REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

(CORAM: NYARANGI, PLATT & GACHUHI JJ A)

CIVIL APPEAL NO 134 OF 1985

NDUATI……..……APPELLANT

V

GITIHA FARM…….……..RESPONDENT

JUDGMENT

This appeal has been preferred against the order of the High Court at Eldoret given on October 14, 1985. I shall summarise it. The learned judge dismissed an application to review his own order, made by consent on June 20, 1984. The first consideration related to the consent to the order, given by the Appellant Julius Nduati. The learned judge pointed out that because Nduati had relied on the consent order of June 20, 1984, in Nduati's own subsequent application of October, 1984, seeking compliance with it, he could not be heard to say one year later in October, 1985, that he had not consented to the order of June 20, 1984. The second point concerned the irregularity that leave to bring an application for *certiorari* had been waived by the consent of Nduati to the order of June 20, 1984. Thirdly the application for review in itself failed, because a long time had elapsed before it had been brought and no new important matter or evidence had been discovered. There had been no appeal against the consent order of June 1984, it would be a hardship, thought the judge, to the other parties, if review succeeded in overtaking the consent order of June 1984.

The appeal has been taken against each one of these aspects of the order, But before I come to deal with the grounds of appeal, it will be useful if I explain how this argument arises.

Julius Nduati, the appellant had been one of thirty-three partners who acquired Gitiha Farm, a parcel of land of twenty acres. Thirty of the partners had one share, in which group fell Julius Nduati. But Zakaria Mwangi and Francis Murithi had two shares each while Haruni Mwega had three shares. It was provided that:-

> "4. The farm is duly sub-divided amongst all 33 partners and each partner is holding his or her piece of land duly demarcated by the partners to sell his or her share to any third party subject to the approval of the Farm Committee."

The Farm Committee comprised eight of the partners headed by Josphat Gitau, Isaaka Gitau and Paulo Wandeto, person names appear in this multifarious dispute. Julius Nduati unfortunately fell to a dispute

with members of the Committee and they are the Respondents to the appeal. I shall refer to them as "the Committee". It appears from the partnership deed that the Farm had been sub-divided the farm and "every partner is holding his or her piece of land as duly sub-divided amongst all the partners." It would seem therefore that one share and one plot were synonymous.

But the Deed does not appear to represent the position on the ground. In 1977, the District Land Control Board gave consent to the transfer of the farm to all thirty-three partners. It appears that Nduati had been allowed to build upon a small plot, the dimensions of which measured 22 feet by eighty feet. In his report of June 21, 1983, the District Officer, Moiben, found that the elders considered that Nduati should continue to reside in the above plot in which he had built, while awaiting further allocation, when a surveyor would come to the Farm, "although the committee had sub-divided and given each member measurements of 100' x 100' for building while leaving the other portion for further sub-division among themselves." The District Officer thus perceived an unfair allocation to Nduati, and could not reply from the Committee why this should be so.He thought that Nduati was "a full member with one share like any other member." During the arbitration on this dispute before the chief, the committee put forward the idea that Nduati did not buy shares but a plot measuring 22' x 80'. Nduati claimed to be a full member with shares the other partners. In this he was upheld. He was found to be a full member and not a plot buyer, who should get his rightful shares. It was the word "shares" which was later to cause trouble. There is no doubt that the District Officer thought that Nduati had one share equal to the share of the other partners, but he used the word "shares" because Nduati was to have a building plot, a plot of 100' x 100' and a further share of the remainder. In all, his land would be equivalent to an equal share with all the other partners.

This decision was made the order of the Senior Resident Magistrate's Court at Eldoret in Land Civil Case No 19 of 1983. It was ordered that "Nduati is declared a shareholder on Gitiha Farm and should get his right shares accordingly.

On November 6, 1983, someone applied for Land Control Board consent.

This court has not been able to see the application form, but it may have been Nduati. On December 2, 1983, the Board sanctioned the transfer of five plots of 100' x 100' each to Nduati. It has been explained had paid in Kshs 2,600 he was entitled to five "shares". But this does not appear to have been the basis of shares until the consent order was given, and it did not form part of the Land Board Consent in 1977, nor the deed of partnership. According to a memorandum dated August 8, 1982, Nduati paid Kshs 2,600 for the business plot 22' x 80'.

The committee was incensed. It claimed that Nduati had got the consent of the Board in December 1983, by misrepresentation. To put matters right the committee brought a badly drafted application for an order for certiorari dated April 6, 1984. It was an application by general agreement not brought under the proper namely Order LIII of the Civil Procedure Rules. But much worse, it did not clearly comply with Order LIII Rule 1 of the Rules whereby an *ex parte* application for leave should be made first. Perhaps this had been intended because two affidavits were filed; the first filed in the appeal record is short one and dated August 6, 1984, the next filed is a longer and fuller statement of the Committee's complaints dated March 4, 1984. Whatever the position was, no leave was granted, but on June 20, 1984, the learned judge set out the consent order which has caused all this trouble. Instead of giving leave, or refusing leave, he went straight through to a compromise.

"Order: By consent the 1st Respondent is declared a shareholder of Gitiha Farm owning in the said farm one share and one plot he presently occupies.The 1st Respondent to be given his above share in the land adjacent to the plot he is presently occupying. Liberty to apply is to the issues concerning the survey carried out by the 1st Respondent. Each party to bear his own costs."

It was now the turn of Nduati to face problems. On October 19, 1984 he lodged a temporary injunction praying for an injunction to be issued to restrain Gitiha Farm, its agents or servants from demolishing Nduati's building on his hand. He asked that the Title Deed deposited with the Court be held; and that the Farm's survey carried out on August 30, 1984 be declared of no effect; and that the Farm be ordered to

respect and adhere to the High Court's order of June 20, 1984. Nduati's supporting affidavit referred to the order of June 20, 1984 and its terms. He then recites the clash between the surveyors engaged by each side. He refused to accept the survey of the farm's surveyor of August 30, 1984, declaring that his building might be demolished. He wanted a temporary injunction pending the hearing of the suit" of which there is no evidence on this record) because he feared a transfer of his share if the title deed were handed to the farm.

There would appear to be some irregularities in this application. Who was involved, the Farm which was not a person, or the partners, or the Committee? It is not clear if there was a separate suit to support the injunction. But in any case it will come as no surprise, that the learned judge once again went straight through to a compromise, by a consent order dated November 23, 1984. It was ordered that the Farm be divided as shown in the plan which had been sent to the Commissioner for Lands.

To avoid any confusion or dispute it was ordered that Julius Nduati should get plot no 34 and plot no 49 in full settlement of all his claims. Paul Wandeto was to be given certain plots. All members were to share the fees of the survey. The title deed was to be released with the Bank book to the District Commissioner Eldoret for division and registration of the plots in accordance with the proposed plan.

The accord did not hold, and on September 18, 1985, Nduati brought the application for review which is the subject of this appeal. He asked for the order of June 20, 1984 to be reviewed; that all subsequent orders in relation to this case as affecting the Applicants shares in Gitiha Farm be reviewed; land that the order of the Senior Resident Magistrate, Eldoret, be reinstated. And so the story comes back to the very beginning, which is a cautionary tale for all those who like to take decisions outside the set procedures of the Civil Procedure Rules. Two matters taken on the appeal can be disposed of quickly; the first concerns jurisdiction and the second concerns the grounds for review of the consent order.

