



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 226 OF 2000

MARGARET BEATRICE MURIGIAPPELLANT

VERSUS

STEPHEN WAWERU NJENGARESPONDENT

J U D G M E N T

The respondent Stephen Waweru Njenga filed a suit in this court on 4th January 1995 to pray for the following orders; namely:-

- (a) an order extending the period to apply for Land Control Board Consent under Section 22 of the Land Control Act.
- (b) an order to transfer parcel Githunguri/Kimathi/659 to the plaintiff.
- (c) Costs.

On 14th August 1996 the appellant applied for this suit to be struck out because it was scandalous, frivolous, and vexatious and/or because it was otherwise an abuse of the process of the court or that it may otherwise delay the fair trial of this case because the sale transaction was null and void for lack of Land Control Board Consent as required under Section 6 of the Land Control Act Chapter 302 Laws of Kenya.

There was also a prayer for costs.

This application was placed before the Principal Deputy Registrar (E.K. Njai) on 15th November 1999 when counsel for both parties submitted either for or against it.

The Principal Deputy Registrar, wrote and delivered his ruling on 2nd May 2000 wherein he dismissed the application with costs.

The appellant was unhappy with this ruling and he filed this appeal in this court on 9th May 2000 in a memorandum of appeal which listed 2 grounds of appeal. There were:-

- (1) That the learned Principal Deputy Registrar erred in law in not making a finding that a suit for specific performance which is filed before the consent of the Land Control Board is granted either after the application for such consent is made within six months from the date of the making of the agreement under Section 8 of the Land Control Act Cap 302 and or the consent is granted after the extension of time under the provisions in Section 8 of the said Act is not legally maintainable and should have been struck out.

(2) The learned Principal Deputy Registrar erred in law in not making a finding that a prayer for specific performance and a prayer for extension of time under the proviso to Section 8 cannot co-exist in the plaint.

The appeal was heard in this court on 4th November, 2002 wherein counsel for the appellant repeated these averments in his submissions adding that an agreement for sale of land which has no blessings of the Land Control Board Consent becomes void six (6) months of its making.

That there would be no point hearing the case first on the issue of consent then wait for consent to be given before deciding the next point of transfer of the land in the same suit. That in not striking out the suit the Principal Deputy Registrar allowed Section 22 of the Land Control Act to be breached.

Counsel prayed that this appeal be allowed and the lower court suit struck out with costs.

Counsel for the respondent opposed the appeal and submitted that the same was incompetent since leave was not obtained to lodge it under Section 75 of the Civil Procedure Act or Order XLII of the Civil Procedure Rules.

That even on the merits the suit could not be said to have been incompetent as there was a prayer in the plaint for the extension of time so as for the plaintiff to seek consent of the Land control Board Consent which the court has power to grant.

That the application to strike out the suit was premised on the fact that the plaint did not disclose a cause of action yet there were two causes of action in the nature of a prayer for extension of time and for specific performance.

He prayed that the appeal be dismissed with costs.

It actually looks strange that a prayer should be made for extension of time to seek consent of the Land Control Board in the same pleadings as the prayer for specific performance, though I agree with the Principal Deputy Registrar that the proviso to Section 8 of the Land Control Act does not provide the time limit within which an application for extension or time of the procedure to be adopted.

Rather than dwell very much on the law required, it is a matter of common sense that even if extension of time were to be allowed, it would require that proceedings be halted so as to enable the applicant to go back to the Land Control Board to apply for the consent in pursuance of the period allowed by the court within which the application is to be made.

But mark you, there is no guarantee that with the extension of time by the court comes the consent. One may be lucky to obtain the consent from the Land Control Board in which event, he/she would go back to court to proceed with the main case. However, you may fail to receive the consent from the board. In that event, what does one do? One may answer, go back to court and withdraw the case.

If this be the only answer then there is no need to engage in such tedious and/or time wasting exercise if proper procedure can be used to get extension of time, obtain the requisite consent before filing the suit relating to the enforcement of sale agreement pertaining to agricultural land?

On the other hand the above may not be the only answer. Apart from the agreement for the sale of agricultural land, there is a claim over land through long user and occupation or by adverse possession and in such case there is no requirement for seeking consent of the Land Control Board consent.

To this extent then it would seem premature to strike out a suit on an interlocutory application on the basis that there has been no Land Control Board Consent for the transaction giving rise to the case.

Subject to what will be said hereinafter, the learned Principal Deputy Registrar was right in not striking out this suit on ground that it did not disclose a cause of action.

I am not so sure an application in extension of time can be made in a plaint other than through the originating summons!

In the application subject to this appeal though, leave need to be sought before filing the appeal under Section 75 of the Civil Procedure Act or even under Order XLII of the Civil Procedure Rules.

No such leave was sought before this appeal was filed in this court and on this legal technicality alone, the appeal is incompetent and cannot be sustained. Consequently the same be and is hereby ordered struck out with costs.

Delivered this 14th day of November, 2002.

D.K.S. AGANYANYA

JUDGE