



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA 14 OF 2019

REUBEN NDUNGU MUIRURI.....APPELLANT

VERSUS

RUTH NYAMBURA MUTHONI.....RESPONDENT

**(Being an Appeal against the judgment delivered in CMCC No 8 of 2015 –Murang'a by the Learned Principal Magistrate Hon E. M. NYAGAH).**

**JUDGMENT**

1. The Appellant being dissatisfied with the Judgement of the learned Principal Magistrate E.Muriuki Nyagah in Murang'a CMCC No. 8 of 2015 delivered on 16/7/2019 preferred the instant Appeal against the judgement and set forth the following grounds of Appeal;

- a. The Learned Principal Magistrate erred in law by finding that the Appellant should have appealed against the refusal of the chairman of Makuyu Land Control Board to the Provincial Land Control Appeals Board, the latter Board is obsolete and therefore in-operational.
- b. The Learned Principal Magistrate failed to appreciate that it is not the local Land Control Board which refused consent but rather the Respondent filed objections without any lawful cause and/or excuse.
- c. The Learned Principal Magistrate erred in law and fact in failing to find that the Respondent was a witness to the sale agreement between the Appellant and the Respondent's mother and therefore she was estopped from filing objections to the sale transaction.
- d. The learned Principal Magistrate erred in law in failing to find that there is a lawful decree that ordered the transfer of land parcel No. Loc. 17/SABASABA/50 to the Appellant.
- e. The Learned Principal Magistrate erred in law and fact by failing to find that the Appellant had demonstrable prima- facie case against the Respondent in the lower Court.
- f. The learned Principal Magistrate erred in law and fact in failing to appreciate and rule on the rival submissions filed by the parties. There is no slightest mention of the Appellants' submissions in the judgment. That the judgement went against the evidence adduced.

2. The Appellant's suit before the trial Court as against the Respondent was that the Appellant had purchased the land parcel number LOC.17/SABASABA/50 from the Respondent's mother vide a sale agreement dated 25/7/2012 after which the Respondent's mother attended the Makuyu Land Board on 18/12/2014 with a view of transferring the suit land to the Appellant where the Respondent herein was also in attendance and raised objections to the transfer. That based on the Respondent's objections the presiding officer, the District Officer Makuyu declined to give consent to the transfer. The Appellant faulted the Respondent for raising objections to the transfer in the presence of a binding sale agreement witnessed by the said Respondent. Secondly that there was a decree in **Murang'a C.M.C.C No 321 of 13 (Reuben Ndungu Muiruri Vs Susan Muthoni Ndungu)** ordering the Respondent's mother to transfer the suit land to the Appellant. The Appellant also contended that the objections raised were baseless and an outright abrogation of the plaintiff's rights over the suit land. That in any event the Respondent admitted witnessing the agreement of sale between the Appellant and the Respondent's mother.

3. The Appellant thus sought permanent injunctive orders against the Respondent from raising unlawful objections to the sale and transfer of the suit land.

4. The Respondent in her defence contended that she is the daughter to the registered proprietor of the suit land and thus holds a beneficial interest over the suit land hence her objections before the Land Board were to protect that proprietary right. The Respondent also raised objections that the Appellant being not a registered owner of the suit land was not entitled to seek the reliefs sought due to the failure to enjoin the registered owner of the land and that contractual interest is not a protected or recognized overriding interest under section 28 of the

Land Registration Act.

5. The Respondent further averred that the suit land was owned and registered in the name of her grandfather and after his death it was fraudulently registered in the name of her mother. That her grandfather's estate was never succeeded in law. The land belonged to her grandfather, she averred. That her mother thus lacks a good title to the suit land to sell and pass title to the Plaintiff. That the suit land is ancestral land and does not exclusively belong to her mother hence her objections to the transfer are founded and valid.

6. The Learned Principal Magistrate found that the Court had no powers to interfere with the decision of the Land Control Board under sections 8 and 11 of the Land Control Act. That the Appellant ought to have Appealed against the decision of the Land Control Board to the Provincial Land Control Appeals Board.

7. The Appeal was disposed of through written submissions.

8. The Appellant submits that the Land Control Board did not decline to give the consent to the transfer but it was the Respondent who raised objections and therefore the suggestion that the Appellant should have proceeded by way of judicial review and or Appeal the decision of the Land Control Board was untenable in the circumstances. That the Appellant having witnessed the sale of the land between the parties, is estopped in law from raising an objection of the very transaction that she approved in the first place before the Land Control Board.

