



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIV MISC APPLI 42 OF 1999

REPUBLICAPPLICANT

VERSUS

THE CHAIRMAN MANYATTA DIVISIONAL

LAND CONTROL BOARD.....RESPONDENT

RULING

MORRIS GUCHURA NJAGE (to be referred to in this ruling throughout as "the Applicant") is an advocate of this court and practices law through his law firm of M/s NJAGE & CO. Advocates based in Embu. In these proceedings he is in his individual and private capacity. He is therefore being represented by another advocate of this court, Mr Mureithi Kibe. The other parties in these proceedings are The CHAIRMAN, MANYATTA DIVISIONAL LAND CONTROL BOARD (to be referred to in this ruling as "the Respondent") who is represented by the ATTORNEY GENERAL of the Republic of Kenya, and in these proceedings MR PRASAD, a State Counsel, in the Attorney General's Chambers conducted the Respondent's case. KENYA NATIONAL CAPITAL CORPORATION LIMITED is the first interested party and will be referred to as "KENYAC" represented by Mr David Onyancha Advocate. DAMARIS WANYAGA Kiragu is the Second interested party and will be referred to as "The Purchaser" and is represented by Mr JOE KATHUNGU Advocate.

MANYATTA DIVISIONAL LAND CONTROL BOARD is established under the provisions of the Land Control Act Chapter 302 Laws of Kenya, with its constitution, functions and duties defined under the same Act. In this ruling THE LAND CONTROL ACT shall be referred to as "THE ACT".

KENYAC is a wholly owned subsidiary of the NATIONAL BANK OF KENYA LTD. On the 31st May, 1999 the Shareholders of KENYAC, the KENYAC BOARD OF DIRECTORS and the Directors of NATIONAL BANK OF KENYA LTD resolved to merge KENYAC'S business operations with those of NATIONAL BANK OF KENYA LTD. because KENYAC'S business and services were a close duplication of what NATIONAL BANK OF KENYA LTD was offering. That merger did not affect the legal relationship between KENYAC and the applicant because the terms and conditions of the applicant are banking facilities (namely: fixed Deposit, Savings Account and Loan Account) were transferred to the National Bank of Kenya Ltd and remained unchanged.

By agreements entered into between the applicant and KENYAC on the 28th October, 1984 and 28th October, 1986 the applicant borrowed KShs.1, 000,000 from KENYAC on terms and conditions therein

agreed, to help the applicant with his Coffee Operations. The said borrowed money was secured against the applicant's two parcels of land namely: L.R. NGANDORI/NGOVIU/160 and L.R. NGANDORI/KIRIGI/856. In the year 1991 KENYAC issued and served the applicant with Statutory Notices under the Registered Land Act in respect of these two properties, citing breaches of the terms of those two loan agreements. It is the applicant's contention that he disputed those Statutory Notices and disputed the alleged breaches of the terms of the loan agreements. He filed a civil suit in the Principal Magistrate's Court at Embu in PMCC NO.74 of 1991 against KENYAC to determine those two issues. It would appear from the submissions made before me that that Civil Case is still pending determination. It is worth noting that the pleadings in Embu PMCC 74 of 1991 were not annexed to any of the affidavits filed in this matter before me.

On the 16th April, 1999, however, KENYAC as a chargee in respect of L.R. NGANDORI/KIRIGI/856 conducted a Public Auction and sold that property to the Purchaser, in exercise of its powers of Sale under the said charge. The Purchaser has deposed in a replying affidavit filed on 29th September, 1999 that she was declared the highest bidder at that auction at KShs.1, 500,000 and bought the applicant's said parcel of land through M/s NDIRANGU MERCHANTS, who conducted the auction.

