



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Nyarangi, Platt & Gachuhi JJ A)**

**CIVIL APPEAL NO 125 OF 1985**

**Between**

**HENRY MUKHWANA KWEMULI .....APPELLANT**

**AND**

**JOSEPH MUSUNGU NGACHI .....RESPONDENT**

*(Appeal from a Judgment of the High Court at Kakamega, Aganyanya J)*

**JUDGMENT**

March 28, 1988, **Nyarangi JA** delivered the following Judgment.

The foundation of this litigation is an oral agreement made between the parties in May 1980 for the appellant to sell to the respondent four acres of land known as No.N/Wanga/Kholela/337 at a price of shs. 6,400/-.

The agreed purchase price was paid to the appellant and the record of minute numbered 521/80 Mumias Divisional Land Control Board held on 7th August 1980 in respect of the land the subject-matter of this appeal reads:

**“Consent was given to an application made by Henry Mukhwana Kwemuli to sub-divide the ..... land into portions ..... thereafter transfer one portion to Joseph Musungu Ngachi by way of sale for shs. 6,400/-”**

The twist in the story occurred when the plaintiff attempted to demarcate the four acres. The relevant Register which was made available to the Court through the helpful testimony of the D.O. Mumias shows the date of entry as 6th May, 1980.

The first limb of the action was an order made by the SRM dated 14th January 1982 by which with the consent of the parties the case was referred to a panel of elders under the chairmanship of the D.O. Mumias. On 17th July 1984 the appellant applied for the adoption of the elders' award. The respondent's Advocate raised no objection. The upshot was that the SRM ruled in favour of the appellant and adopted the award. The Defendant's appeal to the High Court against the SRM's order was dismissed with costs by Aganyanya J on 26th July 1985 to be followed by the appeal to this Court. The grounds of appeal relevant to the case are first that there was not a valid consent of the divisional Land Control Board and secondly that the arbitration by the panel of elders was not properly conducted. The rest of the complaint is based upon grounds of irrelevancy.

In my judgment the only live issue in the case is whether the application for consent was made within the prescribed time.

The appellant was required, under the relevant provisions applicable at the time, to make an application to the divisional Land Control Board within three months – i.e. three calendar months from the 6th day of May 1980. Reference to a “month” in a statute is to be understood as a calendar month. The Interpretation and General Provisions Act Cap. 2, says so.

See also *Dodds v Walker* [1981] 1 WLR 1029.

*Jowitt's Dictionary of English Law*, 2nd edition, volume 1, p. 272 defines the term calendar month as follows:

“a period of time consisting of thirty days in April, June, September and November and of thirty one days in the remainder of the months except February which consists of twenty eight days, except in leap year, when the intercalary day is added, making 29 days.”

On the definition of a calendar month the period within which the application had to be made commenced at the beginning of the month of June. The month of May would be overlooked because the period of time from 6th May to the end of May is not a calendar month. The day on which the agreement was made is to be excluded from the computation of the three months but that on which the application was heard is included – see *Radcliffe v Bartholomew* [1892] 1 QB 161 at page 163. The application to the divisional Land Control Board was made on August 7th 1980, well within the third calendar month from the date of the agreement. It was therefore a valid consent.

For that reason I have come to the conclusion that this appeal has no merit and I would dismiss it with costs. As Gachuhi JA agrees, it is so ordered.

**Platt JA (Dissenting).** I agree that the question is whether the Land Control Board gave its consent within time to the transaction between the parties in this case. The application for consent was made on 6th May, 1980 and the law at that time was that the Land Control Board had to give consent within three months. It is also clear that a month is defined in the Interpretation and General Purposes Act (Cap. 2) as being a calendar month. That definition was inserted so that in the Act itself (Cap. 2), and every other law, and in all public documents, enacted, made or issued before or after the Act, a month should mean a calendar month except as otherwise provided. The Land Control Act (Cap. 302) is a written law and there is no express provision to alter the meaning of the word month.

The question then is: what is a calendar month?

There had been a dispute for some considerable time between the Common Law of England and Merchantile Law as to the meaning of a month; the Common Law initially preferring a lunar month of 28 days, and Merchantile Law preferring a calendar month. The advantage of a lunar month was that it was a period of 28 days from any given date and it did not depend on the length of any particular month in the calendar. The disadvantage was that one had to calculate exactly 28 days for each particular month, and if there was to be a period of more than one month, there might be errors in the calculation as to the date of the last day. On the other hand, the law merchant operated upon a calendar month without regard to the number of days in the month, so that the period ran from any particular day in the month to its corresponding day in the following month less one day. According to the calendar, there are 30 days in April, June, September and November and 31 days in the remainder of the months except February which consists of 28 days except in a leap year when one day is added.

The application of a calendar month to criminal matters was decided in *Migotti v Colvill*, (1878 – 79) 4 CPD 233. The question was how long a person's imprisonment lasted if he was sentenced to one calendar month for one offence, and for 14 days for a second offence commencing at the expiry of the calendar month? The prisoner was sentenced on 31st October and detained in custody until 14th December. It was held that the imprisonment was lawful. At the trial it was argued that a calendar month from 31st October

should have ended one day before the end of November, namely the 29th November and thereafter 14 days would end on 14th December but that was not accepted. The Court of Appeal in England held that a calendar month was a legal and technical term. It was not a Question of counting days. It must be reckoned by looking at the calendar.

One calendar month's imprisonment was to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one day. Cotton LJ explained that as prisoners cannot always be imprisoned during one particular calendar month, namely from the first to the last day of that month, the imprisonment ended at 12 o'clock midnight on the day immediately preceding the day in the following month corresponding to the day on which imprisonment began. Hence if the imprisonment started on the 31st October one should go to the 31st November less one day but in November there are only 30 days. Cotton, L.J. reasoned in this was:

“if there are not enough days in the second month to satisfy the rule, the calculation would be made in favour of the prisoner, and he would be liberated on the last day of the following month.”

Thus, the prisoner sentenced to one calendar month imprisonment will never be imprisoned for a greater number of days than there are in the month in which he was sentenced. So in that case the last day of the following month was 30th November and after a further 14 days the sentence lawfully ended on the 14th December. This is followed in section 333(2) of the Criminal Procedure Code.

In the civil law it is usual that one extra day will be allowed by excluding the day on which the period started to run. So for instance in *Radcliffe vs. Bartholomew*, [1892] 1 QB 161 every complaint under the Act in question was required to be made within one calendar month after the cause of action arose. The offence was alleged to have been committed on May 30th and on June 30th the information was laid. It was held that the day on which the offence was committed was to be excluded and time commenced on May 31st. From May 31st to June 30th was one calendar month.

Similarly, in the case of an enactment that an act must be done within 21 days after the execution, the day of execution is to be excluded (see *William vs. Burgess*, 12 A & E 635); and in the case of an enactment that a plaintiff must bring his action within six months after the act was committed, the day of act was to be excluded. (see *Hardy vs. Tyle* 9B & C 603). I would then compare *Freeman v Read*, (1863) 4 B.S. 174 E.R. Vol. 122 pp. 425 and 429. Notice was required by statute to be given one calendar month before the action commenced. Notice was given on the 28th April and the action was commenced on the 29th May. The day on which the notice was given was excluded. Thus, commencing on 29th April one calendar month would end on the corresponding day in the succeeding month, viz: 29th May and less one day, would be 28th May. Hence the period runs from 29th April, to 28th May and that being a complete month at least one month's notice had been given before the action started on the 29th May.

As the Interpretation and General Purposes Act (Cap. 2) provides for a calendar month which same provision has been made in England, the statement in *Halsbury's Laws of England*, 3rd Ed. Vol. 37 page 83 may be said to conclude the argument –

“When the period described is a calendar month running from the period of any arbitrary date, the period expires with the day in the succeeding month immediately preceding the day corresponding to the date upon which the period starts; save that, if the period starts at the end of the calendar month which contains more days than the next succeeding month, the period expires at the end of the latter month.”

If one applies these principles to the instant case, the application was made on the 6th May and consent had to be given within the periods specified in the Land Control Act (Cap. 302). Those periods were as follows:-

1. In Section 6(2)(a) at the expiration of three months after the making of the agreement, if application for the appropriate Land Control Board's consent has not been made within that time;” and

2. Section 9(2) “where an application for consent in respect of a controlled transaction is made to a Land Control Board, and the Board does not determine the application within a period of three months after the application is made, the application shall be deemed to have been refused at the expiry of that period.”

In either case expiry of the period is the last day of the period of three months. If the sixth May is taken as the day on which the period commenced, the last day would be the 5th August. Supposing that the day of the application is excluded, the period would start on 7th May and end on 6th August. Hence if consent was given on 7th August it is one day too late. In accordance with the Act, consent was deemed to have been refused at mid-night on 6th August. Having investigated the origins and history of the meaning of a calendar month, I cannot find any authority or reason for extending a calendar month any further than by excluding the first day as is usual in civil cases.

I am very sorry to be forced to this conclusion and I would happily agree to some extension if the law permitted me to do so. As it does not, the appeal must be allowed, as the agreement for sale became null and void. It was not a matter which could be allowed to go to arbitration since the arbitrators cannot declare the contract valid which a statute of Parliament has declared to be null and void.

I would therefore allow the appeal and set aside the judgments of the High Court and of the Resident Magistrate and substitute therefor an order that the plaint be dismissed. I would award the Appellant the costs in this Court and below and observe that the Respondent is entitled to the return of the price paid.

I cannot forebear to observe that in view of the fact that the 1967 Land Control Act has now been amended to permit the High court to extend time, perhaps Parliament might consider further legislation empowering the courts to extend time in cases where the Land Control Board has acted a few days over the period. On the other hand, if the meaning of a calendar month is not maintained in principle, great confusion would prevail because of the all embracing definition of month in the Interpretation and General Purposes Act.

**Gachuhi JA.** I also agree that this appeal should be dismissed. Under the provisions of Order XLV rule 17 (2) of the Civil Procedure Rules when the judgement has been entered in terms of the award there is no appeal from that judgment unless the judgment entered is in excess of or not in accordance with the award. The appeal to this Court is not that the judgment is contrary to the award but based on other irrelevant matters which are not part of the judgment and not covered by the rules.

The appellant wishing to resile from the agreement of sale alleges that the Land Board Consent obtained for the sub-division and sale is a nullity since it was granted outside the period of three months allowed under section 6 (2) (a). The parties entered into several agreements the last of those agreements being entered on 23rd May 1980. the application for the Land Board Consent was made but though undated. The fact that it is not dated does not invalidate it. Through the courtesy of the District Officer Mumias, he produced the Land Board Record which revealed that the application was recorded as having been received on 6th May 1980.

The question as to when the application was made could be at anytime during the cause of those agreement and definitely before the last agreement. It may be that the appellant was not ready to have the application being made without having been paid although there is no evidence to that effect. There is no complaint that the application was not made within the three months’ period of making the agreement. This could be implied that the appellant is aware that the application was made within the three months of making the agreement. The objection is of granting the consent by the Board.

Section 9 (2) deals with the granting of the consent within a period of three months after the application is made otherwise the application will be deemed to have been refused. Month has been defined by the Interpretation and General Provisions Act (Cap. 2) as meaning Calendar month. No definition of a calendar month is given in the Act. In *Stroud’s Judicial Dictionary* calendar month is from one day of the month to the corresponding day in the other . Section 57 of the Interpretation and General Provisions Act (Cap. 2), the day the thing happened is not counted in computilisation of the time. The application was

made, according to registration by the Board, on 6th May 1980. Three months by ordinary computation of time would commence on 7th May 1980. Three months would expire at midnight of 6th August 1980. One may interpret the period to end on 7th August 1980 which is in my view acceptable.

One thing which is clear is that the Board meets on a particular day of the week once in a month. As the Board is concerned, it has to consent to a controlled transaction within three months since the receipt of the application. I have checked the calendar and noted that the 7th August 1980 was on a Thursday. The application bears a date of 12th June 1980 which date was on a Thursday when the parties were not present.

It is then left to follow the practice that the Board meets once in every month on a particular day in a week. No other day except the days set out in practice when the Board could meet to transact its business. This would mean that the Board could not meet on any other day in August 1980 except the 7th when the consent was granted. Meetings of the Board are not regulated by the applicants and there is no way the respondent or the appellant could have made the board meet outside its scheduled time.

The parties should not be penalised by the acts of the Board for not having met earlier which fact they had no control. In my judgment 7th August 1980 was the last days of the three months within the meaning of Section 9 (2) upon which the consent could be granted which in fact was granted.

The consent of the Board was validly obtained as provided by Section 8 of the Act and it is final and conclusive and shall not be questioned.

I would dismiss this appeal with costs.

**Dated and delivered at Kisumu this 28th day of March , 1988**

**J.O NYARANGI**

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**JUDGE OF APPEAL**

**G.H PLATT**

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**JUDGE OF APPEAL**

**J.M GACHUHI**

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**JUDGE OF APPEAL**