



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

Criminal Appeal 78 of 2004

WACHIRA KINGURU APPELLANT

VERSUS

KARUKU GICHIRA RESPONDENT

(Appeal from the original Judgment of the Senior Resident Magistrate's Court at Karatina

in Civil Case No. 112 of 2002 dated 3rd September 2004 by Mr. J. N. Nyaga – SRM)

J U D G M E N T

I must begin this judgment by saying that this appeal exemplifies and vividly captures the unmitigated hardships and injustice that the application of certain provisions of the Land Control Act has occasioned to parties. I am not the first person to express such reservations and misgivings regarding the applicability of the said Act. I am certain I will not be the last one as long as the Act remains in operation in its current form. As long ago as on 23rd April 1982, Madan JA. said in the case of Ngobit Estate Ltd. v/s Carnegie (1982) KLR 437 “..... This case once again demonstrates the tyranny which the draconian provisions of the Land Control Act could inflict upon an innocent party” In the same case, Potter JA expressed himself thus on the same issue. “..... The case of the respondent Plaintiff’s unhappily founders on the merciless rock of the land control Act. In the appeals which come before this court in which the land Control Act is involved, it is invariably the case that the Act is not being relied upon by a party in order to fulfil the intended purpose of the Act but by a vendor of an interest in land in order to deprive the purchaser of the benefit of his contract.....” Later on in the case of Kariuki v/s Kariuki (1983) KLR 225 Law JA, expressed him self on the subject in these words “..... This appeal vividly illustrates the injustice that so often flows from the operation of the Land Control Act” And in the case of Karuri v/s Gituru (1981) KLR 247, Madan JA again said “..... The provisions of Land Control Act are of an imperative nature, there is no room for the application of any doctrine of Equity to soften its harshness

The provisions of the Land Control Act being faulted are of course sections 6, 7, 8 and 9 (2) of the said Act. They provide as follows:-

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) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;
- (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.

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) This section does not apply to –

(a) the transmission of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles;

or,

(b) a transaction to which the Government or the settlement Fund Trustees or (in respect of Trust land) a county council is a party..

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 who it was paid, but without prejudice to section 22.

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:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

(2) The land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.

(3) For the purposes of subsection (1), an application shall be deemed to be made when it is delivered to the authority prescribed in the manner prescribed.

(4) An application under subsection (1), shall be valid notwithstanding that the agreement for the controlled transaction is reduced to writing, or drawn up in the form of a legal document, only after the application has been made.

9. (2) Where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void –

(a) on the expiry of the time limited for appeal under section 11;

or

(b) where an appeal is entered under section 11 and dismissed, on the expiry of the time limited for appeal under section 13; or

(c) where a further appeal is entered under section 13 and dismissed, on that dismissal.

The courts over time have interpreted the aforesaid provisions to mean that where an agreement involving a controlled transaction under the act, no consent to the transaction is obtained from the relevant land control board within the stipulated period, renders the agreement null and void and order of specific performance cannot issue. No general or special damages are recoverable either in respect of a transaction which is void for want of consent from land control board and the only remedy open to a party to such a transaction which has become void under the land control Act is to recover any money or consideration paid in the course of the transaction as a debt. No compensation for improvements is recoverable either in addition to the money or other consideration paid in the course of a transaction which has become void as aforesaid. If a party enters into possession of a controlled tenancy that has been avoided by section 6 and remains in possession in furtherance of a void transaction, he

commits an offence punishable under section 22 of the Act.

See generally Karuri v/s Gituru (1981) KLR 247, Kariuki v/s Kariuki (supra), Simiyu v/s Watambula (1985) KLR 852, Njamuyu v/s Nyaga (1983) KLR 282, Mwangi v/s Mwenjathi (1981) KLR 400 and Ngobit Estate Ltd v/s Carnegie (supra).

