



**REPUBLIC OF KENYA**

**High Court at Meru**

**Civil Appeal 5 of 2007**

**CYPRIANO KIMATHI MWONGO.....APPELLANT**

**VERSUS**

**CYPRIANO M'RARAMA MIKUA.....RESPONDENT**

**J U D G M E N T**

The respondent CYPRIANO M'RARAMA MIKUA through a plaint dated 20<sup>th</sup> November, 2003 sued the appellant CYPRIANO KIMATHI MWONGO seeking an order of specific performance of the agreement in the alternative payment of damages for breach of contract as stipulated in the agreement and refund of the purchase price with costs and interest. The respondent and the appellant entered into sale agreement dated 26<sup>th</sup> March, 2003 in respect of sale of ½ an acre out of land parcel No. NKUENE/MIKUMBUNE/1622 at an agreed purchase price of Kshs.540,000/= out of which sum the respondent paid Kshs.136,000/- to the appellant. It was term of the sale agreement that the appellant was to obtain consent from the relevant Land Control Board sign the transfer form in favour of the respondent on or by 30<sup>th</sup> April, 2003 and at the same time the respondent was required to pay the balance of purchase price of Kshs.439,000/- in default of which both the appellant and the respondent were to visit the advocates 'office and thereon the appellant was to refund to the respondent the entire consideration as at then paid. It was further term of the contract that in default of any clause and/or conditions therein the party in default was to pay to the innocent party Kshs.1,080,000/- being the liquidated damages for breach. The appellant did not obtain consent as of April,2003 and claimed in his defence that he received only Kshs.131,000/= from the respondent and not Kshs.136,000/-. The appellant averred that consent of the Land Control board for sub-division was issued to him but consent for transfer of the land to the respondent was not granted as the Land Control Board was not sitting. The appellant denied having breached the contract and having received demand notices.

The learned trial Magistrate after hearing both the appellant and the respondent found that the appellant deliberately failed to honour the agreement and was in breach of the agreement. The learned trial Magistrate found the respondent was entitled to liquidated damages for breach of agreement as spelt out in the agreement entered into between the appellant and the respondent. The trial court found the penalty sum of Ksh.1,080,000/= to be grossly unreasonable considering the consideration sum and reduced the sum to Kshs.270,000/- which is half the consideration sum and awarded the respondent the said sum as liquidated damages for breach of contract. The learned trial Magistrate also ordered the appellant to pay sum of Kshs.131,000/ being the refund of the purchase price paid to the appellant by the respondent as admitted in the appellant's defence. The trial court entered judgment in favour of the respondent against the appellant in the sum of Kshs.401,000/- together with costs of the suit.

The appellant being aggrieved by the trial court's judgment dated 4<sup>th</sup> December, 2006 preferred this appeal setting out 10 grounds of appeal in his Memorandum of Appeal being as follows:-

- 1. The learned magistrate erred in law in awarding General Damages for breach of contract, on a contract that was frustrated by circumstances beyond the control of the Appellant and the respondent herein.**
- 2. The learned Magistrate erred in law in failing to apply the doctrine of force majeure to the circumstances of the case before him.**
- 3. The learned Magistrate erred in law and fact and failed to apply the law of contract to the facts of the suit before him.**
- 4. The learned Magistrate erred in his interpretation as to the provisions of the Land Control Acts.**
- 5. The learned Magistrate erred in awarding Damages in a contract for the sale of land, that was vitiated by want of the requisite consent of the Land Control Board.**
- 6. The learned Magistrate erred in fact in finding that the appellant herein was liable, and further erred in disregarding the appellant's evidence as to the exacerbation of the existing problem, by the acts and omissions of the respondent (plaintiff before the trial court).**
- 7. The learned Magistrate erred and entered judgment under a misapprehension of fact, and arrived at a decision contrary to the totality of the evidence before him.**
- 8. The learned Magistrate erred in awarding an excessive sum by way of damages.**
- 9. The learned Magistrate erred in failing to lift all restrictions placed on the title in his judgment.**
- 10. The learned Magistrate erred in awarding costs to the respondent in the unique circumstances disclosed in the suit before him.**

On 8<sup>th</sup> March, 2012 both Counsel agreed that the appeal be determined by way of written submissions. The appellant filed his written submissions on 12<sup>th</sup> April, 2012 whereas the respondent filed his written submissions on 10<sup>th</sup> August, 2012.

