



IN THE COURT OF APPEAL

AT NYERI

(Coram:Nyarangi, Platt & Gachuhi JJA)

CIVIL APPEAL NO 149 OF 1986

BETWEEN

KARURU MUNYORORO.....APPELLANT

AND

JOSEPH NDUMIA MURAGE.....RESPONDENT

JUDGMENT

March 21, 1988, **Platt JA** delivered the following Judgment.

This is an appeal from the decision of the High Court in Nyeri relating once again to the problem of Land Control consent. The learned judge held that the consent was valid, even though on the face of the document that would not appear to be so. As a consequence, the learned judge ordered specific performance of the contract for the sale of four acres out of the nine or so acres of land parcel No Nyeri/Endarasha/410.

The land in question was a parcel in the Endarasha Settlement Scheme. The Settlement Fund Trustees had allocated No 410 to the appellant Karuru Munyororo. By the beginning of 1980 the appellant Karuru owed some Kshs 12,800.75. By selling four acres to the respondent, Joseph Ndumia Murage for the sum of Kshs 21,000 the appellant sought to clear his land of the debt, leaving him still some balance with which to develop the remainder of the land. On April 17, 1980 the appellant Karuru swore an affidavit in which he stated that he was the registered owner of parcel No 410 that he had proposed to sub-divide it and sell four acres to Mr Joseph Ndumia Murage for the total of Kshs 21,000. They had agreed to follow the right channels through the Land Control Board until the division of the plot was finalized. On that day the respondent Joseph paid the appellant Kshs 1,575 as a deposit which left a balance of Kshs 6,625 which the respondent said that he was ready and willing to pay. There was also a record of their agreement dated April 17 1980, witnessed by Mr Samuel Wang'ondy who gave evidence on behalf of the respondent. The agreement related that the appellant desired to clear the entire outstanding loan. It went on to say that the appellant and respondent had made a compromise that the total cost of the four acres would be Kshs 21,000. After clearing the loan the sub-division of No 410 Endarasha would be done by the Survey of Kenya and the whole exercise would take place in the right channel until two deeds were issued to the parties. It seems that the balance of the price was to be paid on transfer. In fact the respondent did pay off the loans and the chief accountant of the Settlement Fund Trustees acknowledged the payment of Kshs 12,800.75 on May 5, 1980. The consent was given to the sub-division on September 9, 1980. It is apparent from the letter of consent that the application having been made on May 11, 1980, consent was not granted within three months. That period would have ended on August 10, 1980. Under the provisions of the Land Control Act in force up to December 23, 1980, the application had to be made

within three months of the agreement, and then having been made, the consent must either have been granted or refused within three months. If no action was taken within three months it would be deemed that the consent had been refused. (See sections 6(2)(a) and 9(2) of the Land Control Act of 1967 (cap 302). It was understood by the trial court correctly that the amendments to the Land Control Act came into force on December 24, 1980 did not apply to this case, and having looked at its provisions, there is no was of construing them retrospectively in the circumstances of this case.

I am aware of the anxiety of the learned judge in this case and his reason for extending the period of three months. That was because the appellant had been put in prison in June and July 1980. The learned judge held that the period must be extended because the appellant could not appear before the Land Control Board. It is unfortunate that no provision has been made in the Act to extend the time in such circumstances. In comparison with the Law of Limitations Act (cap 22); the Land Control Act (cap 302) does not provide for any period of disability which may be excluded. It is supposed that the representation can be made by the prisoner or arrangements can be made to bring the prisoner under guard to the Board.

I have also noted the attempts by the Administration to get this matter settled. Unfortunately I cannot twist the express terms of a statute under the rule of expediency that the end justifies the means. All that can be said is that the consent to the sub-division and sale having not been granted in time, the consent is void.

