



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Nyarangi, Masime JJA & Kwach Ag JA)**

**CIVIL APPEAL NO 169 OF 1986**

**BETWEEN**

**ELIJAH SHAMALLA BENJAMIN MOMO..... APPELLANT**

**AND**

**GERRY CHIBEU.....RESPONDENT**

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

**JUDGMENT**

December 1, 1988, **Nyarangi, Masime JJA & Kwach Ag JA** delivered the following Judgment.

Gerry Chibeu, the respondent, is the registered proprietor of the piece of land Title Number South Kabras/Chesero/956 (the suit land), which is the subject matter of this appeal. According to the Land Registrar, Kakamega, he became registered as such on March 3, 1981. He bought the suit land at a public auction where it was offered for sale by Kenya Commercial Bank Ltd in exercise of its statutory power of sale as chargee following default by the original owner to repay a loan which had been advanced to him by the Bank on the security of this title.

By an agreement in writing dated February 6, 1982 and entered into between the respondent and Elijah Shamalla Benjamin Momo otherwise known as E K Shamalla (hereinafter called “the appellant”), the respondent agreed to sell to the appellant the suit land at a consideration of Kshs 16,500 which the appellant paid the respondent in cash and receipt of which the respondent duly acknowledged. The respondent on his part surrendered the land certificate to the appellant. The appellant did not take immediate possession.

It is common ground that since the suit land was agricultural land within the meaning of section 2 of the Land Control Act (Cap 302), this agreement for sale was a controlled transaction which required the consent of the relevant Land Control Board for its essential validity.

Less than a fortnight later, the respondent concluded another agreement to sell the suit land to one Fabiano Lubega at a much higher consideration of Kshs 41,000. Attempts by the appellant to secure the cooperation of the respondent in making the necessary application to the Land Control Board for consent were futile with the result that right up to the time the respondent filed proceedings in the High Court, no consent had yet been obtained. When the respondent reneged on his commitment to sell to the appellant, the appellant in order to limit his damage, lodged a caution against the title and took possession of the suit land.

Early in July 1983, the respondent filed a plaint seeking an order for the removal of the caution lodged by the appellant and for his eviction from the suit land. In paragraph 7 of his plaint, he pleaded:

“(7) In any event, the agreement of sale was subject to the consent of the Malava Land Control Board which consent was never obtained rendering the agreement void in terms of section 6(1) (a) of the Land Control Act (cap 302).”

In an apparent attempt to meet this part of the respondent’s case, the appellant filed a defence in which he stated among other things that there was an application for consent pending before the Board.

In the course of time the case finally came for trial before Aganyanya J, who after hearing evidence found as a fact that the respondent did indeed enter into an agreement to sell the suit land to the appellant; that this agreement for sale was a controlled transaction which required the consent of relevant Land Control Board; that as no consent had been obtained, the agreement was void. For this reason he felt compelled, and not without some sympathy for the appellant whom he felt had been treated dustily by the respondent, to give judgment for the respondent. The appellant felt aggrieved and lodged this appeal.

Among the grounds canvassed in this appeal was ground 5 which is couched in these terms:

“ (5) Further without prejudice to the foregoing, the learned Judge erred in failing to consider the defendant’s application for extension of time for the consideration by the Land Control Board of the application for consent to the controlled transaction”.

The appellant gave evidence at the trial and in cross-examination said that the application for consent forms were not signed by the respondent.

That the forms had been prepared and forwarded to the District Officer on February 4, 1983 and that the original agreement was signed on February 6, 1982.

Mr Kagucia, who appeared for the appellant before us submitted that in a controlled transaction where an application for consent had been made and was still pending before the Board neither party to the agreement can take advantage of the lack of consent to avoid the agreement. For this submission Mr Kagucia relied on sections 8 and 9 of the Act which so far as is material provide:

*“ 8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any party thereto:*

*Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do upon such conditions, if any, as it may think fit.*

*(2) The Land Control Board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.*

*(3) For the purposes of sub-section (1), an application shall be deemed to be made when it is delivered to the authority prescribed in the manner prescribed.”(Italics added).*

The relevant part of section 9 of the Act provides:

*“ 9(2) Where an application for the consent of a LandControl Board has been refused, then the agreement for a controlled transaction shall become void – (subject to the right of appeal given under sections 11 & 13 of the Act.)”*

It goes without saying that section 9(2) envisages the existence of, and only comes into play when there

is, a competent application for consent pending before the Board.

Mr Azangalala submitted that since the purported application for consent was submitted to the relevant Board long after the expiry of the period of six months within which applications are mandated to be made under section 8(1) of the Act and was made without seeking an order from the High Court for extension of time within which to apply under the provision, there was no valid application pending before the Board within the true intendment of section 8 of the Act. The application was made more than a year after the agreement was signed. It was not made within 6 months.

No application for extension of time was sought. On these facts we have no difficulty at all on this part of the case and like the learned Judge, we have come to the conclusion that there was plainly no competent application for consent pending before the Board, in the precise wording of sub-section (3) of Section 8 of the Act,

“delivered to the authority prescribed in the manner prescribed.”

It must follow from this that the agreement for sale was void for all purposes for lack of consent under section (6) of the Act with the result that this appeal fails and is dismissed.

In view of the finding we have made concerning the validity of the application for consent made by the appellant in this case, the question whether a controlled transaction in respect of which application for consent is pending before the Board remains extant or subsists until the Board signifies its refusal under section 9(2) of the Act, does not now fall to be decided.

Ordinarily costs follow the event but having regard to the history of this matter and more specifically the conduct of the respondent, we think the proper order to make in the circumstances is for each part to bear his own costs.

Finally, section 7 of the Act provides for the recovery of the consideration paid under a controlled transaction which becomes void by the person who paid it. We were informed from the bar by Mr Azangalala that he is holding the sum of Kshs 16,500 which was paid to the respondent by the appellant. We order this amount to be refunded to the appellant forthwith.

The order of the Court therefore is that the appeal is dismissed with each party bearing his own costs.

**Date and delivered at Kisumu this 1st day of December, 1988**

**J.O NYARANGI**

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**JUDGE OF APPEAL**

**J.R.O MASIME**

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**JUDGE OF APPEAL**

**R.O KWACH**

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**Ag. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**