9. The Appellant faults the finding of the trial Court that the Appellant ought to have Appealed against the decision of the Land Control Board to the Land Control Appeals Board as the same is nonexistent and no rules of procedure have been gazetted by the relevant body to operationalize the Land Control Appeals Board, hence the trial Court's orders were in vain. The Appellant is convinced that he had a valid cause of action against the Respondent herein as her acts amount to having her cake and eating it.

10. Finally, the Appellant submitted that the judgement of the learned Principal Magistrate should not be allowed to stand as the objections filed in the Land Control Board had no merit and the learned Principal Magistrate should have granted orders sought in the plaint.

11. The Respondent opposed the Appeal and submitted that the Appellant had no locus standi to institute the suit before the trial Court in the first instance for want of authority to file the suit on behalf of the registered owner namely Susan Muthoni Ndungu who was not a party to the suit. That at the time of instituting the suit the Appellant's purchaser's interest over the suit land had not crystalized and contends that he had no registrable interest known in law over the suit land and describes the Appellant as a mere busy body.

12. The Respondent faults the Appellant for failing to present before this Court and the trial Court the reasons given by the Land Control Board for declining to issue the consent. That in the absence of that piece of evidence this Appellate Court has no means of knowing the said reasons.

13. The Respondents reiterates the findings of the trial Court that it lacked powers to supervise the Land Control Board and or issue the orders in the nature proposed by the Appellant before the trial Court by dint of Section 8, 9 and 11 of the Land Control Board Act cap 302, that the avenues prescribed under section 11 thereof ought to have been exhausted.

14. The Respondents further reiterate the grounds of objection raised in their defence before the trial Court anchored under section 24, 25 and 28 of the Land Registration Act in respect to the absolute title to the Respondent's mother as the registered owner to the suit land, that a contract of sale is not an overriding interest within the meaning of Section 28 of the said Act and as such the sale agreement could not defeat the rights of an absolute proprietor and concluded that the Appellant lacked power and capacity to institute the suit in respect to the suit land, that the Respondent's mother ought to have been the rightful Appellant thereof. And prays for upholding of the trial magistrate's decision.

15. It is borne out of the record that the Appellant purchased the suit land from one Susan Muthoni Ndungu vide an agreement of sale dated the 25/7/2012. According to the certificate of official search dated the 16/9/14 the suit land is registered in the name of Susan Muthoni Ndungu as at 18/10/2012. Susan is the mother of the current Respondent. The Respondent admitted in evidence in the lower Court that she witnessed/attested the said agreement of sale between her mother and the Appellant. The land measured 2.24 acres or thereabouts and registered in the name of Susan Muthoni. The consideration in the sum of Kshs 1.0 Million was paid in full by the Appellant to the vendor. The property was sold with vacant possession and the purchaser was given the liberty to take possession upon payment of the consideration.

16. It is also borne out of the evidence and the record that the Appellant sued the vendor of the suit land in CMCC NO 321 of 2013 in which judgement was issued on the 4/2/2014 to the effect that the Defendant, Susan Muthoni Ndungu do transfer land parcel No LOC17/SABASABA/50 to the Appellant forthwith as prayed in the plaint and the costs of the suit were to be in the cause.

17. In pursuance of this judgement the Appellant submits that he sought for Land Control Board consent in which event the Respondent objected and the same was declined leading to the filing of the suit to wit; CMCC No 8 of 2015, seeking interalia a permanent injunction restraining the Respondent from raising an unlawful objections to the sale of the suit land.

18. The reasons for the refusal of the Land Control Board consent have not been disclosed by the Appellant. That said the Land Control Board in its preamble states that it is an Act of Parliament to provide for controlling transactions in agricultural land. According to the said Act, a controlled transaction means one of the transactions specified in [section 6\(1\)](#) of this Act, other than those specified in [section 6\(3\)](#).

19. **Section 6(1)** and **6(3)** provides as follows;

“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.

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) This section does not apply to—

(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a County Council is a party.”

20. The import of the above sections is that a controlled transaction refers to a sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area. Further any 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 a controlled transaction.

21. The Act further goes ahead to exempt a transaction in which the Government or Settlement Fund Trustee or in respect of Trust Land or county Council is a party.