How do the aforesaid propositions of law impact on the circumstances of this appeal? The appellant from the facts of the case as presented before the Senior Resident Magistrate at Karatina, was the defendant whereas the respondent was the plaintiff. The respondent sued the appellant seeking an order that the appellant do subdivide and transfer to him 3.0 acres of land out of his land parcel No. Kiine/Thingirichi/347. The respondent claimed that on or about 22nd January, 2002 they had entered into an agreement wherein the appellant had agreed to subdivide his aforesaid parcel of land and transfer 3.0 acres to the respondent. The consideration under the said agreement was that earlier on the appellant had sold his land parcel aforesaid to one Esther Njeri and received the purchase price. However he had failed to effect the necessary transfer and as a consequence was successfully sued by the said Esther Njeri. She proceeded to obtain a decree. In the process of executing the decree against the appellant, the appellant approached the respondent who is his brother and proposed that the respondent should transfer his whole land parcel number Kiine/Thingirichi/332 to Esther Njeri. In return he would give off 3.0 acres from his parcel of land No. Kiine/Thingirichi/347 and transfer the same to the respondent. The respondent agreed, hence the agreement. The respondent performed his part of the agreement and transferred his whole parcel of land aforesaid to Esther Njeri. The appellant in turn put the respondent in possession of 3 acres of suit premises where the respondent resides to date. However the appellant has since refused to have the 3.0 acres formally excised, transferred and registered in the name of the respondent and hence the suit.

In his defence, the appellant denied that he had refused to subdivide the suit premises. He claimed that it was the respondent who had refused to comply with certain issues that had been raised by the appellant with regard to the transaction. That the respondent brought a private surveyor to subdivide the said piece of land despite the fact that it was a subject of a boundary dispute which ought to have been solved by the District land Registrar or by a court order. The appellant had no objection to the land being subdivided by the District land Registrar or a court order. In nutshell therefore the appellant was not disputing the respondent's claim to a portion of the suit premises. His point of departure was logistical.

This then was the claim that came up for hearing before the learned magistrate. The learned magistrate having listened to the evidence of the respondent, his one witness Esther Njeri and the appellant, the evidence being mere regurgitation of what had been set out in the plaint and defence and which I have endeavoured to summarise as above found for the respondent in the following terms.

“..... It is the defendant who refused to accompany the Plaintiff to the Land Control Board. He cannot refuse to go to the land control board and take advantage of Section 8 of the Land Control Act. Equity will not support that. The submission is thereby rejected. The Plaintiff has proved his case on a balance of probabilities. The defendant is hereby ordered to transfer 3.0 acres to the Plaintiff from Land parcel No. Kiine/Thingirichi/347”

It should be noted that in his written submissions, the appellant had raised the issue of failure to obtain the necessary consent from the appropriate land control board.

Be that as it may, the aforesaid holding has provoked this appeal. In a memorandum of appeal drawn by Kimwere Josephat & Co. Advocates, the appellant rubbishes the judgment of the learned magistrate on the following grounds.

1. The learned lower (sic) resident magistrate erred in law by holding that the Section 8 of the land control act Cap. 302 Laws of Kenya was not applicable in this case.
2. The learned resident magistrate erred in law by failing to consider that the whole transaction was governed by Land Control Act Cap 302 Laws of Kenya and as specific performance cannot be ordered once provisions of the said act have not been complied.

3. The learned magistrate erred in law by failing to order that the respondent should have either prayed for land or its equivalent in money and failure to make such a prayer rendered the suit.
4. The learned magistrate failed to consider the evidence produced in a judicious manner.
5. The magistrate erred in law and in fact by failing to adjudicate that the evidence produced was not enough to support judgment in favour of the respondent.
6. The learned magistrate findings were not supported by the evidence on record.
7. The learned magistrate misinterpreted the construction and compliance of the Land Control Act Cap 302 Laws of Kenya.
8. The proper procedure was not followed resulting in a miscarriage of justice.

At the hearing of the appeal Mr. Kimwere and Mr. Kamwenji respective learned counsels for the appellant and respondent agreed to have the appeal argued by way of written submissions. Subsequent thereto they filed their written submissions and cited several authorities which I have carefully read and considered.

This is a first appeal. That being the case, I am required to subject the evidence tendered before the trial court to fresh scrutiny so as to reach my own decision with the usual caveats see *Peters v/s Sunday Post* (1958) E.A. 423, *Mwangi v/s Wambugu* (1984) KLR 453.

In my view this appeal can easily be disposed off on two twin issues; whether consent to the transaction was necessary; if yes, consequences of failure to obtain the same.

The land control Act, Section 6 (1) thereof makes it mandatory that land control board for the land control area or division in which the land is situated must give its consent to the following transactions regarding the land; “..... the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with agricultural land which is situated within a land control area” Failure to obtain such consent within the stipulated period of time renders the transaction void.

