REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appeal 123 of 1995

JAMES WACHIRA WAIGANJO …….....
……..APPELLANT

AND

KAMONDO WANJOHI …….....……
RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nyeri (Tunoi J) dated 5th May, 1993

IN

H. C.C.C. NO. 63 OF 1968)

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JUDGMENT OF THE COURT

The litigation has a long and checkered history. The original defendant died in the course of this litigation and was substituted for by his son who is the respondent in this appeal.

The land in dispute is some ten acres of land parcel Othaya/Kiandemi/303 comprising 21.9 acres and situated in Othaya Division within Nyeri District. The case of the plaintiff who is the respondent in this case, is that he bought ten acres of land from the defendant's father sometime in 1960, but that in spite of him having paid the entire purchase price for the land, the defendant failed to convey the ten acres to him. The plaintiff in 1968, then sued the defendant in the superior court for specific performance. In his defence, which with leave of the superior court, was filed in 1984, the defendant denied that the sale had taken place and that even if there had been a sale, it was null and void since the consent of the relevant land control board for the sale had not been obtained.

After the filing of these pleadings and some futile initial attempts to have the dispute settled by arbitration, the dispute was on 10th September, 1986, with the consent of the parties, again referred to arbitration. The order referring the dispute to arbitration was subsequently set aside on the ground that the arbitration award had not been filed in the superior court within the period specified for this to be done. The superior court then, with the consent of the parties, made another arbitration order. This order was also subsequently, by consequently, by consent of the parties, set aside. The last order for arbitration was made on 23rd March, 1990. The award was read in the superior court on 12th November, 1992, but this time, it was to be challenged by the defendant in the superior court who applied under Order 45 rules

15 and 16 for it to be set aside and the dispute to be aside and the dispute to be determined by the arbitrators was guilty of misconduct in that instead of recording the arbitration proceedings himself, he allowed his clerk to do it and that he failed to consider what had been averred in the defence, that there being no consent of the Land Control Board with respect to the alleged sale of the land, it was therefore, null and void. It was argued in contra that the Chairman did not abrogate his duties to his clerk and that the Land Control Act, which rendered the sale of the agricultural land without the consent of the Land Control Board, null and void, was not in existence in 1969 when the land was sold, and that the Act had only come into existence in 1966.

The learned judge of the superior court, Tunoi J, as he then was, found favour with the submissions made in opposition to the application to set aside the award. He found that no misconduct as alleged had been established, that the Land Control Act was not in existence in 1960 when the land was sold and that the letter of consent was therefore, irrelevant. The appeal before us is against this decision of the learned judge.

The effect of the filure of an arbitrator to consider when raised, whether the sale of land was rendered null and void because the provisions of the Land Control Act or a similar legislation were not complied with, was considered by this Court in the case of NELSON GITHINJI & TAMARU NGUNJU VS MUNENE IRENGI (Civil Appeal No. 133 of 1987) (Unreported), where as in this appeal, the absence of the relevant land control board's consent to the sale of the land, had been alleged in the pleadings. The following relevant observations of this Court in Tamaru Ngunju deserves to be set out in extenso.

"What was crucial, however, was the arbitrator's non-consideration whether the sale of the suit land had obtained the consent of the relevant land control board under section 6 (1) (a) of the Act. This was a matter of law. It had been alluded to in paragraph 9 of the respondent's plaint and in paragraph 3 of the appellant's defence. As we have set out a above, if the consent of the relevant Land control board was not obtained, then the transaction relating to the suit land was void for all purposes. In that connection, therefore, the arbitrator's award would have been made on the non-understanding of the law. Thus, as was observed by Duffus, J. A., in the case of RASHID MOLEDINA & CO (MOMBASA) LTD & OTHERS VS HOIMA GINNERS LTD. [1967] E. A. 645 at page 650 letters B and C:

"Generally speaking the courts will be slow to interfere with the award in an arbitration having regard to the fact that the parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision, but the courts will do so whenever this becomes necessary in the interests of justice, and will act as if it is shown …… that the arbitrators in arriving at their decision have done so on a wrong understanding or interpretation of the Law".

The transaction for which the respondent sought specific performance required the consent of the relevant land control board. This was a legal reguirement. The effect of the arbitrator's award was to grand the respondent the specific performance he sought. If no consent of the relevant land control board was obtained, then, that award was illegal. This have amounted to a misconduct on the part of the arbitrator. In the circumstances obtaining to the proceedings before the arbitrator, we are in no doubt that the award was made without understanding the relevant law. This was notwithstanding the reference to the law applicable to the transaction concerning the suit land in the parties' pleadings in the superior court, albeit superficially. Because of this, the award cannot stand."

But did the alleged sale of the land by the appellant to the respondent require the consent of a land control board? Mr. Mahan, for the appellant, drew our attention to the Land Control (Native Lands) Ordinance No. 28 of 1959, which was in existense in 1960 when the land transaction took place and which provides that the sale of land in areas specified by the Minister under section 3 of that Ordinance shall be null and void for all purposes unless the Divisional Board created thereunder, gives its consent to it within three months of the transaction. What he did not do was to bring to our notice the order of the Minister that the land is within an area which had been so specified by the Minister. We have had to find this out for ourselves. Bu legal Notice No. 338 dated 28th July, 1959, indeed the same date as the date of commencement of the principal legislation namely, the land control namely, the land control (Native Lands) ordinance, the Minister in exercise of the powers conferred on him by section 3 of the Ordinance

shall apply to eight native lands listed therein, including land within "Nyeri District, except Karatina Trading Centre". As described by the very respondent in his plaint , the land in dispute is in Othaya Division which is within Nyeri District. Over a year later on 22nd September, 1960, another legal Notice No. 452, was made in exercise of the powers conferred by section 3 of the Ordinance which shows that the Ordinance was then still in force.

The Ordinance was not repealed until 16th March, 1961. This came about in this way. Prior to this date, the Ordinance could be found in the Colony and Protectorate of Kenya, Ordinance Enacted During the year 1959, Vol XXXVIII (New series) as Ordinance No. 28 of 1959. It is shown as such, in the Alphabetical List of Ordinance (And High Commissioner and Applied Acts) in Force in Kenya on 31st December, 1959, contained in that volume. The Ordinance, referred to as Ordinance No. 28 of 1959, is, at page 522 of the Special Issue of the Kenya Gazette Supplement No. 102 (ordinances No, 16), Nairobi, 31st December, 1960, also contained in the "Alphabetical list of Ordinances (And High Commission and Applied Acts) In Force in Kenya on 31st December, 1960". In 1969, when Kenya had attained internal self government and when it was no longer diplomatic to employ in legislation such epithets like "natives", the short title only but not the text of the Ordinance, was amended by section 21 of the Kenya (Land) Order in Council, 1960, legal Notice No. 589; Kenya Gazette Supplement No 93, 7th December, 1960, to read Land Control (Special Areas) Ordinance, 1959, instead of Land Control (Native Lands) Ordinance, 1959. This amendment came into operation on 7th December, 1960, under the Kenya (Land) Order in council, 1960, Commencement, Proclamation, Legal Notice No. 591. It was in this new amended short title of the Ordinance that the Ordinance was finally repealed by regulation 23 of the land Control (special Areas) Regulations,1961, legal Notice No. 147, special Issue, Kenya Gazette Supplement, 7th March, 1961, which was made on 3rd March, 1961, in exercise of the powers conferred by section 14 of the Kenya (land) Order in Council, 1960. Regulation 1 of the Regulations provided that the Regulations shall come into operation on 16th March, 1961. Needless to say, the ordinance in its original or amended short title, is not included in the Alphabetical List of Ordinance (And High Commission and Applied Acts) in Force in Kenya on 1st January, 1962, contained in the Colony and Protectorate of Kenya, Ordinances Enacted During the year 1961, vol, XL (New Series), printed by the Government Printer, Nairobi. It is clear that in 1960 when the land was sold by the appellant to the respondent , the text of the Ordinance as it had always been, was in existence and in force.

The Land Control Act referred to by the learned judge in his decision may not have been in existence in 1960 but the Ordinance certainly was and that is what a applied. Mr. Mukenya, Counsel for the respondent, quite rightly submitted the Ordinance and been repealed by the Land Control (Special Areas) Regulations, 1961, which was made under the Kenya (Land) Order in Council, in 1960, but was wrong when he went on to conclude that the Ordinance could not therefore apply to the sale of the land which he himself, admitted took place in 1960, when the Ordinance was still in force. Ironically, the first part of Mr.Mukunya's submissions support out view that the appeal must succeed.

In the result, the appeal is allowed, the arbitration award set aside and the dispute between the parties remitted to the superior court for determination in terms of Order 45 rule 15(2) of the Civil Procedure Rules.

It must be obvious from the extent of the research which we have undertaken in this appeal, that the effort of counsel for the appellant, in this appeal, is undeserving of costs in the appellant's favour. Whilst the appellant will have his own costs in the superior court, each party, will, therefore, bear his own costs of this appeal.

Dated and delivered at Nyeri this 17th day of October, 1996.

R.O. KWACH

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR