



IN THE COURT OF APPEAL

AT KISUMU

(CORAM:AKIWUMI., TUNOI & SHAH, JJ.A)

CIVIL APPEAL NO. 18 OF 1995

BETWEEN

WILLIAM OCHARO MAANGI.....APPELLANT

AND

JOSEPH ONYONI KOMBO..... RESPONDENT

(Appeal from the judgment and Decree of the High Court of Kenya at Kisii (Mr. Justice Tom Mbaluto) dated 4th July, 1994

IN

H.C.C.CASE NO. 172 OF 1992)

JUDGMENT OF THE COURT

This is an appeal against the judgment and decree of the High Court of Kenya (Mbaluto, J.) sitting at Kisii.

The relevant facts which emerge are that on 16th January, 1990 the respondent agreed to sell and the appellant agreed to buy from the respondent all that piece or parcel of land known as W. Mugirango/Bonyamuta/117 measuring approximately 0.4) of an hectare at a sum of Shs. 38,000/-. We will refer to the respondent as the vendor and the appellant as purchaser for convenience.

The purchaser paid the sum of Shs. 30,000/- (as agreed) upon the execution of the agreement for sale. The sale of the purchase price, being Shs. 8,000/- was to be paid by the purchaser upon the transfer of the said piece of land (hereinafter referred to as “The suit land” to him (the purchaser).

It is not in dispute that the suit land is agricultural land and as such governed by the provisions of the Land Control Act (Cap 302) (The Act).

The application for consent (for the transaction) by the relevant land control board (Nyamira Divisional Land Board) was given on 17th October, 1991.

The learned judge in the superior court compared the two different copies of the letter of consent from the

said board and concluded that the consent was “doctored” or at least attempted to be doctored and came to the conclusion that there was no consent and declared the transaction void. In our view this is not borne out by the record. It is clear that the photocopies of the two letters of consent are the same save for misplacement of the carbon paper. On that the learned judge with respect went wrong.

Mr. Omae urged us to hold the conduct of the parties in June, 1991 and keeping in mind in particular the discussions at Mr. Osoro’s office on 17th June, 1991 amounted to a ‘renewal’ of the contract dated 16th January, 1991 or that it amounted to an entering into a new contract dated 17th January, 1991. He also urged us to consider the application for consent of the relevant board as fresh contract between the parties.

With the greatest of respect to Mr. Omae we cannot agree with his argument. The written agreement dated 16th January, 1991 is a contract proper for land and no oral discussions can change the nature or date of contract itself is in writing. Again with respect we do not see how an application for consent of the land control board can constitute a contract.

So the factual position is that the application for consent of land control board was dated 17th June, 1991 and that the actual consent was given on 17th October, 1991. It is also clear that the application for the consent was not delivered to the board until September, 1991. So in terms of time there was no application for consent filed until September in respect of an agreement for sale dated 16th January, 1991.

Therefore there is no valid consent given. Section 8(1) of the Act provides for the making of an application for consent within 6 months and section 8(3) states that for the purposes of “subsection (1) an application shall be deemed to be made when it is delivered to the authority prescribed in the manner prescribed.”

Section 6(1) of the Act makes any transaction void for the purposes of the Act if the contract is not given in accordance with the Act.

Hence the transaction is void for all purposes. But that is not the point on which the learned judge dismissed the purchaser’s counter-claim. He dismissed the same on the basis that there was no valid consent. As we are differing with the learned judge on this score and as there is no notice of grounds for affirming the decision of the learned judge as provided for in Rule 91 of the Court of Appeal Rules we in the exercise of the powers of this court pursuant to section 3 (2) of the Judicature Act and rule 31 of the Court of Appeal Rules hold that the transaction in question became void for all intents and purposes by 17th July 1991 as no application for consent of land control board had been delivered by then.

We therefore dismiss this appeal. However we make no order as to costs as we have decided this appeal on a point not taken counsel for the respondent either in High Court or this court.

Dated and delivered at Kisumu this 16th day of June, 1995.

A.M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL