into under

the former system. After careful consideration, it was decided that

where it was not possible to waive such covenants [without incurring

legal proceedings entailing the probability of an injunction against

Government, it would be necessary to retain the restrictions.

The decision to ~~retain~~

(4901/26)

C. O.

Mr.

Mr.

*Mr. Parkinson*

*Mr. Tomlinson*

*Sir C. Bellamy*

*Sir J. Stansburgh*

*Paras. U.S. of S.*

*Paras. U.S. of S.*

*Secretary of State*

DRAFT.

(7761/26)

the restrictions in certain cases was based upon the general principle that where the same vendor sells to a number of persons plots of land, parts of a larger property, and exacts from each of them covenants imposing restrictions on the use of the plots sold which are meant by the vendor and understood by the buyers to be for the common advantage of the several purchasers, the restrictive covenants enure for the benefit of the purchasers, and give them rights not only against the vendor, but ~~inter se~~; and these rights must exist in respect of the whole of the property to be sold as a part of the scheme.

6. I am to enclose a copy of Sir

*Mr. C. Bellamy*  
Secretary-General's despatch of the 25th June 1926, to the Governor of Kenya, from which it will be seen that

*to that land is now*  
*has been advised*

that it is not possible to maintain that ownership comes within the

doctrine laid down in regard to residence and occupation: but that no

public announcement of <sup>any</sup> ~~the decision~~ <sup>modification of policy in the</sup> to ~~show~~ <sup>cancel</sup> the restriction on owner-

<sup>reply</sup> is being made pending the receipt of ~~proposals~~ <sup>a reply</sup> from the Governor <sup>which is still being awaited</sup> of Kenya.

(16-1022/27)

6. I am also to enclose a copy of Sir E. Denny's despatch of the 28th September, 1927, with enclosure, relating to the <sup>occupation by</sup> ~~eviction of~~ Japanese

tenants of a plot in a <sup>covenanted</sup> ~~reserved~~ area <sup>at Mombasa</sup> from which it will be observed that notice to vacate was complied with.

<sup>but</sup> that the treaty question was not raised in <sup>that instance</sup> ~~this connection~~.

7. Consideration of the particular case which has now been submitted, would obviously be affected if it could be shown that the plot in question was part of an area laid out prior to the date of accession of the

East

C. O.

Mr. Tomlinson  
Sir E. Biddley  
Sir J. Stuchburgh  
Perm. U.S. of S.  
Parly. U.S. of S.  
Secretary of State.

(15, 21)

DRAFT.

East African Protectorate to the Treaty of Commerce and Navigation between the United Kingdom and Japan ratified in

1911. It <sup>effect</sup> will, however, ~~be seen~~ <sup>appear</sup> from the accompanying copies of <sup>papers</sup> telegraphic <sup>with the Governor</sup> ~~correspondence~~ <sup>which</sup> that it ~~is~~ <sup>is</sup> not possible to maintain <sup>such a</sup> ~~this~~ <sup>attitude</sup> ~~attitude~~ <sup>in</sup> ~~the~~ <sup>his</sup> ~~case~~ <sup>case</sup>.

8. In the circumstances, Sir Philip Cunliffe-Lister proposes, subject to any observations which Sir John Simon may desire to offer, to reply to the Governor of Kenya in the following sense:— <sup>That</sup> the provisions of the Treaty of Commerce and Navigation (1911)

between the United Kingdom and Japan <sup>has</sup> ~~is~~ <sup>in</sup> ~~no~~ <sup>fact</sup> ~~cannot~~ <sup>mean</sup> that any nationals of Japan are entitled to acquire any particular piece of land any more than British subjects are entitled to acquire any particular piece of land; whether they can do <sup>so</sup> ~~so~~ that must depend on the terms of the

lease

lease or the covenants on the title.

*The correct interpretation of*  
that the Treaty above-mentioned is that  
the Statute Law of Kenya must not

place the nationals of Japan in any

disadvantage in regard to acquiring *or occupying*

land as compared with British subjects.

The Law of Kenya does not do so, and

the difficulty in this case is

simply due to the fact that this  
*township plot in Eastland*  
particular ~~piece of land~~ happens to

have been sold with covenants pro-

viding for European occupation.

These covenants the Government are

under a contractual obligation to

observe.

*no township plots*  
*in future / ex-*  
*already subject to township acts & regulations*  
cept in substantiated areas will be

subject to such covenants,

and the Japanese Government will,

*understand*  
therefore, ~~say~~ that, subject to *certain areas*  
*in Nairobi and other townships*  
~~one or two areas~~ where the Govern-

ment is committed by old covenants,

there

there is nothing in the Law of Kenya  
or in the policy of the Government  
~~which places any restriction on the~~

Japanese as compared with British

*subjects in the matter of the acquisition  
or occupation of land or plots in  
the Colony* I am, etc.,

(Signed) L. B. FREESTON



Transfer 2 draft to Africa Office

In A-11  
by reference to  
as follows.

JRA

Page 1. Transmit copy of No 13.

Page 2. Enclose copy Cmd 1922 "Juwans in Kenya" making attention to page 15.

Page 3. Explain that the decision to abandon segregation was communicated to the Governor by that - as in 1915 to Ladywood in 4901/26 - it was necessary in certain cases to retain the restrictions.

Page 4. Explain in principle as in para 4 of the letter of the 30. 4. 26  
1/11 26 - 7761/26

Page 5. Explain that Enclosure 4 copy of 4/18 2  
by file  
transfer for which it will be seen  
that the Govt has been advised  
that it is not possible to maintain  
that ownership cases which the  
Department had done in regard to

residence & occupation: but that  
no public announcement of the  
decision & abandon the restriction  
in ownership is being made pending  
receipt of proposals from the  
Govt.

Page 6. Enclose also a copy of 2016 &  
1022/27 relating the "Eushai"  
& Japanese tenants & a  
plot in the restriction: ~~specify that~~  
pointing out that in the case, ~~which~~  
notice to vacate was complied  
with ~~that~~ without the  
Draft Notice being raised.

Page 7. Pointing out that in considering  
the matter it would obviously  
make a difference if it could  
be shown that the plot in  
Eushai was part of an area  
laid out prior to the Draft  
but that it could not be seen from  
the old photo copies (Enclosure)  
copies of Nos 15 & 21 in the  
file that it is not possible

to maintain this

Page 8 Propose to refer to the Govt. as  
the lines suggested to the Govt.  
minute of the 26 Nov.

This scrap is not - in  
view the Govt's further minute  
& the 2 scraps include any  
reference to the "Highland  
Eushai".

(I note the casual  
& a land area of Lavan  
settlement refers to a piece  
of land 1922 - but that  
Eushai has been an aboriginal  
& (or there now)

JH Allen  
24/1/32

Telegram from the Governor of Kenya to the Secretary of State for the Colonies.

Dated 13th December. Received at 10-16am 13th December 1932.

18112/32 21

No 240 Confidential.

Your telegram No 263. Group of plots Nos 37

Amended 30/10/33

<sup>No 15</sup> to 43 including plot No 39 on West Side of Corporation Road was not laid out and sold until 1918. Prior to this date they formed part of an unsubdivided area labelled reserved. Plots opposite were laid out in June 1913 and sold October 1913. Also group of West side from 44 southward to 53 was laid out in October 1914 sold 1918. All plots were sold subject to restrictive occupation covenant. Before 1913 area was generally regarded as reserved for European occupation vide Professor Simpson's report but no legally binding covenants were made

Copy to F.O. (22)

C. O.

PC 109  
23

Mr. Freestone 23/11

Mr.  
Mr.

Mr. Parkinson

Mr. Tomkinson

X Sir C. Bottomley 21/11/52

Sir J. Shackbush

Parlt. U.S. of S.

Parly. U.S. of S.

Secretary of State

45 for Sir C. Bottomley

24 NOV 1952

DRAFT.

Sir Robert Hamilton M.P.

Dear Sir Robert,

The question whether the Japanese Consul at Roubaix can claim the right to own and occupy a home in the European area has indeed been referred to the Secretary of State, though not so long ago as the Warren S. Wright's letter suggests. It raises several awkward questions, both as regards Treaty interpretation (on which we are largely in the hands of the F.O.), and of the possibly far-reaching financial and administrative difficulties with which the Kenya Government may be confronted.

all the same, I am sorry that it has not been possible to dispose of it sooner, but it

You may assume you considered  
that the question is under active  
consideration, but I cannot, of course  
~~say that you~~ give  
commit myself to any definite forecast  
of when a final decision will be  
reached.

Yours sincerely,

(Signed) W. J. BOTTOMLEY

16<sup>24</sup>

22nd November, 1932.

Dear Bottomley,

When I was recently at the C.O. a question was raised by an old friend of mine in Mombasa, Warren S. Wright, a lawyer who is thinking of retiring from practice and wishes to dispose of his house to the Japanese Consul. As the house is situated in that quarter of Mombasa which was reserved for European occupation, a difficulty arose as to whether he could dispose of it as he intended. On the other hand, the point was made that any such restriction as that in question would not be in conformity with the terms of our Treaty with Japan.

Answered 24 Nov 32

I cannot recall exactly how the matter was left but I have to-day received a further letter from Mr. Wright in which he states as follows:-

\*With reference to the correspondence which I had with you, concluding with my letter of the 27th July last, I understand that the question of the status of Japanese in Kenya Colony under the Treaty between England and Japan of 1911 has been submitted to the Secretary of State for the Colonies. The papers went through early in August but as yet there has been no formal reply. I wonder if you could do anything to expedite matters at the C.O. Both the Consul for Japan and myself are most anxious that we should have some reply and, should the reply be unfavourable, I shall have to take steps to

No 1

25  
ventilate the position under the Treaty with Japan in the House of Commons. I take it that you would not like to put the matter forward in the House, but if you could see your way to do it I should be exceedingly obliged, and, if not, should be grateful if you would suggest the name of some M.P. who would handle the matter tactfully."

I should be very much obliged if you would kindly have the matter looked up and let me know how it at present stands. It would, of course, be much more satisfactory if the trouble could be arranged without question in the House.

Yours sincerely,

*R. Hamilton*

P.S. Many thanks for your note about Sir Ralph Cator's pension.

Sir C. Bottomley, K.C.M.G.,  
Colonial Office,  
S.W.1.

C. O.

18/12/32 Kenya.

26  
14 15

Mr. Allen 2.12

Mr.

Mr.

Mr. Parkinson.

Mr. Tomlinson.

Sir C. Bicknell.

Sir J. Shuckburgh.

Perma. U.S. of S.

Parly. U.S. of S.

Secretary of State.

*at dict*  
*Announced by No 21*  
*oded out*

*R 297*



12-10/14

3/12/32

*FD*

**DRAFT** T.M.L.

GOVERNOR, NAIROBI.

\* see p. 136 of Treaty Series 1918.

*copy to FD. (22)*

No. 263 Confidential; Your confidential despatch 109 is plot 39 part of an area laid out prior to (a) 6 May 1911 date of ratification of Treaty or x (b) 29 April 1913 date of accession of East Africa Protectorate with covenants against Asiatic occupation which under principles already laid down insure not only for the benefit of Government but for benefit of plot holders inter alia. If it is possible to show this it would obviously make a difference in the position. Telegraph reply.



1. Convention of St. Germain (1919) Article 3.

"In the territories .... under the authority of the Signatory Powers .... the nationals of those Powers .... shall be subject only to the limitations necessary for the maintenance of public security and order, enjoy without distinction the same treatment and the same rights as the nationals of the Power exercising authority in the territory, with regard to .... the acquisition and transmission of their .... real property."

2. Treaty of Commerce and Navigation (1911) between the United Kingdom and Japan, Article 1.

"The subjects of each of the High Contracting Parties shall have full liberty to enter, travel and reside in the territories of the other, and, conforming themselves to the laws of the country,

1. Shall, in all that relates to travel and residence, be placed in all respects on the same footing as native subjects.

4. They shall be permitted to own or hire and occupy houses, manufactories, warehouses, shops, and premises which may be necessary for them, and to ~~lease~~ <sup>lease</sup> land for residential, commercial industrial and other lawful purposes in the same manner as native subjects.

Treaty of Commerce and Navigation with Japan, 1911.

5. They shall, on condition of reciprocity, be a full liberty to acquire and possess every description of property, movable or immovable, which the laws of the country permit or shall permit the subjects or citizens of any other foreign country to acquire and possess, subject always to the conditions and limitations prescribed in such laws.

3. Supplementary Convention of 1925 Articles 7 & 8.  
 provide for the extension of the 1911 Treaty until 29th July 1932, and thereafter until 12 months from the date of notice of intention to terminate.)

(a)  
 F.O./21178/11  
 -Genl.-

In his Circular despatch dated 17th July, 1911 (copy attached) the Secretary of State drew attention to Articles 26 and 27, and stated that towards the end of 2 years from the date of ratification he proposed to notify adherence of Colonies etc. unless furnished in the meantime with a statement of objections to such a course.

(b) In his reply (despatch No. 487 dated 1st September) (31353/11 E.A.) the Governor of the East Africa Protectorate intimated that adherence was "not likely to adversely affect trade of Protectorate".

(A)

(a) *To 21178/11 General*

Supplementary Convention with Japan of 30th July 1925  
 for the modification of the above Treaty.

(a) In his Circular despatch dated 31st August 1928 (copy attached) the Secretary of State enclosed a copy of the Supplementary Convention and asked whether notice of abrogation should be given.

51066/28  
 -Genl.-

(B)

(b) In his reply (despatch No. 616 dated 6th November 1928) the Governor of Kenya intimated that notice of application could be given.

51177/28 Genl.

(C)

(a) *51177/28 Genl. (No. 2) on file*

*(for use 11/11/11)*

*To 21178/11*



GOVERNMENT HOUSE  
NAIROBI.  
KENYA

KENYA

No. 109

CONFIDENTIAL

RECEIVED  
19 SEP 1932  
GOVERNMENT OFFICE

29 August, 1932.

Sir,

I have the honour to refer to the area at Mombasa known as the "European Residential Area". Plot No. 59, Section VIII, Cliff Avenue, was amongst the group of plots sold by auction in 1918, the sale being restricted to Europeans only and subject to a condition precluding occupation by any Asiatic or African other than a domestic servant in the employ of the lessee. The plot is at present held by Mr. Warren Wright, a local advocate.

No. 2 am 302/33  
copy a file

2. In December of last year application was made both by the lessee and the proposed transferee for permission to sell the plot and the house thereon to Mr. Kuga, the Japanese Consul stationed at Mombasa, for his own occupation. The Consul represented that by virtue of the Anglo-Japanese Treaty of Commerce and Navigation of 1911 and the International Convention concerning the Congo Basin of 1919, Japanese subjects are, in Kenya Colony and Protectorate, placed on the same footing as British subjects of European extraction in all that relates to residence, acquisition and transfer of property, moveable or immoveable.

3. The .....

THE RIGHT HONOURABLE  
MAJOR GEN. PHILIP CURLIFFE-LISTER, P.C., G.B.E., M.C., M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET  
LONDON S.W.1.

3. The Acting Attorney General advised at the time that, although the Consul's representation was sound in law, this did not affect the fact that, by giving leave to Mr. Warren Wright to transfer his house and plot to Mr. Kuga for his personal occupation, this Government would lay itself open to an action for damages by other plot holders in the group.

4. I caused the Consul to be informed of the difficulty in which this Government was placed on account of the contractual obligations into which it had entered with European plot holders in the group, and that, if he desired to press for the purchase of this plot, or any other plot subject to the same restrictions, the matter would be referred for your consideration. The Consul, after consulting his Government, has now formally requested that the subject be referred to you. He makes the suggestion that the difficulties created by the covenants in the 1918 leases could be overcome by a short Ordinance amending the "Interpretation and General Clauses" Ordinance by defining "Asiatic".

208

5. I have now received your Confidential despatch (2) of the 29th June, 1932, on the subject of restrictions on the ownership and occupation of Township plots by Asiatics and note that, in the view of your legal advisers, restrictions on ownership can no longer be sustained. This matter is now under consideration by the Attorney General. The decision on this question does not, however, assist in the settlement of the present problem, as ownership without permission to occupy would be of no assistance to the Japanese Consul.

6. I am .....

6. I am advised by the Attorney General that the difficulties created by following the suggestion advanced by the Consul would be so serious as to preclude its serious consideration as a solution to the problem.

The passing of such legislation would be an alteration by Government of an implied agreement to which it had been a party, without the consent of the other parties (i.e. the purchasers of plots in the same group). I am further advised that it would be impossible to convince a Court that the term "Asiatics" as used by Government and the other parties to the contract in 1918 did not include Japanese; and that it is the real intention of the parties at the time of a contract and not a fictitious meaning subsequently placed by one of the parties upon the terms used that would determine the action of a Court in deciding whether an action for damages could be sustained.

Any endeavour to define by legislation the term "Asiatic" on other than geographical grounds would doubtless arouse the strongest opposition from Indian opinion.

7. It is improbable that Mr. Kuga would indemnify this Government against any claim for damages that might be advanced on account of his occupation of the plot; nor does it seem likely that the Japanese Government, now that the question has been raised officially, will be satisfied with any temporary expedient that leaves undefined the position of its nationals as regards the acquisition of land in this Colony and Protectorate.

8. It .....

8. It might be possible to overcome the immediate difficulty by obtaining consent in writing to Mr. Kuga's occupation of the plot from the lessees of the plots in the vicinity. In January last Mr. Warren Wright was informed that sanction to the proposed transfer could not be recommended unless and until he obtained the consent to such transfer of all the plot holders in the group of plots concerned. He has since that date made no further communication to Government and I apprehend that it will be quite impossible to obtain such consent: and that, if transfer were approved by this Government, claims for damages would at once be made by these plot holders.

9. I shall be glad to have your advice on the general situation that has arisen, and on the present difficulty affecting the Japanese Consul as there appears to me to be no reason why this Government should become liable for any damages which might arise from the implementation of the Treaty and Convention in question.

I have the honour to be,  
Sir,

Your most obedient, humble servant,

*K. Laloo*  
GOVERNOR'S DEPUTY.

R. 297

TELEPHONE 273

TELEGRAMS "ADVICE" MOMBASA.

CODE A.B.C. 5TH EDITION

RECEIVED

15 AUG 1932

COL. OFFICE

ATKINSON, WRIGHT, BOWEN & MORRISON, & Co.,

ADVOCATES, NOTARIES  
AND  
COMMISSIONERS FOR OATHS.

G. G. ATKINSON, BARRISTER-AT-LAW  
WARREN S. WRIGHT, LL.B., SOLICITOR  
HERBERT BOWEN, BARRISTER-AT-LAW  
A. MORRISON, BARRISTER-AT-LAW

G. G. & ATTORNEYS

AGENCIES AT:  
NAIROBI, ZANZIBAR & ENTebbe.

P. O. Box 29

RECEIVED  
16 AUG 1932  
COL. OFFICE

R

Mombasa.

East Africa

27th July, 1932.

Dear Sir Robert Hamilton,

I am much obliged to you for your letter of the 6th instant and, for your information, I enclose you a copy of a letter addressed by the Consul for Japan to the Hon. The Acting Commissioner for Legal Government Lands and Settlement, Nairobi, and a copy of his reply thereto.

The matter should now come before you officially "in que course".

Yours sincerely,

*Norman Douglas*

Sir Robert Hamilton,  
Under Secretary of State for the Colonies,  
Colonial Office,  
Downing Street,  
London, S.W.1.

18/12/32  
11

Copy.

16th July, 1932.

The Hon. The Acting Commissioner  
for Local Government, Lands & Settlement,  
NAIROBI.

Sir,

I have the honour to acknowledge the receipt of your letter No. LND, 29/1/1/8/4/17 dated the 5th February.

2. I should be grateful if your Government would approach the Right Honourable The Secretary of State for the Colonies, with a view to ascertaining his attitude with regard to carrying out the terms of the Anglo-Japanese Treaty of Commerce and Navigation, 1911, in so far as this Colony and Protectorate are concerned.

3. I am advised that the difficulties created by the covenants in the leases of 1918 could be got over by a short ordinance amending the "Interpretation and General Clauses" Ordinance by defining "Asiatic".

4. I may say that the delay in replying to your letter is due to my referring this matter to my Government at Tokio, from whom I have now had a despatch giving me instructions.

I have the honour to be,

Sir,

Your obedient servant,

Consul of Japan.



Copy of letter received by the Consul  
for Japan from the Acting  
Commissioner for Local Government  
Lands and Settlement dated 21st July 1932.

.....

Sir,

I have the honour to acknowledge the receipt  
of your letter of the 16th July on the subject of  
treaty rights. Your suggestion will receive considera-  
tion and representations will, in due course, be made  
to the Secretary of State.

I have the honour to be,

Sir,

Your obedient servant

(signed) .....

Act. Commissioner for Local Government  
Lands and Settlement.

The Consul of Japan,  
Mombasa.

36  
5th July, 1952.

Dear Warren Wright,

I have your letter of the 22nd of May, and I must apologise for not having answered it sooner, but I was having papers on the subject looked up in the Department.

The point you raise as regards your house is of interest in connection not only with the general question, but particularly with the bearings of the Anglo-Japanese Treaty, and when the matter comes up officially, as I understand from you is likely to be the case in the near future, I shall give it my close attention. In the meantime, however, you will not, of course, expect any more detailed reply with regard to the facts set out in your letter.

With kind regards,  
Yours sincerely,

(Signed) H. W. HAMILTON.

Warren S. Wright, Esq.

Cliff Avenue,

NOMBASA.

P.O.Box 66.

22nd May, 1932.

Dear Sir Robert Hamilton,

I am taking the liberty of writing to you unofficially, concerning a matter that will probably come before you officially in the near future. My only excuse for the course I am adopting is that the matter is one of very great moment to me personally and I have little doubt but that the matter will interest you, not only from a personal point of view, but also from the official point of view.

The matter is shortly this:-

My house stands on a plot, held under a lease from the Crown dated 1918, which lease contains a covenant by the lessee not to sub-let or assign to Asiatics or Africans. The plot in question is one of a group of 21 plots put up for sale by the Crown in 1918, subject to a restrictive provision preventing the residence of any Asiatic or African, other than the servants of the lessee, on the plot.

In December last the Consul for Japan made me an offer for my house which he desired to purchase; alternatively he was prepared to take a long lease at £30 a month. I informed him that subject to obtaining the consent of the Government, I was willing to sell or lease to him.

I explained to him the nature of the restrictive covenant.

Both I and the Consul for Japan referred the matter to the

and s.o. 5/5/32. (No. 11)

Kenya Government. I wrote to the Commissioner for Lands and the Consul for Japan wrote to and had an interview with the Governor. The Consul referred in his letter to the terms of the Treaty with Japan. The reply which I received was to the effect that unless and until I received the consent of the other plot holders in the 1918 group, the Commissioner for Lands would not recommend Government to sanction a transfer to an Asiatic. The Consul for Japan received a reply, also from the Commissioner for Lands, to the effect that if he wished to press for the purchase of the plot the Government would, of course, submit the matter to the Secretary of State for the Colonies in connection with paragraph 1 of Article 1 of the Anglo-Japanese Treaty of Commerce and Navigation 1911. The letter went on:-

"I should be grateful if you would inform me in due course whether you desire to move this Government to approach the Secretary of State in the matter. This Government greatly regrets its inability to deal finally with the matter, but in view of the financial implications which may be involved, has no other course open to it but to refer the matter to His Majesty's Government in London."

The Consul for Japan has sent the correspondence to his Government at Tokio with his report, and requesting sanction to move in the matter from this end, or, alternatively that his Government move in the matter through the Embassy in London. The dispatch from the Consul went forward to Tokio about the middle of February. Nothing has since transpired, but that is only to be expected, as, it is to be imagined, that the Japanese

Foreign Office has been very fully engaged with other matters in the past few months.

The Consul, whilst very desirous of pressing the matter locally, does not wish to move until he has sanction to do so.

I have not moved to obtain the consent of the other plot holders, as I am not sure that the consent would be unanimous, although I know that most would consent. Moreover, I do not wish to move in this way, pending a decision as to the rights of Japanese subjects under the Treaty.

It is a matter of some interest that when the Consul raised the question of the rights of Japanese subjects under the Treaty, he had to supply copies of the text of the Treaty to the Government Departments concerned as there was no copy of the treaty in the Colony save that in the possession of the Consul for Japan. This is all the more peculiar as the provisions of the Treaty were applied to the East African Protectorate in, I believe, February 1913 by the then Secretary of State for the Colonies. I did not know until I was informed by the Consul that the Treaty affected this Territory. I wish I had known, as in May or June 1926 the Japan Cotton Company offered me £6,500 for this same house. This offer I referred to the then Commissioner for Lands, who referred the matter to the District Committee, with the result that my application for leave to transfer was turned down.

The present situation with regard to house property

in the European Residential Area is that several houses are unlet and have been unlet for some time, the people who occupied them having in many instances taken up residence in modern flats built over shop premises on the Kilindini Road. There are as many or more Europeans living in the non-segregation area as in the European area.

When the recent valuation for rating purposes took place the houses in the European area were valued as if there were an open market for selling or letting, and the valuation was based on the price the owner might expect to get at a bona fide sale, without restrictive conditions. There is in fact no market for houses in the European Residential Area today as all the bigger companies and firms have built to meet their requirements for housing their principals and staff, and, indeed, built in excess of their requirements at the present time.

As you know, I was contemplating retirement at the end of this year, but that depended on my being able to wind up matters here on a satisfactory basis. I am being held up by this question of selling or letting my house and by a Town Planning Scheme which has sterilised all sales of land on the Mainland North, where I have considerable interest in land, for the past 3 1/2 years.

If the restrictive covenant is not removed so far as the Japanese are concerned it will mean a loss to me on

the sale of my house of £3,000, or a possible loss on the letting of £120 to £150 per annum. In the circumstances I am naturally desirous that the Japanese Government should press for their rights under the Treaty and I know that the Japanese Consul is exceedingly keen that the matter should be pressed. If, however, no move is made officially within the next few months I contemplate having questions put in the House of Commons with regard to these restrictive covenants in so far as they operate against the Japanese. The moral and other obligations under treaties are matters of considerable public interest at the present time.

I understand that a somewhat similar state of affairs with regard to residence arose in Vancouver and was settled on the basis that Japanese were allowed full residential rights in a quarter which had been exclusively European.

I must apologise for trespassing on your time in this manner, but I feel from my knowledge of you that a matter of this sort is one which will arouse your interest to the full, especially as you have such an intimate knowledge of the history, both political and otherwise, of the Coast and the inhabitants thereof.

Yours faithfully,

*Maxwell T. Wright*

Sir Robert Hamilton,

*Under Secretary of State for the Colonies  
House of Commons London*

2/18112/32

42

Kenya.

Mr. H.T. Allen.

Mr. Abraham 22/6

Mr. Anshu 22

Mr. Parkinson

Mr. Tompkins

Sir C. Boddley

Sir J. Sturges

Parlt. U.S. of S.

Parly. U.S. of S.

Secretary of State

22 JUN 1932

23/6/32

DRAFT Consen. v. minutes.

KENYA.

DOWNING STREET

CONFIDENTIAL. (2)

29 June, 1932

GOVERNOR BYRNE.

Sir,

I have the honour to acknowledge the receipt of your Confidential despatch No. 62 of the 28th April on the subject of the restrictions on the acquisition of township plots by Indians.

2. In paragraph 8 of your despatch you ask that the question of unrestricted ownership and occupation in that portion of Mombasa area under discussion which

3/6/32

Copy to [unclear] 22

Kenya

To Sec. (Camp 7)

6 copies to [unclear]



which has not yet been sold, as well as that of ownership in regard to the plots which have been sold in that area may be further considered by my legal advisers. You also suggest that the question of ownership in Nairobi, Nakuru and Eldoret and minor townships might also be brought under review.

3. I have accordingly arranged for these matters to be considered by my legal advisers and I enclose a memorandum which represents their views.

*(omit letters of para 3 of memorandum in red brackets)*

H/A

4. I am advised that it is not possible to maintain that ownership comes within the doctrine laid down in regard to residence and occupation. It appears that none of the leases or conveyances contains a covenant against assignment to non-Europeans and the mere fact that the Government restricted bids at the auction to Europeans is

not enough to give the purchasers rights inter se or against the Government.

b. As regards occupation, it is true that, in respect of the areas now under consideration, they were not offered for sale as a whole at one time. Nevertheless wherever plots were sold the conveyances contained covenants against non-European occupation, and the areas were definitely known areas in which it must have been understood that as and when the plots were offered they would be offered under similar conditions.

c. To sum up I am advised that, in respect of areas to which the considerations referred to in the preceding paragraphs apply, the restrictions as regards residence and occupation should be maintained but that the restrictions should

not be extended to ownership.

7. In paragraph 9 of your despatch you suggest the possibility of revising the layout of the land in the area at Mombasa not yet alienated to secure that ownership and occupation by Asiatics of such parts would not, in fact, to any reasonable degree affect adversely the amenities of the plots which have already been sold. You do not mention however, whether there is a similar possibility in respect of Mairobi, Msekuru, Mldoret and minor townships in which restrictions whether as ownership or occupation now apply.

8. On the assumption that your Government does not dissent from the advice which has been given to me the question of the restrictions on residence and occupation may continue

to

*\* A similar note to  
the preceding in  
Tutaka M.P.*

*20*

*17/3/31*

to be regarded as closed and there is no necessity to modify the policy hitherto followed except in so far as it concerns the limitation of the ownership in areas in which residence and occupation is restricted. This was in fact the sole point suggested for further examination in Lord Bessfield's Confidential (4) despatch of the 18th July 1931.

9. Before any <sup>arrangement</sup> ~~arrangement~~ is made of the intentions of the Government in the matter, you will no doubt wish to consider the question referred to in paragraph 9 of your despatch of the revision of the layout of the unalienated portion of the restricted area at Mombasa and possibly other townships. I assume of course that any ~~such revision~~ <sup>such revision</sup> could only be in the direction of reducing the areas in which ~~as to which~~ <sup>as to which</sup> restrictions on residence and occupation must still apply; and also that in so far as

revision

revision may reduce such areas these  
restrictions would only be maintained  
in the reduced areas, the remaining portion  
being thrown open for disposal free of any  
restriction not only as regards ownership  
but also as regards residence and occupation.

10. I regard it as reasonable that  
your Government should have time to  
formulate its proposals as a whole  
before making any public announcement as to  
the abandonment of the restrictions  
on ownership, as you are aware I am being  
pressed for information by the Secretary  
of State for India, and I therefore  
trust that you will be able to expedite  
your final proposals. I should be glad  
if <sup>these</sup> ~~they~~ could be sent to me in a form  
convenient for communication to the  
Government of India. They will pre-  
sumably include full particulars  
(<sup>plans</sup> accompanied by ~~maps~~) of any modifica-  
tions of the present restricted areas  
in Bombay or elsewhere which may be  
proposed after consideration of the

point

point raised in paragraph 9 of  
your despatch.

11. I enclose for your  
information a copy of a letter  
which I have caused to be addressed  
to the India Office.

I have etc.

(Sgd) P. GUNNIFFE-LISTER

C. O.

4/18112/32 Kenya.

7

16/6 2276

Mr. H.T. Allen

Mr. Buck 12

Mr.

Mr. Parkinson

Mr. Tomlinson

Sir C. Bottomley

Sir J. Sturges

23/6/32  
f1

Permd. U.S. of S.

Parly. U.S. of S.

Secretary of State

25

DRAFT cons. v. minutes.

Downing Street

THE UNDER SECRETARY OF STATE

29 June 1932.

ECONOMIC AND OVERSEAS DEPARTMENT

INDIA OFFICE.

Sir,

With reference to the letter from this Department of the 19th May, I am directed by Secretary Sir Philip Cunliffe-Lister to request you to inform the Secretary of State for India that a despatch has now been received from the Government of Kenya with regard to the restriction on the acquisition of township plots

(3)

3ap

Copy to Sec. Comf @ 29 JUN 1932

by

by Indians in the Colony.

2. Sir Philip Cunliffe-Lister

has found it necessary to communicate

with the Governor <sup>again</sup> on the subject, but a

further communication will be addressed to

you on the receipt of <sup>his</sup> the reply ~~from the~~

~~Governor which he has been asked to expedite.~~

3. The Governor adheres to his

*in which I concur*

view that he still regards it as

undesirable in the meantime to give

any publicity to the decisions

communicated in the letter from this

Department of the 10th June 1931.

14/17173/31.

I am etc.

(Signed) H. T. ALLEN.

Segregation Areas in Kenya.

The questions submitted for opinion by the Governor of Kenya are contained in paragraph 8 of the despatch, and can be thus formulated:

Can the Government of Kenya lawfully:-

- (a) sell to non-Europeans plots of land in that area of Mombasa regarded by the Government hitherto as being restricted to European ownership and occupation;
- (b) sell within that area plots of land without a covenant restricting occupation to Europeans;
- (c) permit plots already sold in that area to be owned by non-Europeans;
- (d) sell to non-Europeans plots within areas in Nairobi and other municipalities and townships mentioned on page 4 of the despatch, which areas have hitherto been regarded by the Government as being restricted to European ownership; or
- (e) permit plots already sold in those areas in (d) to be owned by non-Europeans?

Items (d) and (e) represent my interpretation of the sentence in paragraph 8 of the despatch, which runs "the question of ownership in Nairobi, Nakuru and Eldoret might also be brought under review".

2. To deal with the case of Mombasa first, the Law Officers on 23rd March, 1925, were of the opinion, so far as regards the area indicated in the plan forwarded with Kenya despatch of 10th August, 1925, (Gov.41883/25), that Government could not properly (sic) sell any plots to non-Europeans. This opinion was accepted by Mr. Bruce, the Acting Attorney-General, in February of this year, and it appears to have been

*Memo to Gov. Conf. (2) 29 JUN 1932*



6 47

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Memo to: For Conf (2) 29 JUN 1932

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founded upon certain cases which are therein quoted. These cases, however, deal with a set of facts which are different. So far as I have been able to ascertain (and I have perused the cases and others quoted therein very closely) the English legal decisions on sales of land where such restrictive conditions are sought to be enforced deal with

(a) sales where the conditions relate to an estate or block of plots put up for sale at one time, and

(b) sales where the restrictive conditions sought to be enforced are conditions which impose an obligation upon the purchasers.

But in the Mombasa case it appears that, even conceding that there has been a definite pronouncement on the part of the Kenya Government, or at least an incontrovertible presumption that the area in question is reserved for European purchasers, the whole of the area has never been offered for sale at one time; in fact, portions of it have been put up from time to time at substantial intervals. Further, the advertised condition that Europeans only will be permitted to bid is not a condition imposed upon purchasers, but a restriction in bidding to a specified class. The Governor asks, in his opinion given in March, 1925, whether, on the complete analogy of Spicer v. Martin (14 A.C.), Government can "use part of the estate in a manner inconsistent with the law by which it professed to bind the whole". With all respect, I cannot see how, putting the case at its highest, any law can be said to apply. Law connotes an obligation, and no

obligation

obligation has been imposed upon purchasers, and to say the Government has imposed an obligation upon itself begs the question at issue.

3. It may be contended, however, that the Government has induced purchasers of plots, by a definite representation, that all future sales of plots within the area in question would be restricted to Europeans, and therefore a departure from that representation would give a good cause of action, however nugatory the damages might be. It is distinctly open to argument whether Government did so made it with any intention of operating on the minds of intending purchasers, and whether the purchaser of any particular plot was influenced to purchase by such a representation, especially when it is ascertained that there is nothing to prevent any European purchaser from assigning the benefit of his purchase to an Asiatic if he wishes to do so. I am therefore not prepared to agree with the view of the legal advisers to the Kenya Government, although I am not prepared to say categorically that a Court would hold that what Sir Joseph Byrne describes, on page 5, as a "breach of faith" would not, on the ground of misrepresentation, give rise to an action for damages. On question (a) therefore, it would seem that, morally, the Kenya Government believes itself to be bound to continue a policy in respect of which in law I have some doubts as to its obligations. X

4. As to question (b), I think again the facts are not in line with the facts upon which the afore-said English decisions relied upon by the Government of Kenya were made. All these decisions, as I have

said

said above, relate to estates or blocks of plots offered at one sale to the public, and not to plots or blocks offered at different periods, even though connected in some way by a distinct scheme. But the case for damages for misrepresentation would be distinctly stronger than that which might be asserted in respect of a relaxation of the system of restricted ownership. I should more than hesitate to say that the Government of Kenya has not made representations in respect of the entire area in question upon which it expected purchasers to act, and upon which purchasers could not successfully maintain that they had acted.

5. As to question (c), I am unable to see how it is possible for the Government of Kenya to prevent the assignment to non-Europeans of plots already sold to Europeans. In the absence of a prohibitory covenant, it would only be possible to hold the contrary view by implying such a covenant by virtue of the exclusion of non-Europeans from bidding and purchasing. — I am unable to go so far.

6. As to question (d), very much the same considerations apply as in question (a), but the features mentioned in the last sentence of paragraph 5 of Sir J. Byrnes's despatch make it perhaps more likely that a case of misrepresentation could be sustained.

7. Question (e) can be answered in terms of question (c).

*Under official  
copy*  
6.32

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7. Question (e) can be answered in terms of question (c).

*Done on 2/11/52*  
8.32.  
*W. H. G.*



449  
GOVERNMENT HOUSE,  
NAIROBI,  
KENYA.

KENYA

No. 62

CONFIDENTIAL.

28<sup>th</sup> April, 1932.

Sir,

No 20  
1917/31

I have the honour to refer to Lord Passfield's Confidential Despatch No.(4) of the 15th July last regarding restrictions on the acquisition of township plots by Indians. I regret the long delay in replying which has been due to heavy pressure of work in the office of the Attorney-General.

2. A general statement of the broad principles upon which Government has based its action in restricting ownership of plots in certain areas is to be found in a memorandum No.N.1846/23 of the 21st December, 1923, by Mr. Gower, then Acting Attorney General, a copy of which was forwarded to Mr. Thomas under despatch No.374 of the 1st April, 1924. A further copy is attached for ready reference.

As regards the Mombasa residential plots in particular, round which interest has chiefly centred, a memorandum dated the 23rd March, 1925, by Mr. Gower, with the concurrence of Mr. Lyall Grant, then Attorney General, contained the advice upon which this Government acted.

3. The present Acting Attorney General, Mr. Bruce, has now carefully considered the matter, and I enclose two copies of a memorandum by him in which he reviews the legal arguments and arrives at the same conclusion as that expressed by Mr. Gower. Copies of the correspondence between Mr. Gower and the Commissioner of Lands leading .....

THE RIGHT HONOURABLE  
MAJOR SIR PHILIP CUNLIFFE-LISTER, P.C., G.B.E., M.C., M.P.,  
SECRETARY OF STATE FOR THE COLONIES,  
DOWNING STREET,  
LONDON, S.W.1.

Amvord Conf (2) 29 JUN 1932

21325/24

leading up to the decision of this Government are attached to Mr. Bruce's memorandum, together with a copy of each of the plans to which he refers. These plans are marked respectively A, Auction plan of residential plots, Mombasa, (this refers to the auction held in September, 1918), and B, the proposed scheme for the Townplanning of Mombasa, prepared by the Director of Public Works in 1917. Another plan is also enclosed marked C, showing the precise position at present in respect of the alienation of plots to the east of Salia Road. In Kenya despatch No.987 of the 10th August, 1925, plans were sent showing the area within which this Government, acting on Mr. Gower's advice, considered it was bound to maintain restrictive conditions. It will be noticed that on the western side, the area described as "European Residential Area" on Plan No.B extends far beyond Salia Road, which was the boundary of the area shown on the plan now mentioned. The major part of this extended area is the Mbaraki Estate purchased by Government from Major Grogan and now included in the Port Area. Also, on the eastern side the land lying between Tritton Road and the sea is shown on Plan B as "European Residential Area". This land is largely occupied by Government official residences and no proposals have been formulated for offering this land for sale to the general public.

In addition to these plans reference might also be made to the plan showing Town Planning proposals for Mombasa embodied in the Report on Sanitary Matters in the E.A. Protectorate, Uganda and Zanzibar by Professor Simpson (African No.1025) published in February, 1915, (facing page 45) and to the text of the Report, paragraphs (107) (c) and (111) (page 46).

The area recommended by Professor Simpson as

"European....."

*Handwritten:* 4/26/25

"European Residential Area" was larger than, but included, the land shown on the Director of Public Works' plan in 1917.

4. It will be observed that in arriving at their conclusions so far as Mombasa is concerned, the legal advisers have attached great importance to the so-called Town Plan prepared by Mr. McGregor Ross. It should not, however, in my opinion, be overlooked that this plan was in no sense an authoritative document. It was prepared by Mr. Ross without instruction from Government in connection with a drainage survey of the Island; it was never adopted by the local authority or by Government; and was never published either as a town plan or in connection with the 1918 land sale.

Further, the plans which were published in illustration of that sale showed, as you will observe, no detail whatsoever of Crown land in the vicinity of the plots offered, with the exception of the plots on the opposite side of Corporation Road and a few sea front plots all of which at that time had already been sold.

It should also be observed that twenty-one plots in this group were sold by auction in 1912 and 1913 without restriction as to bidding, but under restrictions as to occupation. Six of these plots were purchased by non-Europeans, but of these one has since been transferred to European ownership. The occupation conditions have been strictly observed. Mr. A.B. Patel in the memorandum forwarded under cover of Lord Passfield's despatch Kenya No. 491 of the 15th July, 1931, makes special mention of this sale. Mr. Patel is in error in saying that a sale of plots in this area took place in 1916.

5. In Nairobi Municipality the areas in which ownership and occupation of plots are restricted to Europeans only are small and there are within them only

- 4 -

4188/21  
a few unalienated plots. The plots within these groups, which were shown coloured red on the plan forwarded under cover of Sir Edward Denham's despatch No. 987 of the 10th August, 1925, were, with the exception of the Forest Road plots, sold by auction to Europeans only under a condition of sale prohibiting occupation by non-Europeans. The Forest Road plots were sold by auction to Europeans only but no restriction was imposed either in the conditions of sale or in the title deeds restricting occupation to Europeans only. As it was the clear intention at the time of the sale that this group should be reserved for Europeans only, restrictions both as regards ownership and occupation have been consistently maintained by Government.

In Nakuru and Eldoret Municipalities there are a few plots which were sold at auction to Europeans only and subject to European occupation. Within those groups there are two or three unalienated plots in respect of which the legal advice is, that Government, when the plots are alienated, must impose similar restrictions.

In Nyeri, Kiambu, Londiani and one or two other minor townships there are groups of plots similarly restricted.

These areas are comparatively unimportant in relation to the total number of plots available for unrestricted ownership and occupation in their respective Municipalities or Townships and the maintenance of restrictions has not been the subject of controversy as it has been in Mombasa. These groups of plots differ, however, from the so-called European residential area at Mombasa in that they are compact, clearly defined and have for the greater part been alienated under definite conditions of sale.

6. In considering the numerous cases of inter-

racial .....



racial transfers of township plots throughout the Colony, which have been dealt with subsequent to the abolition of segregation as a policy, this Government has consistently reviewed them, in connection with its power to veto, on strictly legal grounds and having regard solely to its legal liabilities.

The question now under consideration - the restriction of ownership - is entirely a legal matter, the only issue being whether Government would render itself liable to a successful action for damages if this restriction were abandoned throughout the whole area in respect of both sold and unsold plots. As you will observe the consistent legal advice upon which this Government has acted is that it would be a breach of faith, which might lead to actions for damages against the Government by the present holders of the plots in the areas concerned, to allow persons other than Europeans to bid for and purchase any part of this land whether already alienated or not, even though no restriction of ownership was embodied in the leases of the plots sold at auction.

7. Occupation restrictions differ from the restrictions of ownership in that the former were announced as conditions of sale and as such were embodied in the leases of the respective plots, whereas the restrictions of ownership were merely conditions of the particular auction at which the land was sold and have not been perpetuated in the leases. My legal advice is, however, that the ownership restriction can be relaxed only at the risk of an action against Government for damages. It may, of course, be held that the damages that will be awarded by the Courts in respect of Asiatic ownership of a plot would be negligible, as it is difficult to see what damage could be sustained by an adjoining plot-

owner .....

owner in such a case unless the Asiatic purchaser deliberately endeavoured to depreciate the value of surrounding property by permitting occupation by undesirable tenants.

Although the point now under reference is that of ownership, it is difficult to consider the two questions separately. There are no doubt Indians who would desire to buy plots in the Mombasa area as an investment or for speculative purposes, but, if unrestricted purchase were permitted, it would, I consider, notwithstanding the fact that the purchasers of the five plots mentioned in paragraph 4 have not, in fact applied for release from occupation restrictions, be most difficult, if not impracticable, for any long period to differentiate between ownership and occupation in respect of future sales of plots, and to withstand the direct and indirect pressure for release from occupation restrictions which would be continuous.

8. In a matter pregnant with such possible liability as is the question under review in this despatch, it is of prime importance that there should be, so far as possible, no doubts as to Government's legal position. I should be grateful, therefore, if the question of unrestricted ownership and occupation in that portion of the Mombasa area under discussion which has not yet been sold, as well as that of ownership in regard to the plots which have been sold in this area, could receive the further careful consideration of your legal advisers. The question of ownership in Nairobi, Nakuru and Eldoret and minor townships might also be brought under review. In this request Mr. Bruce concurs.

There appears to be no question that where definite restrictions are imposed in leases they must

be maintained except with the consent of all lessees of plots in the respective groups. Such restrictions apply, however, as I have previously stated, to residence only. Ownership restrictions rest on the restriction of bidding at the time of the sale.

9. If in the opinion of your legal advisers the legal position taken up by this Government is untenable, it would, no doubt, be possible by a revision of the layout of the land in the area at Mombasa not yet alienated to secure that ownership and occupation by Asiatics of such parts would not, in fact, to any reasonable degree, affect adversely the amenities of the plots which have already been sold. Sales under these conditions would be more satisfactory from the point of view of Government inasmuch as the range of possible purchasers would be very largely widened and from the point of view of Municipal development in that congested areas in other parts of the Island would be to some extent relieved and a large unoccupied space would be developed.

Even if, however, the local legal opinion is sustained, it might still be feasible to reduce the area of its application by offering for sale a further small group of plots lying between the plots already sold on restricted conditions and the bulk of the area remaining unalienated, subject to restricted ownership and occupation, with a definite intimation to purchasers that no more plots in the area would be offered under such conditions. These plots would form a buffer between the restricted and the unrestricted areas and the risk of a successful action for damages in respect of later sales without restrictions would be reduced to negligible proportions.

10. On this matter I propose to take no further action.....

action until I receive your reply.

I have the honour to be,

Sir,

Your most obedient, humble servant,

*h. J. J. J.*  
BRIGADIER GENERAL.  
GOVERNOR.

COPY.

ATTORNEY GENERAL'S OFFICE,

Nairobi.

No.M.1846/23.

21st December, 1935.

The Hon'ble Colonial Secretary,  
Nairobi.

Part II, paragraph 1 - the operative part of the White Paper reads - "Whatever the circumstances in which members of these communities have entered Kenya, there will be no drastic action or reversal of measures already introduced, such as may have been contemplated in some quarters, the result of which might be to destroy or impair the existing interests of those who have already settled in Kenya".

Later paragraph 7. Segregation in Townships. "So far as commercial segregation is concerned it has already been generally agreed that this should be discontinued..... They have therefore decided that the policy of segregation as between Europeans and Asiatics in the Townships must be abandoned."

The words "reversal of measures already introduced" are in my opinion intended to save present legislation and existing contracts which affect interests in immovable property which are not to be destroyed or impaired.

If this interpretation is correct then paragraph 1 must be read as qualifying and governing paragraph 7.

Before Professor Simpson's scheme was acted on, Townships were divided into European and Asiatic residential areas. Titles issued under the Crown Lands Ordinance, 1903, either contained a specific covenant against assignment and subletting, or such a covenant was imparted by the terms of the Ordinance. To protect the interests of the respective communities consent to transfer between persons of different race was almost invariably refused.

At the later date the same object was secured by confining alienation under building schemes and the aid of restrictive covenants, and also by the exercise of the powers of the provisions of the Crown Lands Ordinance, 1915, Section 71 et seq.

In those areas, laid out under building schemes whether residential or commercial, the position appears perfectly clear and in my opinion the restrictive covenants must be enforced. Not to do so would be to destroy and impair existing interests.

They can be enforced by the lessor, in the present case the Government, *Manners v Johnson* (1875) 1 Ch.D. 373; *Reid v Bickerstaff* (1909) 2 Ch. 305; by the lessees inter se *Elliston v Reacher* (1908) 2 Ch. 574, 685, by a lessee by obtaining an injunction to restrain the lessor from granting a lease of another plot free from the restriction *Spicer v Martin* (1886) 14 App.Cas. 12. In the last mentioned case Lord Macnaghten expressed the position very positively "It seems to me when Mr. Spicer

"put his houses in Cromwell Gardens on the market he invited the public to come in and take a portion of an estate which was bound by one general law - a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase a price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representative be permitted to destroy the value of the thing so sold by authorising the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole".  
Appeal was dismissed with costs.

*what do  
they do*

In what respect do the last mentioned areas which have grown up side by side with areas not strictly laid out under building schemes? I find it difficult to draw any distinction. To permit indiscriminate transfer in one area must have the effect of impairing or destroying existing interests in the other - the whole neighbourhood is affected. In my opinion paragraph 7, qualified as it is by paragraph 1, operates prospectively and not retrospectively. It is directed to the future layout of townships, and those areas in existing townships which can still be alienated without impairing existing interests. In these circumstances areas hitherto protected under practice - amounting to a custom - must still be protected by aid of the provisions of the Crown Lands Ordinance, 1915, and each particular case considered on its merits as in the past.

(Signed) Ivon L.O. Gower.

ACTING ATTORNEY GENERAL.

54

MEMORANDUM ON THE QUESTION ASKED IN THE  
SECRETARY OF STATE'S KENYA CONFIDENTIAL (4) DESPATCH  
DATED THE 15TH JULY, 1931, AS TO WHETHER THE ABANDON-  
MENT OF THE LIMITATION OF THE RIGHT TO BID FOR AND  
PURCHASE PLOTS IN RESTRICTED AREAS IN TOWNSHIPS  
CAN BE SUSTAINED IN LAW.  
-----

On the 1st April, 1924, the then Governor addressed a despatch to the Secretary of State on the subject of the then position in regard to the decision to abandon the policy of segregation in townships which had been announced in the White Paper of 1923.

Paragraph 3 of that despatch read as follows:-

"As regards the sale and transfer of plots in established townships, I have been advised by the Acting Attorney General that a legal question of considerable importance arises. It is his opinion that the revocation by the Crown of restrictive covenants relating to transfer or occupation of plots or buildings by persons of different race from those to whom the premises have been leased cannot fail to prejudice the existing interests of the parties who purchased in the knowledge of these restrictions, and it would appear that, if this view is correct, this Government may expect heavy claims for damages...."

In paragraph 7 of the despatch, the Governor asked for the Secretary of State's ruling on the legal point he had submitted, as early as possible.

On the 22nd May, 1924, the Secretary of State replied to this despatch to the effect that, on the facts submitted to him, his legal Advisers were of opinion that it was not possible to give a definite ruling on the legal aspect of the problem presented by the revocation by the Crown of restrictive covenants, relating to transfer to or occupation of plots or buildings by persons of different race from those to whom the premises had been released, but went on to say that the general view of his legal Advisers

was (inter alia) that in the case of areas sold or leased by the Crown in plots at auction where only Europeans were allowed to bid, and the leases contained covenants against transfer to, or residence by, other than Europeans, his Legal Advisers considered that the Crown could not waive the covenant.

The Secretary of State added that, from the Memorandum prepared by the Commissioner of Lands and enclosed in the Governor's despatch dated the 1st April, 1924, there appeared to be no such leases, that is, no leases in connection with which all the above conditions appeared to have been fulfilled.

The Commissioner for Local Government, Land and Settlement informs me that this is a fact, that there are, so far as he knows, no leases in existence in which, after an auction where bidding was restricted to Europeans, restrictions both as to transfer to and residence by other than Europeans appeared. He adds that in most such leases a covenant against residence by persons other than Europeans appears.

Now, it would appear that as regards land sales in the Mombasa area since 1925 the attitude of the Government on the subject of the limitation of bidding to Europeans only has been governed by an opinion given on the 23rd March, 1925, by Mr. Gower, the then Solicitor General, which opinion was confirmed by Mr. Lyall-Grant, the then Attorney General, in answer to a letter from the Commissioner of Lands dated the 10th March, 1925, in which he asked whether certain areas of land at Mombasa must be reserved for European bidding only, or whether no such restrictions need be imposed. I append a copy of the letter from the Commissioner of Lands dated the 10th March, 1925, a copy of Mr. Gower's minute dated the 23rd March, 1925, a copy of a further letter from the Commissioner of Lands dated the 23rd April, 1925, and a copy of a further letter from Mr. Gower dated the 25th April, 1925. I also append a

copy



copy print of the Director of Public Works' plan referred to in the Commissioner of Lands' letter dated the 10th March, 1925, and a copy of the auction plan also referred to. Mr. Gower's opinion was that Government was bound to sell the whole area marked in the Director of Public Works' plan above referred to as "European Residential Area", subject to bidding by Europeans only, for the reasons given in his minute dated the 23rd March, 1925. This opinion has been acted on ever since, and at every subsequent sale of any block of plots in this area, the bidding has been restricted to Europeans and a covenant against residence by other than Europeans has been inserted in the lease.

So much for the area in Mombasa, where European ownership has been insisted upon. There are three or four blocks in Nairobi where the same state of affairs obtains, and there are a few blocks also in Nakuru and Eldoret. In all these areas the bidding at every auction has been restricted to Europeans, and a covenant against residence by other than Europeans is inserted in the leases. The considerations which influenced Mr. Gower in giving his opinion on the 23rd March, 1925, do not apply to the areas in Mombasa, Nairobi, Nakuru, and Eldoret, other than as above mentioned, nor to any other township. The question then to be considered, is whether Mr. Gower's opinion that we are legally committed to restrict biddings to Europeans in the whole of the Mombasa area to which reference has been made, and, by implication, in the area comprising the 3 or 4 blocks in Nairobi and in the area comprising the few blocks in Nakuru and Eldoret to which reference has also been made, is still to be followed? With regard to this question, I am in agreement with Mr. Gower's opinion, which was supported by Mr. Lyall-Grant, the then Attorney General; and I consider that it would be a breach of faith, which might lead to actions for damages against Government by the present holders of the plots in the areas concerned, to allow

persons other than Europeans to bid for and purchase any part of the areas. It may be contended that the actual damages awarded would not be substantial, but, in my view, the law would be on the side of the persons suing Government.

In my view, therefore, the abandonment of the limitation of the right to bid for and purchase plots in the restricted areas in townships could be sustained in law only in the case of plots and blocks of plots not within the Mombasa area to which reference has been made, nor within the area comprising the 3 or 4 blocks in Nairobi and the few blocks in Nakuru and Eldoret already referred to.

Nairobi,

9th February, 1932.

*T. D. Hillman*  
ACTING ATTORNEY GENERAL.

No.M/12542

DEPARTMENT OF LANDS,  
NAIROBI.

10th March, 1925.

The Hon. Attorney General,  
Nairobi.

Re: Alienation of Residential Plots - Mombasa.

An auction of residential plots in Mombasa is contemplated subject to there being sufficient evidence of demand. The matter is now under consideration by Government and I am requested to ask your opinion on the question of the application of racial restrictions. The plots shown hatched blue on plan were auctioned in 1918, none but Europeans being allowed to bid and the leases containing restrictions to European occupation. The plots now proposed for alienation are those shown in red hatching.

2. Under the ruling of the Secretary of State of the 22nd May last there does not appear to be any ground for putting up these plots for sale to Europeans only, but on this I shall be glad to have your opinion.

3. The plots lie within the area defined by Government Notice No. 340 of the 13th October, 1920. This notice was cancelled on 1st June 1921 (Government Notice No. 208).

4. I am informed that considerable feeling will be aroused amongst the European residents in Mombasa if the plots are made available for Asiatics. On the other hand Asiatics will consider they have a grievance if they are excluded.

Sd. C.E. MORTIMER.

for COMMISSIONER OF LANDS.

23rd March, 1925.

The Hon'ble the Commissioner of Lands.

re: ALIENATION OF RESIDENTIAL PLOTS - MOMBASA.Ref. your No. M/12542 of the 10th instant.

Subject to one or two queries below it appears to me that the position is governed by Re Birmingham and District Land Company and Aliday, 1893, 1 Ch. 342, a leading case, and Government cannot properly sell the plots adjoining those coloured blue except to Europeans.

2. The short particulars of the case under reference are: "A land company put up freehold building sites for sale by auction in lots, subject to particulars and conditions of sale which, in the view of the Court, constituted an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general law affecting the character of the buildings to be erected thereon. At the auction some of the plots were sold and some were not, and after the sale the vendors claimed the right to sell the unsold lots free from the restrictive covenants in case they desired to do so.

Held, that a purchaser who had bought one of the plots sold at the auction, but had not completed his purchase, was entitled to the benefit of a contract by the vendors, implied in the conditions of sales that the vendors would, as to the lots unsold at the auction, observe stipulations similar to those which the purchasers of those lots, had they been sold, would have been bound to covenant to observe, and held, also, that the purchaser was entitled to have such obligations of the vendors expressed in the conveyance to him of his lot".

3. The principle which Mr. Justice Wills lays down in Nottingham Patent Brick and Tile Company vs Butler, 15 Q.B.D. 261 is this - It is a question of fact to be deduced from all the circumstances whether a building scheme is merely a matter of agreement between vendor and purchaser, or is meant by the vendor, and understood by the purchasers, to be the regulations by which the rights of the owners of the several lots are to be adjusted.

4. Is there any doubt but that the whole area in question was laid out as a building scheme for European occupation? I imagine not as the evidence on this point appears fairly clear. To commence with we have the conditions of sale in Official Gazette, 1918, page 659 -

(1) Europeans only shall be allowed to bid and purchase etc.

(15) No building shall at any time during the said term of the lease be used for any other purpose than a private dwelling house or occupied by a person or persons other than an European, or used as a place of residence for Asiatics or natives who are not domestic servants in the employ of the lessee.

Was this restriction repeated in the form of a covenant in the leases of the plots sold? The restriction set out in 15 was futile unless it was contemplated and expected, and the intention of all parties, that in pursuance of the general scheme relating to the whole area each one of the several purchasers should be bound

by and should, as against the others, have the benefit for ever of the restriction. Do the sale plans for instance evidence any intention that the whole area was reserved for European occupation at the time of sale apart from the conditions of sale?

5. If the facts assumed in paragraph 4 are correct then when Government put these plots in the market it invited the public to come in and take a portion of an estate which was bound by one general law - a law perfectly well understood and one calculated and intended to add to the security of the lessees and consequently to increase the prices of the plots. The benefit of that price Government got. Can Government be permitted to destroy the value of the plots sold and use part of the estate in a manner inconsistent with the law by which it proceeded to bind the whole? This is the position exactly and was so put in *Spicer vs Martin*, 14 App. Case and answered in the negative.

6. Then we have at a later date Government Notice No. 540 Official Gazette 1920, page 928, confirming, what I should have thought obvious, the areas a European Residential-reservation. True this notice was later cancelled, but the restriction remains.

7. The case under consideration is not perhaps directly covered by the Secretary of State's despatch of the 22nd May last, but paragraph (d) has a very material bearing. It appears to me, however, on the fact that if the plots hatched red are now sold to persons other than Europeans this would amount to a reversal of measures already introduced which must destroy or impair existing interests of those who purchased in 1918, and such action would be contrary to Part II, Clause 1 of the Command Paper notwithstanding the provisions of Clause 7.

I appreciate the political difficulties, but on legal grounds I am forced to the view expressed above. This is a typical instance of many similar cases in Townships and the matter might be considered of sufficient importance for reference to the Secretary of State, but before doing so I shall be glad to have your answer to the queries raised.

SD. IVON L.C. GOWER.

SOLICITOR GENERAL.

I agree.

SD. R.W. LYALL GRANT.

ATTORNEY GENERAL.

COPY  
No.M.12542

658  
DEPARTMENT OF LANDS,  
NAIROBI.  
23rd April, 1925.

The Hon. Solicitor General,  
Nairobi.

Re: Alienation of Residential Plots - Mombasa.  
Reference your No.473/25 of the 23rd ultimo.

In answer to your enquiries in paragraph 4 -

(1) It is clear that the whole area was intended to be laid out as a residential area for European occupation.

(15/10/25)  
(2) The restrictive clauses in the conditions of sale were repeated in the form of covenants in the respective leases.

(3) The sale plan shows only the plots that were then being offered for sale and a few other plots that had previously been alienated (see plan No.91A). A previously prepared plan (No.91) was also at that time available to the public. This plan shows a few additional plots which were originally proposed for inclusion in the 1918 sale but were subsequently held over. The plan marked "A" indicates in red colour the plots which were actually surveyed at the time of the 1918 sale. No plan shewing the present lay-out of the remaining area was at that time in existence, but a plan prepared by the Director of Public Works shewing a proposed lay-out of the greater part of Mombasa Island and in particular indicating the area now under reference as a European Residential area was available to the public. This scheme was approximately followed when the survey of the plots sold in 1918 was effected, but in the survey of other plots at a later date a departure was made from that design.

SD. C.E. MORTIMER.

for COMMISSIONER OF LANDS.

No.M.636/25.

ATTORNEY GENERAL'S OFFICE  
NAIROBI.  
25th April, 1925.

The Hon'ble  
The Commissioner of Lands,  
Nairobi.

Re: ALIENATION OF RESIDENTIAL PLOTS.  
Ref. your No.M.12542 of the 23rd inst.

In view of the terms of your letter under reply I see no reason to alter the opinion expressed in my No.M.473/25 of the 23rd ultimo - in fact the position is stronger.

In view of the fact that this Department has not been asked to submit the correspondence to the Honourable the Colonial Secretary so I assume you will do so.

I return your plans.

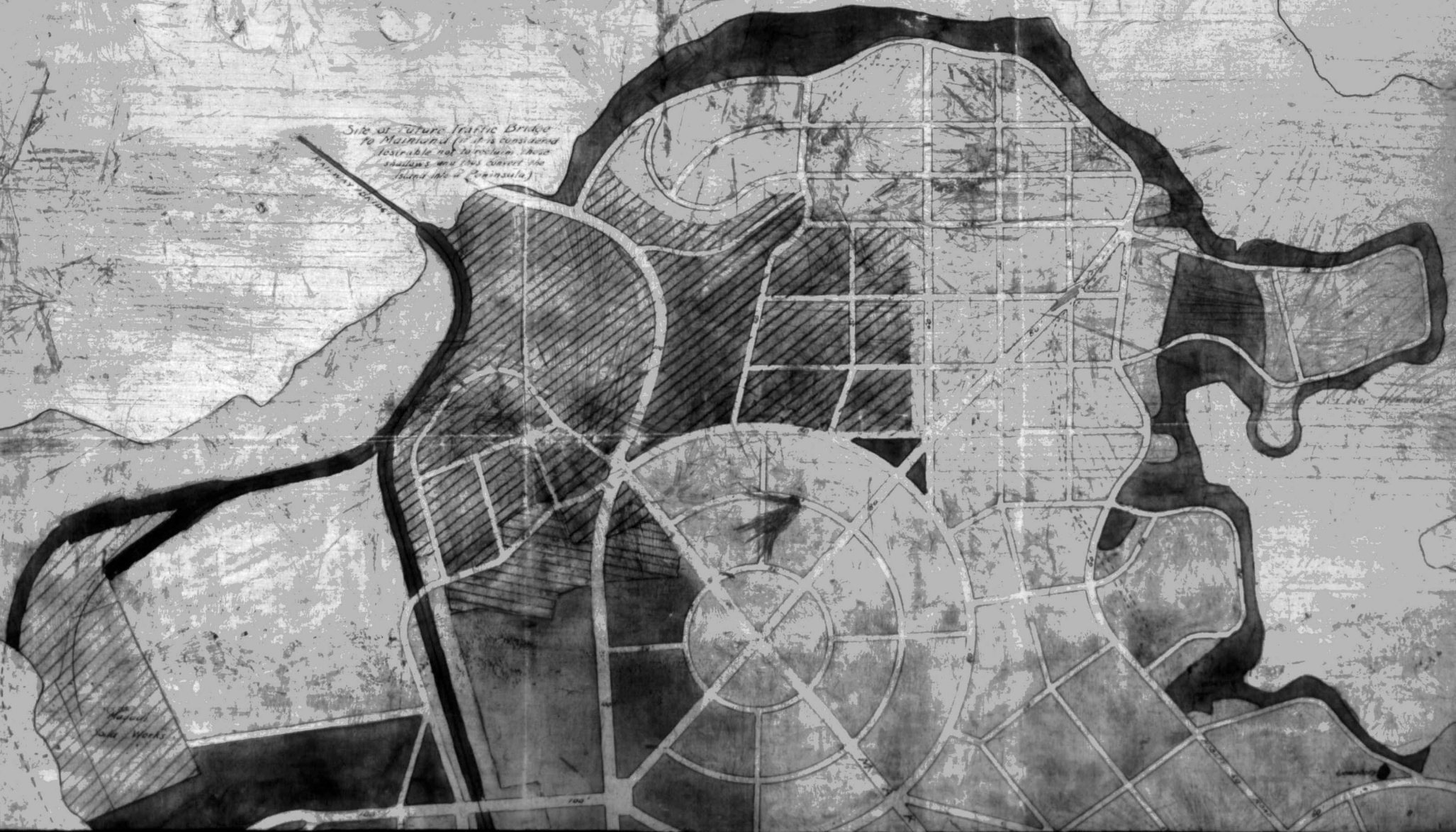
SD. IVON L.O.GOWER.

SOLICITOR GENERAL.

# MOMBASA TOWN PLAN.

DIAGRAM ACCOMPANYING D.P.W. No 550/43 OF DECEMBER 1917

Site of Future Traffic Bridge  
to Mainland (if it is considered  
desirable not to reclaim those  
sandbars and thus convert the  
Island into a Peninsula)



P.W.D. No 1977

11/11/4

# MOMBASA TOWN PLAN.

DIAGRAM ACCOMPANYING D.P.W.S. No 50/43 OF DECEMBER 24<sup>th</sup> 1917





P.W.D. No 197

11/1/14

# MOMBASA TOWN PLAN.

DIAGRAM ACCOMPANYING D.P.W. No 550<sub>43</sub> OF DECEMBER 24 1917



*Mombasa  
during the  
time of the  
British  
rule*









Scale: 600 feet to 1 inch

Colour Key

- Open spaces
- African & Indian Quarter
- European Residential Area
- Business Area
- Port labour location
- Better Class Area and Asiatic Area (Residential)
- Trade Sites Area
- Railway Reserve Area
- Uvanga By Market Area

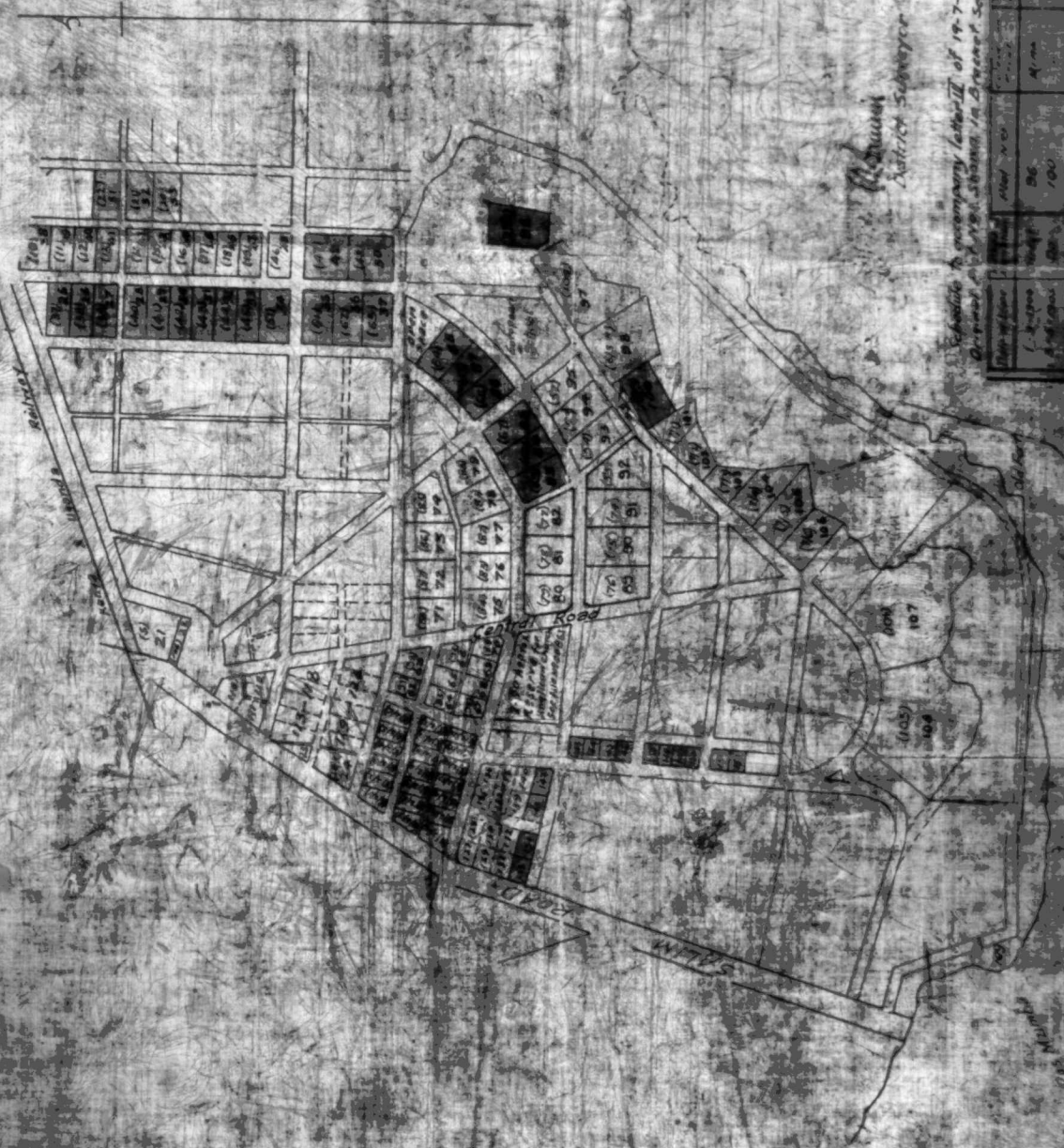


D.W.D No 1977  
 FILE P/MSA/I

SW 517536

# NOMBASA ISLAND Section XXXI

Scale: 1:5000



RAILWAY  
District Subways

Schedule to accompany (Act) II of 1972  
Original of this shown in District Sub VIII

Plot No.	Area	Use	Remarks
100	100	Residential	
101	100	Residential	
102	100	Residential	
103	100	Residential	
104	100	Residential	
105	100	Residential	
106	100	Residential	
107	100	Residential	
108	100	Residential	
109	100	Residential	
110	100	Residential	
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195	100	Residential	
196	100	Residential	
197	100	Residential	
198	100	Residential	
199	100	Residential	
200	100	Residential	

PUBLIC RECORD OFFICE

END

TOTAL EXPOSURES →