The court has considered the submissions by both counsel. It has also considered the authorities in support of the respective arguments by both counsel. The court has also considered the pleadings, proceedings and judgment of the trial court.

The appellant's counsel has submitted on all the 10 grounds together and I propose to deal with the same all together and consider both the evidence and relevant law raised altogether.

There is no dispute in this appeal that both the appellant and the respondent entered into sale agreement dated 26<sup>th</sup> March, 2003 for sale of ½ an acre of an agricultural piece of land. The appellant in his defence admitted having received Kshs.131,000/- whereas in his evidence he averred he was paid Kshs.100,000/-. The appellant's counsel submitted that the appellant acknowledged receipt of Kshs.101,000/= and that respondent was unable to prove payment of Kshs.30,000 towards the appellant's bill. The counsel contended that the respondent ought to have produced receipt for the 30,000. The respondent in his evidence he testified that he went to the hospital and paid Kshs.30,000/- for the appellant's medical bill. Appellant in his evidence did not specifically deny that the respondent did not pay Kshs.30,000/- for his medical bill but stated the respondent paid only Kshs.100,000/- to him as part of the purchase price. The sale agreement under clause 1(a) (b) and (c) show that the appellant received Kshs.101,000/- and not Kshs.100,000/- as he claimed. The appellant's defence under paragraph 3 clearly points out that the appellant admitted having been paid Kshs.131,000/- and not Kshs.136,000/-. The appellant did not clearly in his evidence deny that he said he was paid Kshs.131,000/-. The appellant did not apply to amend his defence either verbally or through a formal application. A party in every suit is bound by its' own pleadings. I therefore find that the appellant through his own admission in the defence

received Kshs.131,000/- and he cannot now be heard to say otherwise or say the respondent ought to have produced receipt for Kshs.30,000/- paid for his medical bill. It is a common sense that medical bills are issued in the name of the patients and any receipt issued is in the name of the patient in respect of whom the bill is paid and usually the receipt is retained by the patient.

The contract as earlier on pointed out was over an agricultural parcel of land in which for any transaction to be valid it is required that consent of the Land Control Board be obtained within 6 months in default the transaction becomes null and void.

Section 6(1) (a) and 8(1) of the Land Control Act provides:

**6. (1) Each of the following transactions -**

**(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**

**(b)**

**(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**

**8. (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:**

When consent of the Land Control Board is not obtained within the stipulated period the purchaser is entitled to refund of the purchase price. section 7 of the Land Control Act provides:-

**7. “ If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”**

In the instant case there is no dispute that consent of the Land Control Board was not obtained by the agreed time though the appellant had commenced the process of excising ½ an acre from Land Nkuene/Mikumbune/622. The appellant averred that before transfer could be completed, all Land Control Boards were dissolved that the respondent became uncooperative. The failure to obtain consent of the Land Control Board within the stipulated period for whatever reason makes the sale agreement null and void.

In the case of KARIUKI –V-KARIUKI(1983) KLR 225 Court of Appeal held:-

**1. “ When a transaction is clearly stated by the express terms of an Act of parliament to be void for all purposes for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void.”**

The trial court in its judgment stated as follows:-

**The submissions by the defendant’s counsel that provisions of S.6(2) (b) of Cap.302 only provided for a refund clearly shows the intention of the defendant that he was not willing to transfer the land to the plaintiff from the beginning and cannot hide under any purported dissolution of the Board. Why then has he failed to do that which he ought to have done after the Board was reconvened.? He did not raise the issue of his sickness either in his statement of defence or evidence and no documents were**

***produced to support any such claim.”***

What the trial Magistrate stated herein above may be so or not but I do not agree or think that the clear words of the Act as to the necessity for consent to a controlled transactions such as this one could be ignored or overlooked without violating the Act. It is alright to already comment on laws which appear to be manifestly unjust but it is not fair for the court's to legislate.