Immediately after that sale KENYAC provided the purchaser with a completed application for Consent Form dated 21st April 1999 under The Act to be presented to the Respondent for approval of that sale and transfer and authorised the Purchaser to lodge it on its behalf with the Respondent. KENYAC also instructed or asked the Purchaser to attend the Respondent at its meeting and to obtain the board's consent, if and when granted. The Purchaser, on her part, handed the said application form to her agent one DIONISIA KIRAGU MURIITHI to take to the Respondent and to represent her at the board. The Respondent has deposed in an affidavit filed on 3rd November, 1999 that the Board sat and gave its consent to the transfer of the applicant's land NGANDORI/KIRIGI/856 to the Purchaser and signed the consent on that 20th May, 1999. The transfer of that land to the purchaser was subsequently registered on the 30th June, 1999.

The applicant has now filed this Notice of Motion on 26th August 1999 seeking the following order under Order 53 Rule 3(1) of the Civil Procedure Rules:-"ORDER:-

That this Honourable Court be pleased to issue an order of certiorari to call unto itself and quash the decision of the Manyatta Divisional Land Control Board dated the 20th May, 1999 respecting the grant of consent to transfer of Parcel of Land NGANDORI/KIRIGI/856".

There are three grounds in support of this applicant:-

- (a) The Board (Respondent) failed to follow the Law and therefore made a decision which was wholly illegal, nul and void.
- (b) The Board gave consent to a controlled transaction in the absence of the parties.
- (c) The Chairman of the meeting was not a designated Chairman according to the Act.

I will first deal with the principles of law relevant to this application.

A Land Control Board is a Statutory body established under the Land Control Act Cap 302 laws of Kenya. Its primary duty is to determine questions affecting the rights of subjects regarding controlled transactions in the disposal of agricultural land. Those transactions include the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within its controlled area. In discharging that primary duty a land control body must act judicially and within its jurisdiction, and is subject to the controlling jurisdiction of the High Court exercised through a writ of certiorari.

The jurisdiction to grant the judicial remedy of certiorari is vested in the High Court by Section 8 of the Law Reform Act Chapter 26 Laws of Kenya, while Order 53 of the Civil Procedure Rules lays down the

procedure by which this judicial control of administrative action is exercised. Through an application for judicial review for an order of certiorari to issue, the decision of the inferior tribunal is brought before the High Court for Consideration. The High Court will be concerned about the proceedings conducted by the Board and the decision it reached. It will consider the following grounds:

- (a) Want or excess of jurisdiction;
- (b) denial of natural justice;
- (c) errors on the face of the record.

These grounds are however not exhaustive, as the exact limits of this remedy have never been, and ought not to be specifically denied. They have varied from time to time, being extended to meet changing conditions. (see the decision of the Court of Appeal in Civil Appeal No.265 of 1997 DAVID MUGO t/a MANYATTA AUCTIONEERS -VS- REPUBLIC (unreported) where all these principles of law were pronounced.

When the High Court is satisfied that there are grounds for quashing the decision to which the application relates, the High Court will proceed to quash it. But it has an added power, in addition to quashing that decision, the power to remit the matter to the inferior court or tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the court.

The applicant's first major complaint is that the Chairman of the Land Control Board Meeting of the 20th May, 1999 was not a designated Chairman according to the Act. Mr Kibe submitted that a Chairman of a Land Control Board is a District Commissioner or a District Officer deputed by him in writing or a member elected by one of their number to preside at that meeting. He submitted that, in the instant case, the Board was presided by District Officer Manyatta Division who had no authority from the District Commissioner to do so.

He referred to a replying affidavit filed by Simon Kiprono Mutai, the District Officer, Manyatta, who deponed that he is the Chairman of Manyatta Land Control Board and that he chaired the meeting of 20th May, 1999. Mr Kibe submitted that, in the absence of a letter from the District Commissioner deputing Mr Mutai to chair that Board meeting, and then Mr Mutai was not the designated Chairman.

In his Response, Mr Prasad informed the court from the bar that his instructions were that the District Commissioner, Embu, who is the Chairman of the Manyatta Division Land Control Board, had other official duties to perform at Kathangariri location within Manyatta Division. The District Commissioner had an Agricultural Field day in the said location. Consequently the said District Commissioner asked Mr Mutai to preside over the Board Meeting. Mr Prasad did not present to the court a letter written by the District Commissioner Embu to the District Officer Manyatta, giving him those instructions. Mr Mutai did not also annexe a copy of such a letter to his replying affidavit.

It may be true that the District Officer Manyatta needed not to prove that he was a designated Chairman and that it was still the applicant's duty to prove his complaint. Where, however, the District Officer Manyatta gave an explanation as to the reason for chairing that meeting, he had a duty to prove to the court that he was a designated Chairman. He neither annexed to his affidavit any letter of authority from the District Commissioner nor deponed in the replying affidavit that he was the Chairman of the Manyatta Divisional Land Control Board through appointment by the Minister and subsequent gazettelement. No Kenya Gazette Notice of his appointment is annexed to his replying affidavit.

In the light of the above, I hold that the applicant has succeeded in showing that the Chairman of the meeting on that 20/5/1999 was not a designated Chairman, and this violated the statutory provisions of the Act.

The applicant's next complaint is that the Board gave consent to a controlled transaction in the absence of the parties. In this regard the facts placed before me by Mr Kibe, Mr Onyancha and Mr Kathungu is that:

the application for consent was drawn up on the 21st April, 1999 by KENYAC. An authorised agent of KENYAC signed that application form, being a chargee in exercise of its power of sale. The same application is also signed by the purchaser. KENYAC, through any authorised agent, did not attend the Board Meeting on the 20th May, 1999. The explanation for its absence is contained in the replying affidavit of MRS Z. K. MOGAKA, then Company Secretary and Legal Officer of KENYAC. KENYAC, as the chargee, did not attend the Board meeting because it had handed the application to the Purchaser and had authorised the said Purchaser to lodge it with the Board and thereafter to attend the Board meeting and to obtain the consent if and when granted. The other reason for KENYAC's deliberate failure to attend the Board meeting is contained in paragraph 5 of Mrs MOGAKA'S replying affidavit:-

"5. THAT in its business practice Kenyac has been aware that application by CHARGE in exercise of its power of sale for such consent is rarely refused and Kenyac rarely sends any representative to its proceedings UNLESS SUMMONED TO DO SO BY THE PARTICULAR BOARD (underlining mine) ."

The Purchaser did not also attend the Board Meeting. She sent her agent, one DIONISIA KIRAGU MURIITHI to take the application to the Board and to represent her. According to the Purchaser, DIONISIA KIRAGU MURIITHI attended the Board Meeting. As there is no replying affidavit from DIONISIA, and no minutes of the Board have been produced, it is unclear whether she attended the Board Meeting at all.

The Respondent's submission in this regard is that KENYAC, as the chargee and financial institution, did not have to attend the Board Meeting as long as the application form was duly signed. The Respondent further submitted that the applicant was no longer the owner of the piece of land which was the subject of the application, namely, L.R.NGANDORI/KIRIGI.1856, for the reason that this land had already been sold on 16th April, 1999 through a Public Auction. A similar submission was made by Mr Onyancha, Mr Kathungu and Mr Prasad.

The answer to that is very simple. It is true that Land parcel No.NGANDORI/KIRIGI/856 was bought by the purchaser on 16.4.1999 at a Public Auction but title did not pass to the Purchaser until that sale and transfer had been sanctioned by the Board and until registration of the title in favour of the purchaser was effected. This was the purpose of this application to the Board any way, so that the said Board could sanction that sale and transfer. Therefore between the date of sale on 16/4/1999 and the date of registration of this parcel on 30/6/1999 in favour of the purchaser, and throughout the proceedings before the Board on 20/5/1999, the land in question was still the applicant's property.

