

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL NO 23 OF 1986

BARASA WANAGWE.....APPELLANT

V

JAFETHA KIMOKOTIANI.....RESPONDENT

JUDGMENT

An interesting issue of law under section 6(2) (b)(section 6(3) in the old Act) of the land control Act 1967 has been raised.

Counsel for the appellant tells us correctly that the judge raised the particular point for the first time in his judgment and so no submissions were made. The exact position was not raised in the pleadings. The defences will have to be amended to include a specific reference to section 6(2) (b) to ensure that the issue whether consent is necessary or not, is considered. We think that it was improper for the judge to decide that issue of law without giving counsel for the appellant an opportunity to exhibit the title and documents and make submissions on the scope of section 6(2) (b). A similar situation seems to have arisen in Cleophas Wasike v Mucha Swala CA 6 OF 1983 where in part the exact interpretation of section 6(2) (b) was left open.

Mr Wafula has been embarrassed by having to put before the court the titles showing the history of the ownership of land which he has not been able to do in full. He makes the valid point that the appellant has been prejudiced.

In view of the decision we are about to make it is not necessary for us to decide if the documents now shown to the court would have been admissible as additional evidence under R 29. Mr Wafula has helpfully urged that a re-trial should be held to decide the issue which was omitted.

Accordingly, we order that the judgment of the High Court and order for costs be set aside and the record be remitted to the High Court Kakamega for a re-trial to be held before a different judge on amended Defence pleadings.

No order as to costs.

March 27, 1987

NYARANGI, PLATT & GACHUHI JJ A