I take note of Mr Mahan's ingenious argument that the application to the Board was actually made on September 3 and that the date of the letter of consent, namely May 11, 1980 was not correct. If the application had failed by August then a new application could be made in September and that had not been granted in time. Unfortunately that is not the case. After the appellant had been put in prison on charges of attempting to obtain money by false pretence, he was in no mood to make an application. Indeed he disputes that he was present on September 3. I am in no position to find that there was a fresh application by the appellant in September so that the consent was granted within time.

The final point raised was that section 8 of the Land Control Act provided that the decision of the Land Control Board should be final and conclusive and not questioned by any court. It has been held many times that the section presupposes that the provisions of the Act have been carried out. As section 9(2) expressly provides that where the application for consent is not determined within three months, the application shall be deemed to have been refused, with the expiry of that period, how then can the Board ignore invalid as a consent. Consequently the transaction has become void.

In the respondent's amended plaint he has merely asked for an order for specific performance and costs of the suit. In his original plaint the respondent had asked for the refund of his money and damages as alternative to specific performance. The alternative prayers having been withdrawn in the amended plaint, the only issue that remains is specific performance. This order must be set aside. But it is noticed that under section 7 the respondent can reclaim any consideration that he has paid.

Therefore I would allow the appeal, set aside the judgment of the High Court and substitute therefore an order that the plaint be dismissed with costs. As Nyarangi and Gachuhi, JJA agree, it is so ordered. The appellant will also have the costs of this appeal.

Gachuhi JA. This is yet another case involving the Land Control Act (cap 302). The parties entered into agreement of sale of 4 acres of land in Endarasha Settlement Scheme. The appellant knew very well that he had no absolute title to parcel number Nyeri/Endarasha/410 until such time he had cleared the amount outstanding and due to the Settlement Fund Trustee. In order for the appellant to be able to sell the four acres, he had to do certain things to have clear title and obtain consent to sub-divide and sale. So the sale agreement was entered into .. ; price was agreed part of which amount cleared the Settlement Fund Trustee .. outstanding. The appellant also received part of the agreed price.

The sole agreement envisaged that the sale will follow the right channel. The only known right channel was to obtain Land Board Consent. Application for the Land Board Consent was made on May 11, 1980. Something must have happened after this because the appellant disputed the sale agreement.

The trial judge correctly found that there was sale agreement and that application was made to the Land Board for consent but the appellant could not attend the Land Board as he was arrested and detained for about six weeks. The appellant disputed attending the Land Board meeting on September 3 1980. Even if there was a meeting on that date, it was obviously out of time as three months provided by section 6(2) .. of the Land Control Act (cap 302) had expired. The amendment to the Act of December 1980 does not affect this transaction. The board could not extend the time of three months in the act.

The provision of the Act is meant to safeguard intending purchasers from losing their money if the sale may not go through. Purchasers should not part with their money until such time consent of the board is obtained according to law. In any view, I have to disagree with the learned judge that the Land Board Consent was obtained within the prescribed time and hold that the consent was obtained after the expiry of three months in which case, there was no valid application before the board. (See section 9(2) of the Land Control Act. The letter of Consent is null and void and the whole transaction is a nullity due to failure of obtaining the Land Board Consent within the stipulated period according to law. The respondent mistakenly amended the prayers in the plaint for refund and damages but he can claim whatever money he had paid as provided by section 7 of the Land Control Act (cap 302). I too would allow this appeal with costs.

Nyarangi JA. I agree. In this judgment I propose to confine myself to the question whether there was valid consent of the Divisional Land Control Board to the material transaction.

The essential matters before the trial court show that the agreement of sale was entered into on or around May 5, 1980, an application for a letter of consent made on May 11, 1980 and the consent given on September 9, 1980. That is not a valid consent because it was given after the expiry of the period set by the law applicable at the time.

Clearly, therefore, Mr Njiru's first point is a good one and suffices to dispose of this appeal.

I too would allow this appeal and as Platt JA agrees the appeal is allowed with costs as Gachuhi JA has proposed.

Dated and delivered at Nyeri this 21st day of March , 1988

J.O NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL