



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, MASIME JJ A & COCKAR Ag JA)

CIVIL APPEAL NO 47 OF 1989

GITHU..... APPELLANT

VERSUS

KATIBI..... RESPONDENT

(Appeal from the judgment and order of the High Court of Kenya at Nairobi

(Porter J) dated 20th December, 1988 in High Court Civil Case No 4758 of 1987)

JUDGMENTS

Nyarangi JA. This is an appeal from the judgment and order of the High Court (Porter, J) on the hearing of an originating summons filed on November 17, 1988 under section 57(8) of the Registration of Titles Act, cap 281 and under Order XXXVI rule 3B of the Civil Procedure Rules. The plaintiff prayed first, for orders that there be extension for the caveat beyond the forty five days mentioned in the notice by the Registrar of Titles and secondly for costs to be provided with.

Very shortly, the grounds for the application were that on January 20th, 1988, the plaintiff entered into a written agreement with the defendant, which they both executed, to purchase a portion of LR 2259/52 identified by a sketch plan attached thereto. The plaintiff then applied to the Registrar of Titles to protect his contractual right by way of a caveat which was registered as IR 6214/18 but the defendant applied for the removal of the caveat whereupon the Registrar caused a notice to be served upon the plaintiff requiring him to obtain an order from the High Court to extend the duration of the caveat in default of which the Registrar would remove the caveat forty five days from October 27th, 1988, the date of service. The material before the trial judge consisted of a short affidavit by the applicant exhibiting and verifying the contents of the originating summons. The substance of the plaintiff's case was that under the agreement, the vendor undertook to obtain the relevant approval for sub-division, but that instead, he decided to negotiate a sale of the whole property to a third party, the Catholic Higher Institute of East Africa and called upon the plaintiff to agree to the cancellation of the agreement. The plaintiff declined and proceeded to apply to the Registrar to register a caveat, whose extension he required to enable him to institute court proceedings and finalise the intended suit for specific performance.

By a replying affidavit the defendant depones *inter alia*, that the land in question is agricultural land and covered by the provisions of the Land Control Act. No consent from the Divisional Land Control Board was obtained in respect of the transaction referred to in the originating summons and the plaintiff is only entitled to a refund of his money. Mr Kowade on behalf of the appellant has raised two important

questions. The first is whether, as counsel submitted, consent under section 6 of the Land Control Act ought to have been obtained. The second is if the caveat under section 57(1) of the Registration of Titles Act, cap 281, is an instrument whose registration is void without the consent aforesaid. Mr Ransley for the respondent maintained upon an examination of the relevant provisions of the Land Control Act No 34 of 1967 and the Land Control Act, cap 302, that under section 6 of the later Act, an agreement for sale is not a controlled transaction and that a caveat is not a transaction. I think it is plain that the sale agreement related to agricultural land. In so far as the plaintiff's affidavit says that there was an agreement for the sale of the agricultural land, I am entirely satisfied that that agreement was for a controlled transaction and therefore caught by section 6(1) of the Land Control Act, cap 302.

At this point it is convenient to refer to definition of "controlled transaction" and also to section 6 of the Land Control Act. A "controlled transaction" means one of the transactions specified in section 6(1) and not excluded by section 6(3) of the Land Control Act cap 302.

It is clear from this definition that the agreement between the parties to this appeal was not excluded by sub-section (3) of section 6 of the Land Control Act.

For my part, I accept that under that agreement, the defendant agreed to sell his agricultural land to the plaintiff. In other words, the subject-matter of the agreement was sale, one of the controlled transactions. Section 9(2) of the Land Control Act provides as follows:

(2) Where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void-

(a) on the expiry of the time limited for appeal under section 11; or

(b) where an appeal is entered under section 11 and dismissed, on the expiry of the time limited for appeal under section 13; or

(c) where a further appeal is entered under section 13 and dismissed, on that dismissal.

In my judgment on a true construction of sub-section (2) of section 9 of the Land Control Act, a sale agreement is an agreement for a controlled transaction.

I am driven to the conclusion that any such agreement shall become void unless the Land Control Board for the land control area where the land is situated has given the necessary statutory consent.

I am bound to say that the provisions of section 9(2) of the Land Control Act is compelling me to reach that conclusion.

There was no application made for consent, as in my view, the law required. It follows that the plaintiff could not lawfully claim any right under section 57(1) of the Registration of Titles Act cap 281. The plaintiff had no legal interest capable of registration under the Registration of Titles Act. For these reasons, I am unable to agree with the conclusions of the High

Court and I, therefore, would allow the appeal with costs and costs of the

High Court proceedings and order that the order dated December 20, 1988 be vacated forthwith.

As Masime JA agrees and Cockar Ag JA concurs, it is so ordered.

Masime JA. I agree that this appeal must be allowed with costs. The learned trial judge whose decision has been appealed had no doubt in his mind that the agreement for sale of the suit premises had become void for all purposes under the provisions of the Land Control Act cap 302 of the Laws of Kenya. Surely then the same court cannot validate it under the same Act?

In the recent case of *EK Shamalla v Gerry JB Chibeu* CA No 169 of 1986 this court held that where there was no competent application for consent pending before a Land Control Board by the time the six months period prescribed in section 8(1) of the Act expired the agreement was void for all purposes. On the facts of the present appeal the agreement for sale was made on January 29, 1988. No application for consent had been made by July 12, 1988 the date of the caveat on the title of the suit premises and indeed no valid application was or has ever been made. The agreement therefore became void for all purposes in terms of the Act. In those circumstances if the parties were still desirous of continuing the transaction they would have to seek the High Court's order to extend the time for application to the Land Control Board under the proviso to section 8(1) of the Act; that would amount to a novation. But on the facts of the appeal only one party is desirous of getting on with the transaction and consequently the transaction cannot be revived.

Finally, I feel in fairness to learned counsel for the respondent that I should advert to submissions he made on the construction of section 6 of the Land Control Act. He sought to distinguish between a controlled transaction and an agreement for such a transaction and submitted that while the former is void if consent is not obtained the latter becomes void only if consent is refused. He further urged that since the proviso to section 8(1) of the Act permits the superior court to extend the time for making an application for consent the agreement for sale remains extant indefinitely. With respect to learned counsel the distinction sought to be drawn is one without a difference; it is obvious that there must be an agreement between the parties to a controlled transaction at a certain date before an application for consent can be made to a Land Control Board. It would be contrary to the policy of the Act to hold that a transaction becomes void for want of consent but that an agreement to be party to a transaction does not.

It is for the above reasons and those stated by Nyarangi JA that I agree that this appeal should be allowed and I therefore concur in the orders he has proposed.

Cockar Ag JA. I have had the advantage of reading in draft the judgments of Nyarangi and Masime JJ A. I agree with them and have nothing to add. The appeal should therefore be allowed and I concur with the orders as proposed by Nyarangi JA.

Dated and Delivered at Nairobi this 5th Day of November, 1990

J.O. NYARANGI

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JUDGE OF APPEAL

J.R.O. MASIME

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JUDGE OF APPEAL

A.M. COCKAR

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Ag JUDGE OF APPEAL