



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 93 OF 2010**

**RAMBEI OLE KURARU.....APPELLANT**

**VERSUS**

**M'IMAANA KIRUKU MUCHIRI.....RESPONDENT**

*(Being appeal against the judgment of H. N. Ndung'u, Senior Principal Magistrate in Nanyuki Senior Principal Magistrate's Civil Case No. 98 'B' of 2004 delivered on 29<sup>th</sup> April 2009)*

**JUDGMENT**

This judgment is the result of an appeal against the judgment of H. N. Ndungu, learned Senior principal magistrate, vide Nanyuki S.P.M.C.C. No. 98 'B' of 2004 delivered on 29<sup>th</sup> April 2009. The history of the dispute started when Rambei Ole Kuraru, the appellant herein, filed the plaint dated 11<sup>th</sup> August 2004 whereby he sought for judgment against M'Imaana Kiruku Muchiri, the Respondent herein, in the following terms:

- (i) An order to transfer to the Plaintiff 8 acres to be excised from the Defendant's land as L.R. NO. TIMAU/S.S./2.**
- (ii) Costs of the suit.**
- (iii) Interest at court rates.**

The Respondent filed a defence to deny the Appellant's claim. The suit was heard by Honourable H. N. Ndungu, learned Senior Principal Magistrate, who in the end dismissed the Appellant's claim and instead ordered the respondent to refund the Appellant Ksh.65,155/97. She also awarded the Appellant costs of the suit and interest. The Appellant was unhappy hence he was prompted to file this appeal.

On appeal, the Appellant listed the following grounds in his Memorandum:

- 1. That the learned Senior Principal Magistrate relied on a decision of this Court in *Hirani Ngaithe Githire –Vs- Wanjiku Munge* delivered on 16.2.1979 on the issue of application for consent of the Land Control Board within 3 months and failed to consider or to read Section 8 of the Land Control Act that consent be sought within 6 months.**
- 2. That the learned Senior Principal Magistrate erred in law and in fact by failing to consider fully the provisions of the Land Control Act.**
- 3. That the learned Senior principal magistrate erred in law and in fact by applying a 1979 decision of the High Court that had subsequently been rendered inapplicable by the amendment of the Land Control Act in 1980.**

4. ***That the learned Senior Principal Magistrate erred in law and in fact by considering a defence that had not been pleaded.***
5. ***That the learned Senior Principal Magistrate erred in law and in fact by considering matters that were not in evidence.***
6. ***That the learned Principal Magistrate erred in law and in fact by failing to distinguish between the making of an application for consent of the Land Control Board and the grant of such consent.***
7. ***That the learned Senior Principal magistrate erred in law and in fact by disregarding the fact that the Land Control Board for the area had granted the necessary consents.***
8. ***That the learned Senior Principal Magistrate erred in law and in fact by purporting to nullify consents duly granted by the Land Control Board.***
9. ***That the learned Senior Principal Magistrate erred in law and in fact by failing to consider admissions made by the respondent in his evidence.***
10. ***That the learned Senior Principal Magistrate erred in law and in fact by failing to hold that on the proper interpretation of the Land Control Act and the rules made there under consent of the Land Control Board was necessary only with regard to registered land.***
11. ***That the learned Senior Principal Magistrate erred in law and in fact by failing to consider or to consider fully that at the time the transaction was entered to the suit premises were in the process of acquisition by the Respondent from the Settlement fund Trustees, were not registered and that therefore Section 6 of the Land Control act did not apply to those premises by virtue of Section 6 (3) (b) of the Land Control Act.***
12. ***That the learned Senior Principal magistrate erred in law and in fact by considering only the date on which consent was granted and failing to consider the requirement of the Land Control Act relating to the time during which consent should be sought.***

When this appeal came up for hearing, the learned counsels recorded a consent order to have the appeal disposed of by written submissions. Before delving deeper into the merits or otherwise of the appeal, let me set out the brief facts of the case that was before the trial Court. The appellant's case was supported by the evidence of the Plaintiff (appellant) alone. In his evidence, Rambei Ole Kuraru (P.W. 1) told the trial Court that he bought some land from M'Imaana Kiruku Muchiri (respondent) three times i.e. on 17<sup>th</sup> January 1983, P.W. 1 stated that he entered into an agreement with the Respondent to purchase 5 acres for Ksh.32,500. He then paid a sum of Ksh.27,500 leaving a balance of Ksh.5000/= which he duly settled in February 1983. P.W. 1 produced receipt showing he paid Settlement Fund Trustee a sum of Ksh. 17,500/= using the Respondent's name. P.W. 1 said he entered into another sale agreement with the Respondent on 18.4.83 to buy 1 acre at a cost of 6,000/= which he settled by giving the respondent 15 goats worth Ksh.3000 and the remainder by cash. On 12<sup>th</sup> February 1985, the Appellant entered into another agreement with the Respondent to purchase 2 acres at Ksh.10,000/=. In the latter transaction, the Appellant settled the consideration by installments and that by 2<sup>nd</sup> September, 1985 he had paid a total sum of Ksh.9,400/= leaving a balance of Ksh.600/=. The Appellant said he made an overpayment of Ksh.17,500/= which he paid to the Settlement fund Trustee on behalf of the Respondent. In total the appellant said, he purchased 8 acres. The appellant said he obtained consent for the transfer of 6 acres on 3<sup>rd</sup> November 1983. On 3<sup>rd</sup> April 1986 the Appellant obtained consent to transfer to himself 2 acres. P.W. 1 further produced documents showing he obtained consent from the relevant Land control Board for transfer of 8 acres on 7<sup>th</sup> November 1991, but unfortunately the Appellant could not get title because the respondent had not been issued with a title deed. He claimed he was told by the Land Board to wait until titles are issued. The appellant claimed he was shocked when he did a search to learn that the Respondent had picked his title from the land office on 21<sup>st</sup> October 2003. The Appellant said he was prompted to file the suit when the Respondent refused to transfer the land to him.

The Respondent (Defendant) also testified without summoning the evidence of independent witnesses. M'Imaana K. Muchiri (D.W. 1) admitted before the trial court that he sold land measuring 2 acres to the Appellant on dates he could not remember. The land is said to be situate in Timau Settlement Scheme. He denied having sold to him 6 acres. He said he was ready to refund the appellant money meant for the purchase of six acres. The Respondent further admitted that the Appellant paid on his behalf Ksh. 17,500/= being the outstanding loan due to the Settlement Fund Trustee. The Respondent said he gave the

appellant two (2) acres as consideration. The Respondent further stated that the appellant resides on the two acres. He denied ever visiting the Land Board to obtain consent. In cross-examination, the Respondent admitted having visited the offices of Gitobu Manyara Advocate to execute an agreement to sell 5 acres to the appellant. He also admitted having visited the offices of Ole Kaparo & Waweru Advocates where he executed an agreement to sell 2 acres to the Appellant. He told the trial court that he was not willing to transfer six (6) acres to the appellant because if he does so his family will miss where to cultivate.

The learned Senior Principal Magistrate considered the evidence and came to the conclusion that the transactions which were stated to have taken place by the Appellant indeed were true. The learned Magistrate found as a matter of fact that the Respondent executed agreements to sell land and even visited Land Control Board on four occasions to obtain the necessary consents. She came to the conclusion that the transactions were null and void under *Section 6 (1) and (2)* of the Land Control Act. The learned Senior Principal Magistrate then proceeded to dismiss the Appellant's suit. She, however, ordered the Respondent to refund to the appellant Ksh.65155/97.

Let me now go back to the Appeal. The record shows that the Appellant has put forward twelve (12) grounds of Appeal. In my view those grounds may be summarized to one main ground that is to say whether or not the transactions undertaken by the parties to this dispute was null and void under *Section 6 (1) and (2)* of the Land Control Act? There is no dispute that the saga herein involved the sale of land. There were three agreements namely:

- (i) Agreement dated 17<sup>th</sup> January 1983 – in respect for the sale of 5 acres.
- (ii) Agreement dated 18<sup>th</sup> April 1983 – in respect for the sale of 1 acre.
- (iii) Agreement dated 12<sup>th</sup> February 1985 – in respect for the sale of 2 acres.

The evidence also shows that the parties obtained 3 consents for the above transactions as follows:

- (i) On 3<sup>rd</sup> November 1983 for the transfer of six (6) acres.
- (ii) On 3<sup>rd</sup> April 1986 for the transfer of 2 acres.
- (iii) 7<sup>th</sup> November 1991 for the subdivision of the parcel known as Timau/2 into two portions measuring 8 acres and the balance.

From the evidence presented, it would appear the consent given on 3<sup>rd</sup> November 1983 covered the sale of six acres by the first two agreements (i.e. of 17<sup>th</sup> January 1983 and 18<sup>th</sup> April 1983). The consent of 18<sup>th</sup> April 1986 covered the sale of 2 acres contained in the agreement of 3<sup>rd</sup> April 1986. There are two scenarios which have presented themselves in this dispute. The first scenario is in respect of the first two agreements. I have already stated that the first agreement was entered into on 17<sup>th</sup> January 1983 for the sale of 5 acres whereas the second agreement was executed on 18<sup>th</sup> April 1983. The Land Control Board consent to cover the two transactions was given on 3<sup>rd</sup> November 1983. Before then, the law required under *Section 6 (1)* of the Land Control Act that an application for consent must be made within three (3) months after the making of the agreement. That provision was later amended to increase the period to six (6) months (see *Section 8 (1)* of the same Act). The law is quite explicit that unless the application is made within the prescribed period, the agreement becomes void. It is apparent that the application for consent presented to the Land Control Board was not dated. This court cannot therefore state whether or not the application for consent was made within the period prescribed. For the sake of argument, I will treat the first agreement as having been combined with the second agreement so that the date of the agreement can be said to be 18<sup>th</sup> April 1983. Therefore the law required the parties to the transaction to apply for consent within 6 months i.e. latest by 18<sup>th</sup> October 1983. I will assume that the application was made by 18<sup>th</sup> October 1983. The evidence shows that the Land Board considered and approved the application on 3<sup>rd</sup> November 1983. It cannot in the circumstances of this case, therefore be said that the application for consent was made out of time. Even if for a moment it is said that the application was made outside the prescribed period, I doubt whether the court had power to question the Land Control Board's decision to grant the consent. My holding is fortified by the provisions of *Section 8 (2)* of the Land Control Act which expressly states that the decision of the Board shall be final and conclusive and shall not be questioned in any court. On this ground, I am of the view that the learned Senior Principal

Magistrate fell into error. She also fell into error when she failed to note that the prescribed period was six months under *Section 8 (1)* of the Land Control Act. Previously the period for a party to apply for consent was fixed to three months from the date of agreement, but the law was amended in 1980 to extend the period from three (3) months to six months.

The second scenario relates to the third agreement which was made on 12<sup>th</sup> February 1985 for the sale of two acres. Consent to transfer the two (2) acres was given on 3<sup>rd</sup> April 1986. Again, the application for consent was undated. What is obvious is that the Land Control Board met, considered and approved the undated application for consent on 3<sup>rd</sup> April 1986. I will deal with this scenario in the same way I used in the first scenario. The parties to the agreement were required to apply for the Land control Board consent within 6 months from the date of the agreement. The application in the second scenario should have been made latest by 12<sup>th</sup> August 1986. I have already stated that the application for consent was undated. Therefore the same could have been made within or outside the prescribed period. The crucial issue here is that the law does not prescribe the period within which a Land Control Board should consider the application for consent. In this case consent was granted. No appeal has been preferred as envisaged under *Section 8 (2)* of the Land Control Act. In the circumstances, the decision to give consent cannot be questioned in any Court of Law.

In the end and on the basis of the above reasons, the appeal is allowed. The judgment of the learned Senior Principal Magistrate delivered on 29<sup>th</sup> April 2009 is set aside and is substituted with an order entering judgment in favour of the Plaintiff (Appellant) and against the Defendant (Respondent) in the following terms:

- (i) The Defendant (Respondent) is ordered to transfer to the Plaintiff (Appellant) Eight (8) acres to be excised from Plot No. 2 Timau Settlement Scheme, Nanyuki now known as L.R. No. Timau/S.S/2 within 30 days from the date of this judgment. In default the Deputy Registrar of this Court is authorized to execute the necessary documents to effect the transfer.***
- (ii) The Defendant (Respondent) is directed to give vacant possession of the above mentioned portion measuring Eight (8) acres within 30 days and in default the Plaintiff (Appellant) will be at liberty to forcefully evict the respondent at the respondent's cost.***
- (iii) The Defendant (respondent) is ordered to pay costs of the appeal to the Plaintiff (Appellant).***

***Dated and delivered at Nyeri this 23<sup>rd</sup> day of September 2011.***

**J. K. SERGON  
JUDGE**

In open court in the presence of Kinoti holding brief Wanjohi for the Appellant an Chweya holding brief Ombachi for Respondent.