



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Civ Case 487 of 2005

**IN THE MATTER OF AN APPLICATION BY ENKASITI FLOWER GROWERS LIMITED
UNDER SECTION 8(1) FOR EXTENSION OF THE PERIOD TO MAKE AN APPLICATION
FOR CONSENT IN RESPECT OF A CONTROLLED TRANSACTION TO THE
KAKUZI/THIKA LAND CONTROL BOARD**

RULING

By originating motion dated 11.04.05 and filed the same day brought under section 8 (1) of the Land Control Act (Cap.302), Enkasiti Flower Growers Ltd applied for an order that the period for making an application to the Kakuzi/Thika Land Control Board regarding the transfer of L.R. No.1087/1 Title I.R. 58576 containing 32.74 hectares situate in Gatanga Road, Thika in the Thika County Council be extended until expiry of 21 days from the date of the order sought, or such other order as the court may consider appropriate.

The application is supported by the affidavit of Mansukhlal Shantilal Patel sworn on 08.04.05. It is to the effect that on 12.06.96 he, Mansukhlal Shantilal Patel on behalf of the applicant company, Enkasiti Flower Growers Ltd and Patrick Mwaura of the respondent/objector company, Protein & Fruits Processors Ltd completed and signed on behalf of their respective companies an application for Consent of Land Control Board addressed to Kakuzi/Thika Land Control Board. However, the application was not submitted to the Kakuzi/Thika Land Control Board. Mr. Patel explains this omission by saying the applicant expected it would be able to obtain from the President an exemption from Land Control Board Consent under section 24 of the Land Control Act. Mr. Patel adds that exemption was granted by the then President on 03.02.97. Thereafter the applicant company caused a caveat to be registered against the Title to the subject land. Various improvements of the land in question followed thereafter according to Mr. Patel. He adds that the applicant provides permanent employment to some 700 employees on the land in question and adjacent land. The Presidential exemption was, however, not gazetted as required by section 24 of the Land Control Act. Mr. Patel on behalf of the applicant company says he was not aware that the Presidential exemption was required to be gazetted and that he believed it to be effective notwithstanding its non-gazettement. He says, however, that he has since been advised of the Presidential exemption's ineffectiveness on account of its not having been gazetted. For that reason, Mr. Patel on behalf of the applicant company has moved the court under section 8 (1) of the Land Control Act seeking extension of the period for making an application for Land Control Board Consent.

On 22.07.05 Messrs Protein & Fruit Processors Ltd filed grounds of objection to the application for extension of time for lodging Application for Land Control Board consent. The ground of objection are that the application is defective and bad in law; that the applicant has not come to court with clean hands; that the purported sale agreement relied on by the applicant company which is central to the application for Land Control Board Consent is null and void; and that the objector will suffer serious oppression

together with irreparable financial and emotional losses.

At the hearing of the application, the applicant was represented by learned counsel, Mr. W.A. Amoko while the respondent/objector company was represented by its Director, Mr. P.K. Mwaura.

Both parties made submissions in support of their respective clients' cases and cited various authorities in connection therewith. Mr. Mwaura said, inter alia, that he relied on his grounds of opposition of 22.07.05 plus his supporting affidavit of the same date. While the grounds of opposition are there, I have not been able to find the supporting affidavit in the court file.

I have given due consideration to the arguments and counter-arguments of the parties.

Section 8 (1) of the Land Control Act under which the application was brought for extension of the period for making an application for Land Control Board Consent provides as under:

"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 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."

And subsection (2) of the same section provides that 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.

The applicant company informed this court through Mansukhlal Shantilal Patel that it relied on a Presidential exemption dated 03.02.97, hence the said company's non-submission of an application for Land Control Board Consent to the subject land transaction. A photocopy of the Presidential exemption was exhibited as Annexure "MSP 5" to Mr. Patel's affidavit sworn on 08.04.05. That exemption is described as a Legal Notice under the Land Control Act (Cap. 302). It bears no Legal Notice Number, which lends credence to the averment that it was not gazetted. Section 24 of the Land Control Act under which the exemption is said to have been given provides as follows:

"24. The President may, by notice in the Gazette, exempt –

- (a) any land or share, or any class of land or share; or**
- (b) any controlled transaction, or any class of controlled transaction; or**
- (c) any person in respect of controlled transactions or some class of controlled transaction,**

from all or any of the provisions of this Act, 2 or from any prohibition made under section 23, on such conditions (if any) as he may think fit to impose,"

It is clear from section 24 of the Land Control Act that a Presidential exemption can only be validly given by notice in the Gazette. The evidence availed to this court is that no gazettelement was done. The purported Presidential exemption is, therefore, invalid and of no effect. In the premise, there is no exemption from the requirements of the Land Control Act.

Who was to do the gazettelement? I think that, in the ordinary course of events, it is the issuing authority. As this was not done, the applicant company ended up with a piece of paper which did not confer upon his company the desired exemption. The applicant company says it did not know that gazettelement was required. That sounds rather curious in view of the very clear provisions of section 24 of the Land Control Act. Mr. Patel deposed in his affidavit that he was not aware that the exemption

required to be gazetted. Ignorance of the law is no defence. He and his company were not vigilant. Had they been, they would have taken measures to get the issuing authority to have the exemption gazetted. Instead, the applicant company slept over the matter for over 9 years. The applicant company can't escape blame altogether.

It is deposed by Mr. Patel that the applicant company made due payments arising out of the subject land transaction and that the respondent/objector company received the said payment. What should the court do in the circumstances?

The application poses a big dilemma to the court. However, on balance, I am of the view that equity weighs in favour of enlarging time for the applicant to make an application for requisite Land Control Board Consent, for consideration by the relevant Board on merit. Accordingly, the application is allowed and the applicant company is given 21 days to apply for Land Control Board Consent for consideration by the relevant Board on merit. However, in view of the applicant company's lack of timely diligence in this matter, the said applicant company shall bear the respondent's/objector's costs of this application.

Orders accordingly

Dated at Nairobi this 7th day of February, 2006.

B.P. KUBO

JUDGE