That being so, when the application for consent was placed before the Board, it had both the power and the statutory duty to order attendance of the applicant or of any person interested in or affected by that application; and to require the applicant to adduce evidence to its satisfaction as to the applicant's identity and as to the ownership of the land of which the application relates and to require any person to produce any document it may think fit for a person to appear before it or produce a document or other evidence. This is expressly provided for by section 17 of the Act. The power to order attendance is discretionary but where such attendance is not ordered, reasons must be recorded.

The clear provision of Section 17 of the Act means nothing more than this: the Board, as constituted under the schedule to the Act and S.15 (2) thereof as to quorum, must sit and hear the application. To hear the application means to receive the evidence of the applicant, in support thereof and evidence from any other interested or affected party, and then either to give its consent or to reject it*'

In the instant case, if the Board had perused the application filed by KENYAC and the Purchaser, it would have become clear that the sale was by a chargee exercising its power of sale under the charge. The Board had the duty to summon the chargor to appear before it, to give evidence as to the legality or otherwise of that sale or public auction. The Board had the duty to satisfy itself that the public auction had been conducted properly. In this case it did not do so.

When the Board therefore gave its consent to the transfer of the land to the Purchaser, in the absence of

both KENYAC (Chargee) and the applicant (chargor) it condemned the chargor unheard and deprived him of his property unfairly. By so doing the Board breached the rules of natural justice.

In our legal system the trial procedure is adversarial in nature. Parties to a dispute should be given an equal chance to give their respective version of events. This in administrative law is the rule which is known as AUDI ALTERAM PARTEM (hearing either sides or the right to a fair hearing). This rule requires that a person is entitled to know the case against him and to have the opportunity of giving his own side of the case.

The applicant indeed borrowed money from KENYAC. When he was served with a Statutory Notice of Sale of his property, he disputed that Notice and filed a suit in the Principal Magistrate's court in Embu. All this happened in 1991. In the month of April, 1999 when his property was sold at a public auction that Civil Case was still pending in court for determination. Despite that sale by public auction in April, 1999 the property had not vested in the purchaser. This could be done only by the Purchaser going through the Land Control Board, obtaining its consent and then registering the title in her favour. It was therefore necessary for the Board, when considering that application, to have summoned the applicant as the person directly to be affected by the intended transfer. By failing to do so, the Board violated a rule of natural justice whose purpose is to ensure that our adversarial system of trial, whether quasi-judicial or a full scale trial, works fairly.

The applicant's last complaint is that the Board failed to follow the law and therefore made a decision which is wholly illegal null and void. The Respondent, KENYAC and the Purchaser are all of the strong view that the Board was properly constituted, the law was followed and therefore the decision was lawful.

In principle, where Parliament has laid down a procedure for administrative authority to follow, its failure to follow that procedure may be challenged in courts. That principle will only apply where it can be shown that it was the intention of Parliament that that procedure must be followed, i.e. it was mandatory to do so.

Parliament, when enacting the Land Control Act, made mandatory provisions under section 9 thereof, prescribing mandatory consideration for the granting or refusal of consent in respect of controlled transactions. These provisions again presuppose that persons who should appear before the Board are the seller and purchaser of the land, i.e. both the owner of the land and the purchaser. In this instant case, these would be a representative of KENYAC, then the Purchaser and the applicant in this application.

For, it is provided in Section 9 that, in deciding whether to grant or refuse consent in respect of a controlled transaction, a land control Board SHALL have regard to the effect which the grant or refusal of consent is likely to have on the economic development of the land concerned or on the maintenance or improvement of standard of good husbandry within the land control area; act on the principle that consent ought generally to be refused where the person to whom the land is to be disposed of is unlikely to farm the land well or to develop it adequately; or is unlikely to be able to use the land profitably for the intended purpose owing to its nature; or already has sufficient agricultural land. These matters could not be determined unless the parties appeared before the Board to answer them; act on the principle that consent ought to be refused if the terms and conditions of the transaction (including the price to be paid) are marketly unfair or disadvantageous to one of the parties to the transaction. This is again where the present applicant's presence was necessary.

