IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO.36 OF 2008

SAMUEL NDUNGU MUNGAI….....1ST APPELLANT
FRANCIS KIBANYA……...….2ND APPELLANT
FRANCIS MARIU MIGWI…....……..….3RD APPELLANT

VERSUS

SIMON NGUGI MUIGAI ……..……RESPONDENT

[An Appeal from the Judgment of Hon. S. M. Mungai, Principal Magistrate, in Nyahururu C.M.C.C.No.213 of 2006 dated 18th March, 2008]

JUDGMENT

The respondent in this appeal, Simon Ngugi Muigai filed a suit against the appellants, Samuel Ndungu Muigai, Francis Kibanya and Francis Muriu Migwi seeking a declaration that he (the respondent) is the registered owner of NYANDARUA/GILGIL WEST/14 (the suit property) and that the appellants' acts of interference with the suit property are illegal and void. The respondent also prayed for general damages, permanent injunction to restrain the appellants from interfering with the suit property and costs of the suit.

The appellants denied interfering with the suit property. Evidence was presented by the respondent that he is the registered proprietor of the suit property. The respondent applied twice to the Land Control Board for consent to subdivide the suit property. Each application was rejected by the board on account that the appellants' objection. The respondent testified that the appellants' parcels of land are several kilometers from the suit property; that the appellants did not give reasons for their objection. The respondent suspected that the objection was based on the misconception that he (the respondent) intended to sub-divide a school plot and a road of access. He maintained that the sub-division he sought was in respect of his own land – the suit property.

Testifying on behalf of the other appellants, the third appellant stated that they have in no way interfered with the suit property; that they never raised any objection before the Land Control Board against sub-division of the suit property.

It is common ground that the respondent is the registered proprietor of the suit property. The only question which fell for determination by the trial court and which is the question raised in this appeal is whether the appellants interfered with the suit property.

The learned magistrate found that since the appellants had failed to demonstrate that the respondent's suit property had encroached into the neighbouring property belonging to a school, then the respondent had proved his claim against the appellants. He proceeded to enter judgment in favour of the

respondent. The above reasoning is by all standards not logical.

It is the respondent who alleged that the appellants had interfered with the land control process by objecting to the grant of a consent to sub-divide the suit property. It was incumbent upon the respondent and not the appellants to prove his claims. The appellants were aggrieved and have challenged that decision in this appeal citing seven grounds which may be distilled thus:

a) that the learned magistrate shifted the burden of proof to the appellants

b) that the magistrate took into consideration extraneous matters

c) that the decision was against the weight of evidence and

d) that the cause of action was not disclosed

I have considered these grounds, the written submissions by both sides and hold the following view of the matter.

The basis of the respondent's claim was that the appellants had objected to the sub-division of the suit property and as a result the Land Control Board twice over rejected the respondent's application for consent.

While there is no doubt that the respondent was the registered owner of the suit property, there is no evidence whatsoever that the appellants have in any way obstructed him from sub-diving it. There is no evidence that two land control boards were convened, the business transacted by the board on 27th April, 2006 and on 25th May, 2006; nothing to suggest that the appellants were in attendance and objected; the nature of their objection and the decision of the board are unknown. There is no evidence that the respondent applied to the Land Control Board for consent.

In terms of **Section 8(1)** of the **Land Control Act**, an application for consent to the board must be made in the prescribed form. No such form was produced to demonstrate that indeed the respondent applied for consent. The application for consent must be accompanied by fees. No receipt to show payment of the fees was exhibited. No plan showing the manner of proposed sub-division was produced.

By dint of **Section 16(1)** of the Act, the decision of the board must be in writing, signed by the chairman. There was no written decision of the board. In the absence of all these essential nexus, it is inconceivable how the learned magistrate could arrive at the conclusion that the appellants had interfered with the sub-division of the suit property. The respondent explained that the objection was oral and the board was unwilling or refused to furnish the applicant with the decision.

I am not persuaded that the respondent who was represented by counsel was without a recourse to obtain the minutes of the board or call its secretary to testify.

Finally, **Section 8(2)** of the Act provides that the board can either give or refuse to give a consent. If it refuses or consents subject to the right of appeal, that decision is final and conclusive and cannot be questioned by any court. The Act makes elaborate procedure for the filing of applications, prosecution of those applications and the appellate process. The decision of the board is appealable to the Provincial Land Control Appeals Board. The decision of the Provincial Land Control Appeals Board is final and conclusive only subject to a further appeal to the Central Land Control Appeals Board. The decisions of all these bodies cannot be questioned in any court.

The role of the court in the controlled transaction is restricted by **Section 8(1)** to extension of time within which to apply for consent. Again it is only the High Court that can entertain an application for extension of time. The courts have repeatedly held that where a statute provides for a procedure, that procedure ought to be followed. In the **Speaker of the National Assembly** Vs. **the Hon. Njenga Karume**, Civil Application No.92 of 1992, the Court of Appeal said:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

For these reasons, this appeal succeeds and is hereby allowed with costs. The judgment of the lower court is set aside and respondent’s suit in the lower court dismissed with costs.

Dated, Signed and Delivered at Nakuru this 7th day of February, 2011.

W. OUKO
JUDGE