



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC CIVIL CASE NO. 441 OF 1991

1. LOISE NJOROGE

2. NELSON NJENGA NJOROGE..... PLAINTIFF

VERSUS

KENETH PAVEY & 2 OTHERS.....DEFENDANT

RULING

This is an application for order of

1. Certiorari to bring into the High Court and quash the decision of Masaku Donyo Sabuk Land Control Board granting Kenneth

Pavey consent to sub - divide Land parcel L.R. no. 9741/2 into

the three pieces and to transfer the land.

2. Prohibition directed to Kenneth Pavey his agents and servants to be enjoined and restrained from interfering and or tress passing on LR No. 9741 situate at Athi River Machakos District.

Leave to apply for the above orders was granted on 5.6.91 in High Court Misc. Application no. 393 of 1991.

The application is supported by a long statement and petrifying affidavit. The two respondents including Kenneth Parvey (first respondent) did not file a replying affidavit. Kenneth Parvey however filed Notice of objections to the applications to the application containing six grounds. They are technical objection to the application which do not challenge any fact in the statement.

The result is that the facts supporting the application have been disputed.

The land parcel L.R. No. 9741/2 is registered in the name of Njoroje Kiiru who died on 4.6.84 The applicants were granted letters of Administration intestate to his estate on 4.1.85 In High Court Succession Cause no. 654/84. In High Court Civil case no. 523 of 1985 the present applicants sued Kenneth Parvey claiming that he was deceased tenant They claimed arrears of rent and order for vacant possession. Kenneth Parvey filed HCCC No. 3683/85 against the applicants claiming that deceased had

by an agreement dated 4.11.77 sold 35 acres to him a price of shs 420,000. He prayed for an order of specific performance of the Agreement of sale. The two suits were consolidated and tried by Shields J who on 8.11.90 found that Kenneth Parvey was not a tenant of the deceased but rather a purchaser who went into possession of the land on the footing of the Agreement of the sale dated 4.11.77. The trial Judge however failed to make an order for specific performance of the Agreement because the Land Control Board consent was not produced. He left the questions whether or not the Agreement was void and whether or not Kenneth Parveys possession became adverse and blossomed into a littled under limitation actions Act for determination in a different action.

Loise Njoroge and Nelson Njunge Njoroge - the legal representatives of Njoroge Kiiria appealed against the judgment of Shields J. in Civil Appeal No. 56 of 1991. Kenneth Parvey filed a cross Appeal. On 29.6.92, the Court of Appeal dismissed the Appeal and marked cross - appeal as withdrawn.

The record shows that Kenneth Parvey died on 24.8.95 and limited granted in respect of his estate was given to Rose Kabui Hinga, Kim Pavey and Yusuf Khan on 24.6.97 in High Court Probate and Administration Cause No. 430/96. The three legal representative thereafter made an application dated 19.9.97 asking for leave to be made parties and to proceed with the case. The application was allowed by Mboghli J. On 3.10.97. The legal representatives of Kenneth Pavey have not filed a replying affidavit and their counsel Mr. Rustum Hira has categorically stated that the legal representatives are not filing any affidavit.

It is the decision of the Masaku Donyo Sabuk Land Control Board giving consent to sub-devision of the land and transfer which is being challenged. The decision of the land Control Board is contained in the minutes held on 6.12.90 at para 15 minute no. 153/90 I which reads:

“As a result of court order and decree in favour of Kenneth Pavey Civil case no. 3683 of 1985) in the High Court of Kenya Nairobi, an application has been received from secretary central Authority Nairobi seeking sub division of the above mentioned land parcel (that is L.R No. 974/2) into three portions of 22 .01; 10.12 and 4.05 ha respectively. The above proposal is approved”

That decision was followed by a letter of consent of the Land Control Board dated 7.12.90 authorizing the sub-divisions. Documents annexed to the supplementary affidavit of the applicants sworn on 9.6.99 show that Mr. Kenneth Pavey and one John Rikie Kimani executed an application dated 21.11.90 for transfer of 10 acres from parcel no. 974 (sub divisions ‘C’ to John Rikie Kimani and that the Board on 21.12.90 the Board on 21.12.90 by minute No. 163/90 at para 16 gave consent for the transfer of the 10 acres.

Mr. Kirundi for applicant contends inter alia, that the consent of the Land Control Board is null and void as the Land Control Board did not have jurisdiction to Receive and consider the application for consent.

I have considered the statement and the submissions made by the respective counsels.

According to s. 8(1) of the Land Control Act, an application for consent of the Land control Board has to be made in the prescribed form within six months of the date making of the agreement for the controlled transaction. By proviso to that sub section the High Court may on application extent the six months period for sufficient reasons. The prescribed form - Form I shows that the application must be signed by the owner of the land, lessor Mortgagor charger its or by his authorized agent or agents. It must also be signed by the purchaser lessee mortgagor chargee or by his authorised agent or agents so in this case the application should have been signed by legal representatives of the proprietor and the purchaser Mr. Kenneth Pavey. By Section 9(1)(C) - the Board shall refuse contract, inter alia, where sale is to a person who is not a citizen of Kenya but by s. 24 of the Act the President can by notice in the Gazette , inter alia exempt any transaction or person from provisions of the land Control Act. The Board gives consent to a controlled transaction on an application by willing seller and willing buyer. That is why the application for consent has to be signed by both parties to the transaction or by their agents. The Board cannot force unwilling seller to sell the land by imposing a consent which seller is opposing. The judgment of Shields J

did not deal with the validity or otherwise of the Agreement of sale of 4.11.77. It did not also deal with the question whether or not Kenneth Pavey had acquired title by adverse possession under the limitation of Actions Act. Shields J did not order specific performance of the Agreement of 4.11.77. So, if Kenneth Pavey wanted to claim the land by adverse possession, he would only have done that through a separate action. In the present application I do not have jurisdiction to decide whether or not Kenneth Pavey had acquired the 35 acres by adverse possession.

Firstly since judgment of Shields J did not give an order of specific performance, there was no judgment in favour of Kenneth Pavey which would have been enforced through the grant of consent of the Land Control Board. Secondly, there was no valid application for the consent of the Land Control Board on the basis of which the consent would have been granted because

a There was no application in Form 1 filed before the Board

b The application for consent was not made by parties As the minutes of the meeting of the Board of 6.12.90 shows, the application was made by secretary, Central Authority Nairobi

c There was no application made before the Board signed by both the owner of the land or his legal representatives and Mr. Kenneth Pavey.

d Six months had long expired since 4.11.77 when the agreement was made and there was no order of the High Court extending the time for making an application to the Board.

e The application for sub division of the land could only have been made by the registered proprietor or his legal representatives and not by Kenneth Pavey or the central Authority

Thirdly, Mr. Kenneth Pavey indicates in the application for consent of the Board dated 21.1.90 that he is a British citizen a fact which has not been denied. By s. 9(1)(C) the Land Control Act the Board had no jurisdiction to grant consent unless the president through notice in the Gazette had exempted Kenneth Pavey from the provisions of Land Control Act.

Lastly the Board had no jurisdiction to grant the Consent unless the legal representatives of the deceased owner had consented to the sub division of the land.

Mr. Rustam Hira for 1st Respondent submitted that once the Board gives its consent, the court has no power to question it. It is true that S. 8(2) of the Land Control Act provides that, subject to any right of appeal conferred by the Act, the decision of the Land Control Board shall be final and conclusive and shall not be questioned in any court.

The applicants are not by this application challenging the decision of the Land Control Board on the merits. Their complaint is that the Board had no jurisdiction to grant the consent and therefore the decision is void ab initio. This court has supervisory jurisdiction over the proceedings of subordinate courts tribunals and statutory bodies etc (S.65)(2) of the constitution. In particular this court has power to inquire whether or not the Masaku Odonyo Subuk Land Control Board has followed the law in reaching its decision and quash its decision if it is made without jurisdiction or in excess of jurisdiction.

I am satisfied for the reasons stated that the Land Control Board acted ultra vires the Land Control Act in giving the consent and that the consent so given is a nullity in law. The first prayer in the application therefore succeeds.

Although an order of prohibition is sought in the second prayer it is clear from the wording of the prayer that what applicants are seeking is an order of injunction against Kenneth Pavey or un legal representatives. Mr. Pavey is a private individual. The order is not sought against a public body or public officer. The prayer for an order of prohibition is clearly incompetent.

For the above reasons I allow the application to the extent that I grant the order of certiorari in respect of

the decision of the Board given on 6.12.90 as prayed with costs to the applicants.

E. M. Githinji

Judge

24.8.2000

Mr. Mwangi holding brief for Mr. Kirundi present

Mr. Mutinda for 1st Respondent present

Mr. Mutinda

I apply for leave to appeal I also apply for typed proceedings and Ruling

E. M. Githinji

Judge

Mr. Mwangi - No objection

Court: S. 8(5) of Law Reform Act gives Respondents a right of Appeal as of right

Order: Proceedings and Ruling to be typed and copy to be supplied to Respondent

E. M. Githinji

Judge