The respondent’s claim was based on both exchange and partition. As already stated the appellant had sold his land to Esther Njeri but failed to transfer the same to her. She sued him and his property was proclaimed by auctioneers. The appellant approached his brother, the respondent to come to his rescue. The respondent offered to transfer his land to the said Esther Njeri on condition that the appellant would transfer in return a portion of his suit premises measuring 3.0 acres to the respondent. The respondent delivered on his part of the bargain whereupon the appellant put him into possession of the 3.0 acres of his suit premises. However the appellant refused to move a step further and have that portion transferred and registered in the name of the respondent. The respondent on insisting that the appellant should have the land subdivided and portion thereof transferred to him in exchange for his land that he had transferred to Esther Njeri at the instigation of the appellant brought the transaction contemplated directly under the provisions of the Land Control Act. It would appear that the parties were well aware of the requirement that consent of the relevant land control board was necessary. That would explain the respondents answer that “..... The defendant refused to accompany me to the land control board” when being cross-examined by Mr. Kimwere during the trial. That being the case the land transaction involving the appellant and respondent was a controlled transaction under the land control Act. A consent of the relevant land control board to the transaction was therefore absolutely necessary. No such consent having been obtained the transaction became void. On the authorities cited at the beginning of this judgment, the remedy for specific performance claimed by the respondent in the plaint was not available to the respondent. Specific performance cannot be claimed in respect of a dealing as this which has become void and only recovery of consideration paid if any under the agreement is allowed under section 7 of the Land Control Act. The plaint as filed by the respondent had no such alternative prayer. That being the case the learned magistrate fell into error in ordering specific performance.

Of course, I can well appreciate where the learned magistrate was coming from. Here is a brother who enlists the support of his brother to get him out of a tight spot on a particular understanding. However once the burden is eased from him, the appellant turns around and does a dishonourable thing. He blatantly violates the agreement and thereafter seeks refuge in the provisions of the land control Act. The fact that his brother gave out to Esther Njeri the only land he had and has no other land to go to does not bother him or sway his heart or conscience to do the right thing. Obviously the learned magistrate was driven to do substantive justice to the parties herein. He invoked equity to come to the aid of the vulnerable respondent. However as already stated the provisions of the Land Control Board Act are of an imperative nature, there is therefore no room for the application of doctrines of equity to soften its harshness.

In the Ngobit case, Potter J.A. in an obiter dictum said the following with regard to the interpretation of statute law with special reference to the land Control Act.

“..... The function of the judiciary is to interpret the statute law, not to make it. Where the meaning of a statute is plain and unambiguous, no question of interpretation or construction arises. It is the duty of the judge to apply such a law as it stands. To do otherwise would be to usurp the legislative functions of parliament

The position appears as regards the interpretation of the Land Control Act to be that the same should be interpreted in a plain manner notwithstanding the tyranny which the draconian provisions inflicts to an innocent party such as the respondent herein.

The respondent has argued that the appellant having substantially admitted the respondent's claim in the plaint, he is estopped from resisting the respondent's claim. A simple answer to this submission is that Estoppel is not available to the respondent under the provisions of the Land Control Act and the interpretation to be given.

The respondent has also submitted that because there was part performance of the agreement by the respondent, then specific performance should be ordered. Again in the absence of the consent of the land control board to the transaction, specific performance cannot be ordered notwithstanding the part performance of the agreement by the respondent. The agreement became void and unenforceable.

Finally the respondent has in his submission invoked the doctrines of Equity. That the appellant has come to court without clean hands as opposed to the respondent. That he who comes to equity must come with clean hands. I have addressed the issue of Equity elsewhere in this judgment. I need not repeat the issue here. Suffice to say that doctrines of equity are inapplicable in the circumstances of this case.

I am however not without sympathy for the respondent who has been rendered landless by the misguided and nevarious actions of his brother. However my sympathy is no substitute for the law. I do not think however that the case of the respondent is that hopeless. He could apply to the president under section 24 of the land control board for exemption from the requirement for land control board consent in respect of the transaction of transfer, partition and or exchange of land parcel Kiine/Thingirichi/347, the subject matter of the suit leading to this appeal.

Otherwise I allow the appeal and set aside the judgment and decree of the learned magistrate and substitute therefor an order dismissing the respondent's suit in respect thereof. In view of the circumstances obtaining and the fact that the protagonists are brothers I will make no order as to costs in this appeal as well as in the subordinate court.

Dated and delivered at Nyeri this 30th day of June 2008

M. S. A. MAKHANDIA

JUDGE

Delivered by Hon. Lady Justice Kasango this 30th day of June 2008

MARY KASANGO

JUDGE