

1937

38323

C0533/486
KENYA

38323

COMPLAINT OF COLONEL BRIERLEY

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LEGAL.
FURNAL.

Draft to Sir A. Wade here with

(I spoke to
Mr F. [unclear])

A. [unclear]

4/7/37

N.B. § 87 of the Kenya Mining Ordinance 1933 gives power to Govt. to remove from ~~any~~ Crown land..... any clay, gravel, stone, brushwood, timber, or other materials required for any public works.

This would seem to let Govt. out but this are the words "subject to any lease or location" after "Crown land" and a lot may turn on the interpretation of that.

X

There was also a spot of bother in Nigeria where a met. prospector brought about the amendment of the minerals Ordinance to cover sand etc. (see 1922 Ordinance)

s.c.f. 57.

* i.e. whether the words "subject to.... location" simply qualify "Crown land" as as to mean "Crown land which is subject.... location" or import a new condition as as to mean that Govt. has power to remove but only subject to the terms of any lease, so that if a lease gave "all minerals" Govt. could be held to have assigned all rights.

To Sir A. Wade.

6/11
carb. s.c.

6 7 37

[Handwritten initials]

[Handwritten signature]

3. COLONEL C.E. PONSONBY, M.P. (S/O. TO. S/S) ..26.7.37.
Comments on Col. Brierley's grievance and requests
Acting Attorney-General be asked to reconsider his
decision.

DESTROYED UNDER STATUTE

To Col. Ponsonby (3 ackd).....29.7.37.

Re the reply to no 2 has been
received
297 10/9/37

Wait a
moment
C.E. Ponsonby
10/9/37

5 your dep 512
Reports on alleged grievances of Col. Brierley
states that an ex gratia grant of £100 has
been offered and refused.

6 Mr. Pilling
Refers to 5 and states that section 87 of
the Mining Ordinance does not apply in this case.

Sir G. Brooke

I mentioned this to you. The point is whether
I am not set up in the law. I know the law can't commit
a tort but could you draw up a claim for
removing rocks which wouldn't be a tort?
(The trouble appears to be the extravagant amount
of the claim)

Sir G. Brooke
15/9

As has been done in a report of Civil Case
No. 2,030
15/9

Sir G. Brooke

The Kenya Supreme Court Report
for 1936 have not yet been received
in Library, we have inquiries as
to whether they have been
sent to the Law Office

From what I can gather from this despatch
it would seem that the petition of right has not been
drafted very expertly, but I do not think that it
follows that merely because the petition asks for
damages because the Crown entered upon the land and
removed sand, the claim is necessarily made in tort.
That must depend surely upon whether it is going to
be alleged that the entry by the Crown was illegal.
Of course, if that is the allegation, it is a claim
for damages for tort; but if it is admitted, as I
think it must be, that the Crown entered legally
and took the sand legally, there may still be a
question as to whether there is not some common law
or statutory right to compensation, and in my view that
would not be a claim in tort. It is, indeed, almost
exactly what happened in the famous de Kyser Hotel
case.

I realise the Attorney General's difficulty
in view of the decision of some Judge in Kenya which
is clearly a wrong decision. We often grant a fiat a
demur, and the last time we did it successfully was
in the North Charterland case.

In my opinion what ought to be done is
this - they should grant the fiat, and if the Attorne
General still thinks that the claim is laid in tort
he should give notice that he will demur, and he
should demur. If the Court holds that he cannot

do that, he should appeal and get that branch of the law set right. Having done that, he can proceed with his demurrer upon which will be decided the question whether the claim is or is not laid in tort. If the Court finds that it is not, they will reject the demurrer and try the petition on its merits.

H/B 20.9.37.

Sir G. Buxle

I submit a draft in fear & trembling

S.G. Flood

Layne with the W.

H/B 21/9

Sir C. Bottomley

You should see so we may hear about this case s/o.