In case of **HARAMBEE CO-OPERATIVE SAVINGS AND CREDIT LIMITED –V-MUKINYE ENTERPRISES LIMITED C.A. NO.25 OF 1981** Court of Appeal in adapting in part, the dictum of Mellish L.J in **EDWARDS-V-EDWARDS(1876) 2 CH.D** at page 297 stated as follows for the purpose of the appeal before it:-

***“The Act must be presumed to have been framed with recognition of equitable as well as legal doctrines. If the legislature says that a transaction is void of all purposes unless the consent of the relevant Land Control Board is given to it, how can a court say that although no consent has been given in certain circumstances it shall be valid?”***

In case of **NYAMUNYU –V-NYAGA(1983) KLR 282**, Madan, Potter and Kneller, JJA held:-

***“Specific performance cannot be claimed in respect of a dealing which becomes void and only recovery of the consideration paid under the agreement is allowed under section 7 of the Land Control Act.”***

Further to the above in the case of **MWANGI-V-MWENJATHI CIVIL CASE NO. 589 OF 1977 KNELLER, J**, as he then was stated:-

***“1. That the sale was void for all purposes because the Land Control Board had not given its consent within three months of the agreement hence specific performance cannot be ordered.”***

***2. That the plaintiff's entry into possession of the suit land was in furtherance of a void transaction and constitutes an offence under Section 22 of the Land Control Act.***

***3. That the plaintiff could only recover the purchase price as a debt.***

***4. That the plaintiff failed in his claim for improvements or mesne profits and must vacate the suit land.”***

The respondent countered the appellant's submission by relying on Article 10(2) (b) of the Constitution arguing that the court is enjoined when applying the law or interpreting the law to apply the values and principles of equity and justice inter alia. He also argued that Article 40 of the Constitution enjoins the Court to protect person's rights in property and argued that the appellant is using court to deprive the respondent the right to property being amount paid as consideration and the liquidated amount agreed in the agreement. He submitted that it is either the appellant cedes to the parcel of land he was selling to the respondent or he pays the amount awarded by court together with costs and interest.

The Land Control Act which deals with controlled transactions in respect of agricultural lands, such as in this case, is not against the principles of equity and justice. The Act must be presumed to have been framed with recognition of equitable as well as legal doctrines.

There is a good reason why the legislation says that transaction in which consent in not obtained is void for all purposes and intentions. In view of the foregoing I decline to venture further into this area but only to say principles of equity and justice were considered when legislation passed the Act. Further the issue was not raised by the appellant amongst his ground of appeal and I have noted that the appellant has not made any comment on the same, purely I believe as this was not one of the appellants ground of appeal.

The respondent further submitted that the appellant cannot take refuge on the shelter of the provision of

the Land Control Act(Cap.302)in dawn of the new Constitution and legal dispensation to defraud buyers of the land. That Article 159 of the constitution of Kenya 2010, it was argued requires that the Court in exercise of the Judicial authority to be guided by the principles of doing justice to all, administer justice without delay and undue regard to procedural technicalities and protect and promote provisions and principles of the Constitution. The Constitution of Kenya I note recognizes the Land Control Act as one amongst laws applicable in this county. The act is not unconstitutional nor has it been submitted before the lower court or this court how the Land Control Act can be said to water down the contents of Article 10 and 159 of the Constitution of Kenya 2010. Furthermore consent of Land Control Board is not a mere formality but goes down to the substance of the transaction on agricultural land and without it the transaction is null and void.

The respondent counsel argued that this appeal is incompetent and time barred as it was filed on 11/01/2007 against a judgment that had been delivered on 4<sup>th</sup> December, 2006 and without leave to file appeal out of time.

Under Order 50 rule 4 of Civil Procedure Rules 2010 it is provided:

***4.” Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time(whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:***

***Provided that this rule shall not apply to any application in respect of a temporary injunction.”***

In view of the above the time do not run between 21<sup>st</sup> December, of every year and 13<sup>th</sup> January of the following year. From 4<sup>th</sup> December, 2006 to 21<sup>st</sup>December, 2006 was 17 days. The appellant had 13 more days from 13<sup>th</sup> January,2007 to file the appeal. The appellant filed this appeal on 11/01/2007 within time. I find the appeal was filed within time and was not filed out of time. Court’s leave was not necessary in view of the above.

In view of the provisions of Section 7 of the Land Control Act I find that the respondent was entitled to refund of the consideration sum of Kshs.131,000/-. The respondent was not entitled to general damages for breach of contract.

The upshot is that the appeal is allowed and the trial court’s judgment is set aside and substituted as follows:-

***a. The appellant do refund to the respondent consideration of Kshs.131,000/- with costs with interest from 4<sup>th</sup> December, 2006.***

***b. Costs of appeal to the appellant.***

DATED, SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2012.

***J. A. MAKAU***  
***JUDGE***

**Delivered in open court in the presence of:-**

1. Mr. Kimathi And Ndongoro for appellant
2. Mr.C. Kariuki for respondent

***J. A. MAKAU***  
***JUDGE***