



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAKURU**

**CIVIL MISC APP 261 OF 2006**

**SAMUEL KIMANI MAIGUA.....APPLICANT**

**VERSUS**

**SIMON NJOROGE KARIUKI.....RESPONDENT**

**RULING**

The applicant, Samuel Kimani Maigua brought this Notice of Motion under the provisions of **Section 8** of the **Land Control Act (Cap.302 Laws of Kenya)** seeking the order of this court to extend time within which he can apply for the Land Control Board consent from the Bahati Land Control Board. The grounds in support of the application are stated on the face of the application. The applicant states that he purchased from the respondent, Simon Njoroqe Kariuki, a portion of land measuring three acres out of parcel No.LR.6746/15 Nyathuna – Bahati at a purchase consideration of Ksh.630,000/=. The applicant paid the sum of Ksh.440,000/=. He states that the respondent made it impossible for the consent to be obtained from the said Land Control Board since he owed land rents. The applicant complained that the respondent had made several promises that he would attend the Land Control Board to enable the requisite consent to be obtained but had failed to do so. The applicant reiterated that the reasons for the delay in obtaining the requisite consent of the Land Control Board were beyond his control. He urged this court to grant extension of time to enable him obtain the said consent. The application is supported by the annexed affidavit of the applicant.

The application is opposed. The respondent filed grounds in opposition to the application. He stated that the application was incompetent and bad in law. He further stated that this court lacked jurisdiction to grant the orders sought by the applicant. He stated that the orders sought by the applicant would be in vain since the respondent could not be compelled to attend the Land Control Board if he did not wish to.

At the hearing of application, Miss Njoroqe for the applicant reiterated the contents of the application and the supporting affidavit. She submitted that the applicant and the respondent entered into an agreement for the purchase of an agricultural land on the 20<sup>th</sup> June 2005. Consent of the Land Control Board was required to be obtained within six months of the said agreement. She submitted that, although the respondent made several promises that he would attend the Land Control Board, the period in which the said consent would have been obtained expired before the said consent was secured. Miss Njoroqe maintained that the respondent had been deliberately evasive in refusing to attend the Land Control Board. She urged the court to allow the application for extension of time to enable the applicant apply for the consent from the Bahati Land Control Board.

Mr. Kimatta for the respondent opposed the application. He submitted that the only remedy available to the applicant was to seek a refund of the purchase consideration. He maintained that even if this court

were to extend time, the respondent would not and could not be compelled to attend the Land Control Board. Mr. Kimatta referred this court to several decided cases both of the High Court and the Court of Appeal which were to the effect that the Land Control Board cannot be ordered by the court to grant consent. He submitted that the agreement entered between the applicant and the respondent was a voluntary contract. It had become apparent that the respondent had backed out of the said agreement. He urged the court to disallow the application.

I have carefully considered the rival submission made before me by Miss Njoroge for the applicant and by Mr. Kimatta for the respondent. I have also read the authorities relied on by Mr. Kimatta in support of the respondent's opposition to the application. The issue for determination by this court is whether the applicant established a case to enable this court extend time to enable him obtain the requisite consent of the Land Control Board. The applicant made the application under the provisions of **Section 8 (1)** of the **Land Control Act** which provides that;

***“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.”*

In the present application, it was apparent that the respondent was unwilling to appear before the Bahati Land Control Board for the purposes of applying for consent to give effect to the Land Sale agreement entered between himself and the applicant. The respondent's reluctance to attend the Land Control Board appears to be motivated by the fact that the respondent is angling for a purchaser who would pay him a higher purchase consideration. For all intents and purposes, it appears that the respondent does not intend to give effect to the said agreement for the sale of the three acres of land. The respondent's action amounts to constructive rescission of the contract.

What can the applicant do in the circumstances where it appears that a vendor is no longer willing to attend the Land Control Board to secure the consent of the said board to a controlled land transaction? In the case of the applicant, he has chosen to apply to this court to extend time to enable him obtain the consent of the Bahati Land Control Board. The applicant has however not annexed a copy of the application made to the said land control board to enable it grant the said consent sought. Such an application to the Land Control Board must be signed by the vendor and the purchaser. In the present application, there is no evidence that the respondent signed an application to be presented to the Bahati Land Control Board so that the said board can grant consent to the said sale transaction. This court wonders of what use the extension of time would be to the applicant if the respondent is unwilling to attend the Land Control Board to enable the said board can grant consent. This court cannot compel the respondent to attend the said Land Control Board. The position that the applicant finds himself in is similar to the position that the plaintiff found herself in the case of **Elizabeth Cheboo vs Mary Cheboo Gimnyigei CA. Civil Appeal No.40 of 1978 (unreported)**. The Court of Appeal in that case held that the High Court did not have jurisdiction to extend time to enable a purchaser obtain consent where the vendor was unwilling to attend the Land Control Board. Madan JA, observed at page 2 of the judgment that;

***“This being a transaction affecting agricultural land, the plaintiff was unable to apply for consent of the land control board concerned as required under Section 6 of the Land Control Act because the defendant also refused to sign the necessary application form for consent. The transaction became void under Section 6(2).”***

In **Munyororo vs Murage [1988] KLR 180**, the Court of Appeal held that the High Court could not extend time to validate a consent of the Land Control Board which was granted after the expiry of the period stipulated by law. The Court of Appeal lamented that unlike the provisions of the **Limitation of Actions Act (Cap. 22)** which provided instances under which the court could extent time, in the case of applications made to the Land Control Board, the period which a person was under disability was not a

consideration.

In the circumstances of this application therefore, it is clear that the application by the applicant cannot be allowed. This court cannot issue an order in vain. The respondent has not signed the application for the grant of consent by the Land Control Board. He is unwilling to attend the said Land Control Board. His conduct since he entered into the agreement for the sale of the parcel of land in question is consistent with that of a person who was no longer willing to continue with the sale transaction. This court cannot compel him to attend the Land Control Board. Even if this court were to grant extension of time, the probability that the respondent would attend the said Land Control Board is remote. The only remedy available to the applicant is to file a suit for the refund of the purchase consideration as provided for by **Section 7** of the **Land Control Act**. I sympathise with the situation that the applicant finds himself in. There is nothing this court can do to ameliorate his situation in the face of clear provisions of the law.

I will therefore dismiss the application filed by the applicant herein. In the circumstances of this case, I will make no orders as to costs since it was the respondent who brought the existence of the situation that the applicant is now wallowing in.

It is so ordered.

**DATED at NAKURU this 7<sup>th</sup> day of December 2007**

**L. KIMARU**

**JUDGE**