On this point I entirely agree with Mr Kibe's learned submission that the Act does not give the Board a blanket power to process applications before it in a manner of a conveyor belt. The Board had to acquire from the application itself and the physical applicants, including the owner of the property, information which would have guided it in terms of the provisions of Section 9 thereof. Mr Mutai, in his affidavit, has not shown whether these terms were complied with, for the only endorsement on the application form is "APPROVED". This is why it was imperative for the minutes of the Board of 20/5/1997 to have been presented to the court. There are no such minutes. Compliance by the Respondent of the Provisions of the Act is therefore, uncertain.

Mr Onyancha raised the issue of quorum and procedure and submitted that the Act, which constitutes the Board, does not prescribe the procedure which the Board should follow, that if the procedure had been provided then it would have been easy to see if the Board acted in excess of jurisdiction. He submitted that the Act does not even provide for a quorum. Even a District Officer sitting alone would form a quorum, he submitted.

Mr Onyancha's submissions clearly lacked seriousness. Section 15 of the Act provided for procedure and quorum at meetings of a Land Control Board; Section 16 thereof deals with how decisions of the Board are to be recorded; Section 17 deals with the power of the Board to order attendance and Section 9 thereof gives the Board mandatory considerations for the granting or refusal of consent. A District Commissioner or designated person cannot purport to sit alone to approve an application for consent under the Act. If that ever happens, that District Commissioner or designated person shall be acting in an arbitrary manner prejudicial to the rights of another, and this amounts to an abuse of the authority of his office, is a criminal offence and is punishable under Section 101(1) and (2) of the Penal Code.

Mr Onyancha further submitted that the applicant has not suffered special damages, over and above the one suffered by the public since he had assigned all his rights to the chargee (Kenyac). In my view the applicant's rights in the charge (chargor) had not been extinguished by the time the application for consent came up for consideration by the Board.

Both Mr Onyancha and Kathungu submitted that the remedy of CERTIORARI was not available because the applicant had an alternative remedy - to appeal to the Provincial Land Control Appeals Board and that he also had filed a Civil Suit in court, being Embu HCCC 67/99, now transferred to Nairobi and consolidated with Nairobi HCCC NO.1694/1999. The Court of Appeal IN CIVIL APPEAL NO. 265 of 1997 (Supra) has held that the existence of an alternative remedy is no bar to the granting of an order of certiorari.

I hold that there was want of jurisdiction on the part of the Board when it sat on the 20th May, 1999 because it was chaired by a person who was not the designated Chairman and there is no proof before me of the members who sat, whether or not the requisite quorum had been formed. No minutes were made available to the court.

The Board also acted in denial of natural justice to the applicant by contravening the provisions of Section 17 of the Act, when it failed to order the applicant's attendance at the meeting.

The Board also acted in excess of its jurisdiction by acting contrary to the provisions of Section 9 of the Act.

Each of these three grounds invalidated the decision of the Board made on the 20/5/1999.

Consequently therefore, I do hereby quash the decision of the Manyatta Divisional Land Control Board made on 20/5/1999, giving consent to the transfer of L.R.Ngandori/Kirigi/856 from KENYAC to the Purchaser. I set aside all the consequential orders, including the registration of title on 30/6/1999 in favour of the PURCHASER

The court was informed that parties to this application, in particular, the applicant and the Purchaser, have instituted several suits, both in the Principal Magistrate's Court at Embu and in this court, relating to this matter. In view of this I decline to remit this matter to Manyatta Divisional Land Control Board for reconsideration. Parties may pursue their respective remedies in those suits.

I award the costs of this application to the applicant. It is so ordered.

Dated and Delivered 9th November, 1999.

A.G.A ETYANG

JUDGE