22. The Place of the Land Control Board and some of its provisions have been distilled by the Court of Appeal in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] Eklr** when it observed as follows;

“**Sections 39, 40, and 41** of the Land Act provides for the rights of a vendor in relation to a contract for sale of land and the procedure for obtaining an order of possession where the purchaser is in breach. Similarly, **Section 42** provides for the rights of the purchaser against rescission of a contract for the sale of land and **Section 42 (3)** gives the Court power to grant relief to the purchaser.

**Section 161 (2)** of the Land Act provides:

“All law relating to land shall be construed with the alterations, adaptations, qualifications and exceptions necessary to give effect to this Act.”

We have extensively quoted the provisions of the Land Control Act, the Constitution and the current land laws in order to demonstrate that the Land Control Act is not a modern legislation although it has not been repealed. Some of the institutions created by the Land Control Act are no longer in existence, for instance, the office of District Commissioner, Provincial Commissioner and the Central Land Control Appeals Board. The President who had power under that Act to exempt transactions from the provisions of the Act has no longer power under the Constitution to deal with matters relating to land. The policy behind the Land Control Act, nevertheless, it is clear that some aspects of the policy may not be valid under the current Constitution. Some of the principles for granting or refusing consent stipulated in **Section 9** may not pass muster under the current Constitution. The Constitution in Article 60 (1) spells the principles of land policy, provides for land holding by non-citizens in **Article 65** and **Section 159** of the Land Act, as amended by Land Laws (*Amendment*) Act, 2016, provides that the minimum land holding acreage and maximum land holding acreage shall be subject to provisions of **Article 66 (1)** and **60 (1)** of the Constitution respectively.

However, **clause 7 (1)** of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution of Kenya 2010, provides:

“**All law in force immediately before the effective date continues to be in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with this Constitution.**”

23. Taking the cue from the Court of Appeal aforesaid, the question that must be answered by the Court is whether the issuance of a Land Control Board consent in view of the Court orders issued by the Court in CMCC No 321 of 2013 is/was necessary.

24. Under the Civil Procedure Act, decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within [section 34](#) or [section 91](#), but does not include—

(a) any adjudication from which an Appeal lies as an Appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of Appeal, “decree” includes judgment, and a judgment shall be Appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

*Explanation.* — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

25. Further an order means the formal expression of any decision of a Court which is not a decree, and includes a rule *nisi*; Taking the above definition and read together with section 25 of the Civil Procedure Act which states that the Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow: Provided that it shall not be necessary for the Court to hear the case before pronouncing judgment, it can be deduced that a judgement of a Court is not a controlled transaction so much so that there is no transaction in form of a sale lease mortgage etc as defined in a controlled transaction as provided for in the Land Control Act.

26. In the case at hand the vendor was ordered to transfer the suit land to the Appellant vide the orders or judgment of the Court issued in CMCC No 321 of 2013. The rights of the parties that is to say the Appellant and the Vendor in CMCC No 321 of 2013 were settled by the judgement which ordered Susan Muthoni Ndungu to transfer the suit land to the Appellant. These orders are still in force and are available for execution in CMCC No 321 of 2013 given that the life of Court orders or judgment is 12 years from the date of pronouncement.

27. The orders of the Court having not been a controlled transaction in accordance to the Land Control Board Act, therefore, the parties need not seek consent of the Land Control Board in my view. It would be an absurdity if the Court orders are overridden by the decision of the Land Control Board. I do not think, to my mind, that this was the intention of Parliament.

28 It is my considered holding therefore that the filing of the suit CMCC No 8 of 2015 was completely unnecessary and if left to stand will amount to an abuse of the process of the Court. For that reason, I proceed to strike it out.

29. In upshot the Appeal is not meritorious and for purposes of the effectiveness of the Court orders issued in CMCC No 321 of 2013, the parties are at liberty to proceed with the execution of the said judgement.

30. The costs of the suit in the lower Court and the Appeal shall be payable by the Appellant and the Respondent in equal share.

31. **It is so ordered.**

**DATED, SIGNED AND DELIVERED AT MURANGA THIS 18<sup>TH</sup> DAY OF JUNE 2020.**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

T M Njoroge for the Appellant

Ndungu HB for Kirubi for the Respondent

Njeri, Court Assistant