S.G. Flood

There is a great difference between the final words of para 2 & para 5 and Col. Ponsombly's "quite a considerable portion of Col. Ponsombly's farm". I think that this might be omitted to Sir Pilling's notice s/o - as the same time as the letter to Col. Ponsombly.

S.G. Flood

28/9/37

To Kenya Spts 5 amended

To Col. Ponsombly (s/o)

8th Oct 37

To H. Pilling (6 ansd) s/o

11.10.37

10. Colonel Ponsombly (s/o)

27.10.37

Acks (8) with comments

? Patsy Clerk White

J.P. Ponsombly 4/11

11. H.G. FILLING (S/O TO MR. FLOOD) 10.11.37.

Comments on the case.

12. GOV. KENYA 691 20.11.37.

States that the Attorney-Genl. is in full agreement with proposals contained in para 4 of (7) and indicates action taken.

No action required

? Patsy

Clerk White 26/11

J.P. Ponsombly 26/11

Sir G. Buxle

I expect you mentioned this to Mr Haragin.

He agrees with your view so that is all right, & we shall now see what view the Courts take

I would not stir up Col Ponsombly as he can do nothing about it and neither can we. But No 11 has its amusing side. The charge for 45 is however the amount mentioned in para 4 of NOS. ? Patsy: I will ask No 11

Col Ponsombly only dealt with the land that fell into the river

for layout Green

29/11

H/B 27/11

AIR MAIL

KENYA
No. 691



12.
GOVERNMENT HOUSE
NAIROBI
KENYA

20 November, 1937.

Sir,

2
/

With reference to your despatch No. 842 of the 2nd October on the subject of Colonel Brierley's claim against this Government, I have the honour to inform you that the Attorney General is in full agreement with the proposals contained in paragraph 4 of that despatch.

2. Messrs. Atkinson, Bown, Morrison and Ainslie have accordingly been informed that I am prepared to give my consent to the suit if their Client wishes to proceed with it, but that, if the suit is framed in tort, the Attorney General intends to enter a demurrer. So far, no reply has been received from this firm of Advocates.

I have the honour to be,

Sir,

Your most obedient, humble servant,

R Brooke-Popham

AIR CHIEF MARSHAL
GOVERNOR.

THE RIGHT HONOURABLE,
W. ORMSBY GORE, EC., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S.W. 1.

THE SECRETARIAT,

NAIROBI.

KENYA COLONY.

No. S/D/J&L.11/8/2/53

26th November, 1937.

Dear Flood,

Many thanks for your letter (No. 38323/37) of the 11th October about Colonel Brierley. You will see from a despatch which goes by the same mail as this letter that we are following the line of action suggested in the fourth paragraph of the Secretary of State's despatch No. 842 of the 2nd October, in dealing with his claim.

AS regards the point you raise in your letter about the amount of soil which fell into the river, the Public Works Department say that it would not be possible to prove, from a survey of the banks of the river at the present time, precisely how much soil may have fallen into the river as a result of the operations of the Department's workmen.

J. B. W. FLOOD, ESQ.,
COLONIAL OFFICE,
DOWNING STREET,
LONDON, S.W. 1.

As the matter appears now to be going to the Courts, it must be dealt with there and the onus of proof of the claim is upon Colonel Brierley and his agents. In this connection, it seems rather curious that Colonel Brierley's first claim on the 14th September, 1936, was for 36,125 square feet of soil valued at £622/10 and that his present one is for 2,615 square feet valued at £45.

Yours sincerely,

Spilling

240
R. 27
10
27th October, 1937.

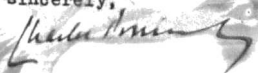
Dear Ormsby-Gore,

COLONEL BRIERLEY

8.
I am much obliged by your letter of the 8th October and all the trouble that your Office has taken to clear this matter up.

Obviously as legal questions are involved nothing more can be done at the moment, but I hope that some action may be taken such as taking the case to the Appeal Court in East Africa.

Yours sincerely,



The Rt. Hon. W.G.A. Ormsby
Gore M.P.,
The Colonial Office,
Downing Street, S.W.1.

C. O.

Mr. Flood: 10.37.

38323/37. Kenya.

Mr.

Mr.

Sir H. Moore.

Sir G. Tomlinson.

X Sir C. Battonley.

Sir J. Shuckburgh.

Permt. U.S. of S.

Parly. U.S. of S.

Secretary of State.

Semi-official for Mr. Flood's signature.



Downing Street.

11th October, 1937.

Dear Pilling,

Thank you very much for

your letter about Colonel Brierley's claim. As you say, the despatch makes the local situation quite clear and in our reply of the 2nd of October we are suggesting some further avenues for exploration. These questions of tort are, however, matters for the lawyers. There is, however, one point which I must bring to your notice.

Paragraph 2 of the despatch at the end of it says that no soil was taken off the farm but a small amount of soil fell into the river. Colonel Ponsonby, who has written to the Secretary of State about it, says that "Unfortunately,

the

DRAFT.

H. G. PILLING, ESQ., C.M.G.

2 drafts.

FURTHER ACTION.

the workmen employed by the Crown undercut the river banks with the result that a quite considerable portion of Colonel Brierley's land fell into the river and was washed away. "Colonel Brierley further contends that the removal of such a large amount of sand by the Crown was an interference with his concurrent right".

There is here a discrepancy which should be carefully cleared up when a reply is being returned.

Yours sincerely,

C. E. Ponsonby also says that

Yours sincerely,

(Sgd) J. E. W. Flood.

C. O.

Mr. Flood. 5 10.37.

Mr. Sir G. Buxton
Mr.

Sir H. Moore.

Sir G. Tomlinson.

X Sir C. Bottomley. 7.20

Sir J. Shuckburgh

Perm. U.S. of S.

Parly. U.S. of S.

Secretary of State.

to C. E. W. 8/10/37 p.

DRAFT.

COLONEL C. E. PONSONBY, M.P.

2 drafts.

FURTHER ACTION.

or on some other ground not sustained in law

Ans. (10)
38323/37. Kenya.

For the Secretary of State's signature.

Downing Street.

8th October, 1937.

Dear Ponsonby

You wrote to me on the 26th of July about the case of Colonel W. E. Brierley in Kenya. I have now received a report from the Governor and it appears that the matter is really one of considerable legal complication. The position is that the Court in Kenya some time ago gave a judgment to the effect that once the fiat for bringing a case against the Crown had been issued it was not open to the Crown to demur. Before that decision the practice had been that if the claim appeared to be (in tort) the

Attorney-General

Attorney-General would advise the grant of a fiat but would warn the applicant that

the Crown would enter a demurrer. In that case it would be open to the Court to hear arguments as to whether the claim was or was not based on tort and if it was not then to proceed to deal with the matter.

This course, which is I may say the usual one, would have been followed in the case now under consideration had it not been for this local judgment, and in view of that the Attorney-General appears to

have had no option but to refuse a fiat ~~as~~ if, as is the opinion in Kenya

at Brierley's
the claim is based on tort, since if a fiat is granted the local judgment

My advisers, however, are of

opinion that the Kenya Court decision is probably

bad in law and I have accordingly suggested that

steps should be taken to put it right, if

necessary taking a case to the Appeal Court

in East Africa. It may also be that the

claim is not in tort at all since in view of the

plain

*By this means the legal point
the question was decided
was decided by the Court.*

*prevents the Crown from
denouncing and a very
difficult legal position
problem at once arises.*

C. O.

Mr.

Mr.

Mr.

Sir H. Moore.

Sir G. Tomlinson.

Sir C. Bottomley.

Sir J. Shuckburgh.

Perm. U.S. of S.

Parly. U.S. of S.

Secretary of State.

DRAFT.

FURTHER ACTION.

plain language of the Kenya law the Crown has a right to enter and remove material, and there may still be some common law or statutory right to compensation, and cases have been argued in this country on such lines.

I have put all these points to the Governor and I fear that as legal questions are involved which may come before the Court I cannot do anything more on that aspect of it. I think, however, that I ought to tell you that in discussing the matter the Governor says that Colonel Brierley's claim is considerably exaggerated since the amount of materials mentioned in the complaint is far in excess of the amount actually taken. The figures in this connection are being checked. Also the Governor's information is that no soil was taken off the farm although a small amount fell into the river

during

owing to
having the undercutting of a portion of the
land. I notice that you say in your letter
that quite a considerable portion ^{of Colonel Brierley's land} fell into the
river and I am taking steps to have this
discrepancy brought to the notice of the
authorities in Kenya.

I cannot do anything more at the
present time, since the legal issues are really
rather complicated and involve questions of
important policy in regard to the rights of the
subject against the Crown. As you will see,
I am taking steps to have as much enquiry into
the facts as possible made, and I can only
hope that the case will be properly settled.

Yrs sincerely

(Signed) W. GRMSBY CORE.

C. O.

Mr. Hood 21/9.

Mr.

Sir G. Bush 22/9

Sir H. Moore.

Sir G. Tomlinson.

X Sir C. Bottomley. 22/9

Sir J. Shuckburgh.

Permt. U.S. of S.

Parly. U.S. of S.

Secretary of State.

(for conson)

DRAFT.

Kenya
70 S/2.
Governor

FURTHER ACTION.

Review for letter to
Col. Brierley

38323.



1937

Sir

I have the honour to ask the
rest. of your despatch No 512 of the 6th of
September regarding Colonel Brierley's claim
against the Govt. I note that the
Acting Attorney General has advised that
the claim was based on tort and, if that
view is correct, then I agree that
there is no option save to refuse a
fiat, in view of the local Court decision
that when a fiat has been granted the
Crown cannot demand.
2. Where I desire, however, to offer
a few comments in the hope of
helping to solve the difficulty. First
of all, while it seems clear that
the petition of right has not been

AIR MAIL

KENYA
No. 512



5
GOVERNMENT HOUSE
NAIROBI
KENYA

RECEIVED
13 SEP 1937
C. O. REGY

6 September, 1937.

38313

I have the honour to address you on the subject of an alleged grievance of a certain Colonel Brierley in connection with the action of the Public Works Department in taking sand from his land at Kombasa for Government purposes. Information has been received that action is being taken with a view to ventilating this grievance publicly in the United Kingdom.

2. Colonel Brierley is the owner of a piece of land at Diani, near Mwi, about sixteen miles from Kombasa, and holds the said land from the Crown, subject to the provisions of the Crown Lands Ordinance (chapter 140 of the Revised Edition of the Laws of Kenya) and any special conditions contained in the title.

In February, 1936, the Executive Engineer, Public Works Department, entered upon this land with workmen and removed therefrom sand and country rock for public purposes. These materials were required for building gun emplacements and barracks at Mombasa, and the action was taken under the provisions of section 77(4) of the Crown Lands Ordinance, which entitles the Crown to remove from land minerals mentioned in the Second Schedule to the Ordinance and required for a public purpose. Colonel Brierley's farm was the nearest

place/

THE RIGHT HONOURABLE
W. CRIMSBY GORE, P.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON. S.W. 1.

Forwarded ①

place from which, in the opinion of the Executive Engineer, sand suitable for making the gun emplacements could be obtained, and this sand was removed from the river which runs through Colonel Brierley's farm and also from the banks of that river. No soil was taken off the farm but a small amount of soil fell into the river owing to the undercutting of a portion of the bank.

3. In September, 1936, Messrs. Atkinson, Brown, Morrison and Ainslie, acting for Colonel Brierley submitted a claim for damages to the amount of £772.10.0 to the Executive Engineer, Mombasa, and the question of legal liability was referred to the Attorney General by the Director of Public Works. As the result of the Attorney General's advice Government denied all liability, but at the same time, having regard to all the circumstances of the case, offered Colonel Brierley an ex gratia payment of £10. This offer was refused.

4. In due course a plaint was presented under the Petitions of Right Ordinance (Chapter 17 of the Revised Edition) claiming the sum of £700 detailed as follows:-

2,000 tons of country rock	
@ Sh.4/75 per ton.....	2475/-
1,200 tons of sand @ Sh.	
3/- per ton.....	180/-
2,615 square feet of soil.....	45/-
	<hr/>
TOTAL	2700

In his plaint the suppliant did not plead breach of contract or that his rights under the Crown Lands Ordinance or under the grant had been infringed. He merely confined himself to a claim for damages because the Executive Engineer entered upon his land and removed

sand/

sand and country rock, and the Acting Attorney General advised that this was clearly an act in trespass and tort.

In Kenya Civil Case No. 14 of 1966 the Supreme Court decided that once the Governor's fiat has been granted the Crown cannot demur. Previous to this decision it had been the practice in this Colony for the Attorney General to advise the grant of a fiat, when the grant was framed in tort, but to warn the suppliant that the Crown would enter a demurrer. This practice was based on Robinson, Civil Proceedings against the Crown, 1908 Edition, page 379:-

"Practically equivalent to the grant of a qualified fiat is the course occasionally adopted by the Crown, whereby it grants the fiat absolutely, but at the same time warns the suppliant that the Crown will demur and that in the Crown's opinion the petition must fail".

In view of the recent decision of the Supreme Court the practice which it followed is no longer open to the Crown, and therefore, the Acting Attorney General had no option but to advise that the fiat should be granted in view of the fact that the claim was framed in tort. In returning the fiat, however, it was stated that the plaintiff be prepared to present a new fiat claim if it is clear that his claim was not based on tort, the new claim would be considered with a view to the fiat being granted.

3. No further representations by Colonel ... or on his behalf have been received and it has been observed that the door was not closed to the suppliant. If the suppliant is prepared to amend his claim to make it quite clear that he is not suing the Crown in tort, then a fiat will be granted, but the suppliant has, up to the present, chosen to avail himself of the fiat.

right, after notifying Colonel Brierley of its intention to enter and to pay compensation, if any, payable, entered upon Colonel Brierley's land for the purpose of obtaining large quantities of sand for building gun emplacements at Lombard and other public purposes. Unfortunately, the workmen employed by the Crown undercut the river banks with the result that a quite considerable portion of Colonel Brierley's land fell into the river and was washed away. Colonel Brierley further contends that the removal of such a large amount of sand, by the Crown, was an interference with his concurrent right.

In September 1936 Colonel Brierley sent in a formal claim for compensation. Considerable correspondence ensued from which at first it appeared that Colonel Brierley's claim would receive favourable consideration but ultimately the Crown denied all liability and offered Colonel Brierley an ex gratia payment of £10. This sum was quite inadequate to compensate Colonel Brierley for the damage done and on the 7th day of this year he lodged a petition of right. On the 19th May 1937, however, he was informed that the Acting Attorney-General had withdrawn his right to the issue of the petition.

26th July 1937

RECEIVED

12 AUG 1937

C. O. REGY.

Dear Brerley

I am writing to you on behalf of Colonel W.E. Brierley of Kenya Colony who considers that he has been treated in a somewhat high-handed manner by the Acting Attorney-General for that Colony.

Putting the matter very shortly the facts are as follows: Colonel Brierley is the lessee from the Crown of about 1000 acres of land some fifteen miles from Mombasa. Through part of it runs a tidal river in the banks whereof is a deposit of sand. Under his lease Colonel Brierley is given the specific right to win and remove sand. Under Section 77 (2) of the Kenya Crown Lands Ordinance No. 18 of 1925 the Crown has a concurrent right. This right can, however, only be exercised by the Crown without the lessee's consent if the sand is required for public purposes. Under Section 77 (3) it is further provided that the Governor may make rules providing for compensation to be payable in respect of damage suffered by a lessee through the exercise by the Crown of its said right.

In the early part of 1936 the Crown in exercise of its

right, after notifying Colonel Brierley of his intention to enter and to pay compensation, if any, payable, entered upon Colonel Brierley's land for the purpose of obtaining large quantities of sand for building gun emplacements at Messess and other public purposes. Unfortunately, the workmen employed by the Crown undercut the river banks with the result that a quite considerable portion of Colonel Brierley's land fell into the river and was washed away. Colonel Brierley further contends that the removal of such a large amount of sand, by the Crown, was an interference with his concurrent right.

In September 1936 Colonel Brierley sent in a formal claim for compensation. Considerable correspondence ensued from which at first it appeared that Colonel Brierley's claim would receive favourable consideration but ultimately the Crown denied all liability and offered Colonel Brierley an ex gratia payment of £10. This sum was quite inadequate to compensate Colonel Brierley for the damage he had suffered and on the 24th day of this year he lodged a petition of right. On the 18th May 1937, however, he was informed that the Acting Attorney-General had refused at his first to the issue of the petition.

2

21

Draft

C.D.
5 JUL
6 "

35-3/37.

6. July 1937.

Amidst

Dear Wade,

S. 27 g.c.

We have heard ^{officially} ~~from~~ ~~Schmitt~~ that a memorandum is on its way home with a view to ventilating publicly a grievance of a ^{case} Colonel Brierley in connection with the action of the Public Works Department in taking sand from his ground at Mombasa, for Government purposes. It seems that Colonel Brierley has submitted a petition of right to the Governor and that the Governor has refused his fiat. The Governor was, of course, acting on legal advice, but it would help us here when the memorandum arrives and might assist in avoiding publicity, if we could have the facts. We should be very glad, ^{in fact} if you would let us have a despatch. Section 87 of the Mining Ordinance ¹⁹³³ would appear to be in point but this may be a ^{dispute over it}.

Yours sincerely,

J. G. Hood

SIR ARMIGEL WADE, C.M.G., O.B.E.

C. O.

Mr. Grose Smith

Mr. *Phoskin*

Mr. *Flood* 2 of 5

Sir C. Parkinson

Sir G. Tomlinson

Sir C. Bottomley

Sir J. Shuckburgh

Permt. U.S. of S.

Parly. U.S. of S.

Secretary of State.

1/7/37

G.D.
R - 2 JUL
D 5

Semi-official for Mr. Flood's signature.

July, 1937.

DRAFT.

SIR ARMIGEL WADE, C.M.G., O.B.E.

Dear Wade,

We have heard from

Schwartz that a memorandum is on its

way regarding a complaint by a *in connection with* Colonel Brierley of the action of the

Public Works Department in taking sand from his ground *at Winton* for

Government purposes. It seems that

Colonel Brierley has submitted a

petition of right to the Governor

and that the Governor has refused his

flat. The Governor was, of course,

acting on legal advice, but it would

help us here when the memorandum

arrives and publicity starts, if we

could

Home with a view to ventilating publicly a grievance of

FURTHER ACTION.

It might assist in arriving

could have the facts. We should be

very glad, ~~if you would let~~ if you would let

us have a despatch.

Yours sincerely,



R-297 E

13
END

Mr. Flood.

Mr. Schwartz came to see me yesterday. He said that a Colonel Brierley has a house at Mombasa and the P.W.D. have taken sand from his ground forcibly for Government purposes. He consulted Mr. Atkinson, the well-known Nairobi lawyer, who advised him that he had a good cause of action against the Government. He accordingly submitted to the Governor a petition of right, and the Governor has refused his fiat. A memorandum is on its way home for the purpose of ventilating publicly this grievance. Mr. Schwartz suggests that before any publicity is given to the matter we should ask the Governor for the facts.

It seems to me that this might be a good thing to do because, as we have laid down many a time, a fiat should only be refused if the action is mischievous and vexatious, or clearly discloses no cause of action* (e.g. when it is a claim for tort against the Crown).

The

* not always
the

The Governor, of course, has done this on legal advice and, as the acting Attorney General is new, I should rather like to have a look at what has happened in advance of any publicity.

H/B 28.8.37.