



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, OMOLO & LAKHA, JJ.A.)

CIVIL APPEAL NO. 157 OF 1992

BETWEEN

ZAKAYO N. NGUGI APPELLANT

AND

G.K. KINUTHIA RESPONDENT

**(Appeal from the Order of the High Court of Kenya at Nairobi
(The Hon. Justice Tank) dated 31st October, 1991**

in

H.C.C.C. NO. 3483 OF 1990)

JUDGMENT OF THE COURT

The respondent sued the appellant in the superior court seeking an order of specific performance of an agreement for sale of agricultural land to which no land control board consent was given as required by the provisions of section 6 of the Land Control Act.

The appellant filed a defence resisting the respondents claim but he did not plead lack of land control board consent. If the appellant was going to rely on illegality as a defence to the claim, he was obliged to plead it - See Order 6 rule 4 of the Civil Procedure Rules.

The respondent applied to strike out the defence under 0.6 r. 13(1)(a) of the Civil Procedure Rules on the ground that it did not disclose any defence to the claim and this application was granted. The appellant did not appeal against that order. Instead, he applied for a review of the order under Order 44 arguing that the court had not taken into account the question of lack of land control board consent.

Tank, J. dismissed the application holding that the issue of lack of consent was in existence and within the knowledge of the appellant at the time of the filing of the suit and was not therefore a new and important matter within the meaning of Order 44. It is against that determination that the appellant has now appealed to this Court. On the evidence, there can be little doubt that the Judge came to the correct decision on the point. The appellant was precluded by the rules from raising the defence of illegality otherwise than by express pleading.

For these reasons, we think the appeal has no merit, and it is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 25th day of June, 1996.

R.O. KWACH

.....

JUDGE OF APPEAL

R.S.C. OMOLO

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR