



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAKURU
ELC MISC. 5 OF 2019
IN THE MATTER OF KIMS POULTY FARM LTD
AND
LR.NO.SOLAI/NDUNGIRI BLOCK 7/3 (GITWAMBA)
RULING

1.The Applicant “Kims Poultry Farm Limited” has referred this matter to this court by way of case stated and seeks the determination of the following issues:-

1. *Whether the Company Kims Poultry Farm Ltd was upon incorporation in Kenya a legal Company since its two directors were then foreigners on work permit, though they subsequently were granted Kenyan Citizenship.*
2. *Whether the purchase by the Company of LR No.Solai/Ndungiri Block7/3 (Gitwamba) in 2006 was a valid transaction.*
3. *Whether the certificate of lease for a term of 99 years over the property to Kims Poultry Farm Ltd on 15/6/2017 is valid.*
4. *Whether the current status of the two directors as Kenya Citizens validates the status of the Company and any defect there may have been on the purchase of the land.*
5. *The legal status of Kims poultry Farm Limited and the title deed issued in respect of land parcel Solai/Ndungiri Block7/3 (Gitwamba).*

2. The brief background is that Kim’s Poultry Farm Limited was incorporated in Kenya on 16th June 2006, and was issued a certificate of incorporation No.C.125712. The two initial subscribers, shareholders and directors were husband and wife Ki Hwan Kim and Ma Namsooke and were foreigners of Korean Nationality. On 2nd October 2006 the Company entered into a sale agreement to purchase land parcel **Solai /Ndungiri Block 7/3 (Gitwamba)** measuring 20.87 Hectares from one Stephen Thuku Mungara. An application for consent of the Land Control Board was made and was granted on 28th September 2006. The property was transferred to the company on 8th December 2006 and a title deed issued in the name of the Company.

3. On the issue whether or not Kim’s Poultry Farm Limited was validly incorporated in Kenya when both founding directors were foreigners the answer must be in the affirmative. Both under the repealed

Companies Act, Cap 486 of the Laws of Kenya and the Companies Act No.17 of 2015 which replaced it there is no restriction as to who can incorporate a Company in Kenya. Any person can incorporate a Company as long as the requirements necessary to be satisfied in regard to the memorandum of Association and Articles of Association are met. The shareholders and directors of Kim's Poultry Farm Limited having been foreigners could not impede the incorporation of the company.

4. More significant is the issue whether the purchase by Kim's Poultry Farm Limited of **LR No.Solai.Ndungiri Block 7/3 (Gitwamba)** in 2006 was valid. There is no doubt that the sale and purchase transaction constituted a controlled transaction within the meaning of section 6 (1) of the Land Control Act Cap 302 Laws of Kenya in respect of which the consent of the relevant land control board was a prerequisite.

Section 6 (I) provides as follows:-
(1) Each of the following transactions that is to say—
(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 (L.N. 516/1961) 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.

5. In the present matter it appears the parties to the transaction while appreciating the consent of the Land Control Board was required for the transaction applied for consent vide an application dated 26th September 2006. In the land control board application form, however under paragraph 2 (a) & (c) the names of the directors of the company and their Nationality respectively was not given.

6. The considerations which the Land Control Board has to take into account in granting or refusing to grant consent to a transaction are set out under section 9 of the Land Control Act. Under Section 9 (1) (c) the Land Control Board is obligated to refuse to grant consent if the land is to be disposed to a person who is not a citizen of Kenya or to a private Company where all the members are not Kenya Citizens.

Section 9 (I) (c) provides as follows:

9 (I) In deciding whether to grant or refuse consent in respect of a controlled transactions, a land board shall-

(a) _____

(b) _____

(c) refuse consent in any case which the land or share to be disposed of by way of sale, transfer, lease exchange or partition to a person who is not:-

(i) a citizen of Kenya; or

(ii) a private company or co-operative society all of whose Members are citizens of Kenya; or

(iii) group representatives in Corporated under the Land (group Representatives) Act, 1968 (Cap 287), or

(iv) a state Corporation within the meaning of the state Corporation Act, 1986 Cap 446).

7. On the basis of Section 9(1) (c) (ii) of the Act, the Land Control Board that considered the application between Stephen Thuku Mungara and Kim's Poultry Farm Limited ought to have refused to grant consent if it was disclosed the purchasing company was owned by foreigners. As no disclosure was made, the consent of the Land Control Board was given and the transaction was completed by registration of the transfer and issue of the title deed for the land on 8th December 2006. On the material available, there was nothing sinister in the failure to make disclosure that the purchaser company was foreign owned. It is apparent the directors and shareholders of the company had been doing business in Kenya over a considerable length of time for they had as early as 13th August 1997 registered a business name under the name and style of "**Kim's Poultry Farm under Reg. No.269106**" as per the certificate of Registration of Business issued in favour of Kim Hwan Kim Annexed to the application. I do not think that in the absence of proof of fraud a letter of consent issued by the land control board can be impugned.

8. Under the provisions of the Land Control Act there is no provision under which a consent issued by the board at its sittings can be queried. The Act only provides for appeals against refusal to grant consent to the provincial land control appeals board in the first instance and in the second instance to the central land control appeals board. Section 13(2) provides that the decision of the central land control appeals board is final and conclusive and not subject to be questioned by the court.

9. Perhaps in the present case if disclosure had been made that the company was foreign owned at the time the application for the land board consent was made, the company could have been advised to seek presidential exemption from the provisions of Act under the provisions of section 24 which provides as follows:

24: Exemptions

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

10. The shareholders/directors of the company were intent on enhancing their investment in the country as their subsequent conducts show and I do not suppose there would have been any reason for them to have been denied exemption from the provisions of the Act if such an application had been made.

11. On the basis of the material placed before the Court, Mr. Ki Hwan Kim was granted Kenyan citizenship as per the certificate of registration as a citizen of Kenya No.000243 issued to him on 30th August 2012 and he was subsequently issued with a Kenyan identity card and passport respectively.

12. Though it is not clearly explained it does appear the directors/ shareholders of Kim's Poultry Farm Limited sought and obtained conversion of the freehold title Company held over **LR No. Solai/Ndungiri Block 7 (Gitwamba)**. The company was issued with a lease over the property for a term of 99 years from 1st January 2017. The application for conversion of the freehold title no doubt must have been informed by the provisions of Article 65 of the constitution which limited the tenure a foreigner could hold land in Kenya to a period not exceeding 99 years. Article 65 of the Constitution

65. Landholding by non-citizens
- (1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.
 - (2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the

provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more.

(3) For purposes of this Article—
(a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and
(b) Property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.

(4) Parliament may enact legislation to make further provision for the operation of this Article.

13. As the shareholders/directors of the company as at the time the Constitution was inaugurated in August 2010 were foreigners, it was perfectly in order for the Company to seek conversion of the tenure of the land holding to leasehold to conform to the Constitution.

14. Though I have held that the consent of the Land Control Board given in September 2006 sanctioning the sale transaction to a Company that was owned by foreigners was not valid, I am satisfied it was an innocent and inadvertent error and /or mistake occasioned by the non-disclosure that the company was foreign owned. There is no demonstrations that there was any intention to defraud and/or misrepresent. Indeed the foreigners had been running a poultry business for a considerable length of time from the 1990s under the name “ Kim’s poultry Farm Limited” . The Land Control Board consent issued was never challenged by any person and the terms of the agreement of sale between the vendor and the Company were met.

15. Having regard to all the attendant circumstances in this matter I am persuaded that the shareholders/directors of Kim’s Poultry Farm Limited had a sincere objective of acquiring land in Kenya to give their business a foothold and that although the law on the grant of consent by the Land Control Board was flaunted, there was no intention to circumvent the law. Under Article 159 (2) (d) of the Constitution and section 19 (1) of the Environment and Land Court Act, the Court is enjoined to administer substantive justice without undue regard to technicalities of procedure. It would be an affront to and a travesty of justice if I was to apply the law strictly and invalidate the sale transaction entered by the company in 2006 on the basis that instead of applying for presidential exemption from the provisions of the Land Control Act, the Company applied for the Land Control Board’s consent which the board instead of refusing with reasons granted the consent and the transaction was carried to completion.

16. The intention of parliament in enacting the law limiting how foreigners can acquire land in Kenya must have been among other the things to prevent infiltration by foreigners and to preserve and protect agricultural land holdings in regard to which the Land control Act applies. The activities of Kim’s Poultry Farm Limited have not been shown to be offensive and consequently there would be no basis to recall the transactions. It is noteworthy that the directors/shareholders of Kim’s Poultry Farm limited have since become Kenya Citizens and are such entitled to all rights and privileges enjoyed by Kenya Citizens under the Constitution and all other laws which would include owning agricultural land.

17. On the basis of my foregoing discussion and analysis I hold that Kims Poultry Farm Ltd was properly registered as a private company in Kenya . That the sale transaction in respect of **LR No Solai /Ndungiri Block 7/3 (Gitwamba)** between Stephen Thuku Mungwara and Kim’s Poultry Farm Limited was valid notwithstanding that the Land Control Board issued a consent rather than defer and/or refuse the application for the parties to seek presidential exemption from the provisions of the Land Control Act. It is my view that even though the consent of the Land Control board was not validly given that did not invalidate the transaction which was duly completed. I hold the Company obtained a valid title over the property. The subsequent conversion of the freehold title to a leasehold was in conformity with the constitution although after the shareholders became Kenya Citizens, there was no necessity for the conversion. The Company is now fully owned by Kenya Citizens, the shareholders having been granted Kenya Citizenship and thus any limitation in property ownership by the Company on the basis of foreign ownership would be invalid.

Ruling dated signed and delivered electronically at Nakuru this 30th day of April 2020.

J M MUTUNGI

JUDGE