Mr Gatimu pointed out that as leave had not been granted to pursue an order for *certiorari,* Order LIII Rule 1 of the Civil Procedure Rules and not been complied with. From this he concluded that that proceedings before the learned judge were a nullity, including his consent order of June 20, 1984. There is no doubt that if the learned judge had given orders as prayed for, they would have been null. On the other, if he had refused to give orders it is not clear what the position would be. The present situation is different again. The learned judge did not deal with the application and affidavits before him. He sidetracked the application and entered a consent order. He could at any stage up to the consent order give leave. Had he done so there could not be any doubt as to his jurisdiction. But before leave is granted the learned judge still has jurisdiction, to consider leave. The consent order did not deal with the application at all. There is no doubt that the parties always have the right to enter into a consent order or compromise, unless their consent is expressed, so as to clothe the Court with a jurisdiction that it does not possess. This consent order did not provide that despite leave not being granted, the court could continue to hear the application. There was an application before the court which it could deal with, and which the parties apparently choose to compromise, instead of the applicant pressing for leave.

There is no real basis for the claim, that the learned judge must have allowed the Review, because the error on the face of the record was that the learned judge exercised jurisdiction which he did not have.

On the other hand, had the learned judge really embarked on the application without leave, the lack of leave would certainly have robbed him of jurisdiction, and Mr Kiarie's attempt to extricate the proceedings on the basis of curable irregularity, would not avail him. The authorities cited by Mr Kiarie do not touch this point. The learned judge picked the wrong ground to support his order, by saying that the irregularity had been waived.

Returning then to the second simple point, the Appellate cannot be allowed to say that he did not consent to the consent order, when he himself relied on it in his own application for an injunction, aimed at requiring the committee to carry out the terms of the order of June 20, 1984. He cannot approbate and reprobate. Having clearly supported the order of June 20, 1984 during the injunction proceedings, he cannot be heard to say that he did not consent to the order.

Supposing however, that the Appellate had at first supported the consent order, but had then found it unlawful as being ultra vires, the Appellate would not have been debarred from bringing his application for review.There is no time limit for applying for review, for the good reason that the application may only be possible after ascertaining what error lies on the face of the record, or, for example what new and important material or evidence has been discovered. Of course there may be cases where negligent delay can be detected. It does not appear that in this case there was culpable delay as much. What may have happened was that the appellant obtained advice late, that the consent order was possibly ultra vires. Then the appellant may have fallen under the temptation of wrongly denying his agreement to the consent order.

The final question is whether the consent order and indeed the *certiorari* application, challenged the consent of the Land Control Board.

Mr Gatimu relied on section 8 of the Land Control Act (Cap 302) which provides that subject to the appeal system set out in the Act, a consent cannot be challenged in any court. The appeal system only operates when consent has been refused; not when consent has been granted. In this case, the consent was granted, and thus there was no appeal. Gatimu argued therefore that an order to bring up the consent for quashing, would infringe section 8 of the Act.

However, Mr Kiarie had the answer. It is well established that if organs like the Land Control Board have acted in excess of their jurisdiction, or wrongly in law, *certiorari* is available to quash their orders. In principle, Mr Kiarie is right that *certiorari* does not infringe section 8 on the ground that section 8 presupposes that the consent has been regularly obtained.Apart from statutory impropriety, fraud upon the Board, *(inter alia*) would also be a cause for holding that a consent had not been regularly obtained.

On the other hand, the court's consent order did mark a departure from the terms which had been approved in the consent of the Land Control Board dated December 1983. The Board gave consent to an application in vague terms specifying the size of the plots but not where plots were situated. I have not been able to exactly compare the situation envisaged by the Board in 1983 with the position in 1977. But it would appear that the consent of 1983 which may have made some departure from the consent granted to the sup-division in 1977.

It would also appear that the consent granted in 1983 did not really follow the order of the Senior Resident Magistrate and the Arbitration award of the District Officer, Moiben. There is a dispute whether the consent granted in December, 1983 was obtained regularly, it being suggested that the Appellant deliberately misled the board as well as the fact that the application for consent was not applied for by those parties. The argument here is that there was a breach of the Rules of natural justice because the Farm Committee was not notified that consent would be applied for. It is not necessary to indicate the rights or wrongs of these arguments, but it is sufficient to say that there may well have been grounds for which merited the attention of the learned judge so as to decide whether leave should be grated for a proper hearing of the application. It was not an application about an entirely useless proposition.

But there is no doubt that the order of June 20, 1984 (and also that of November 23, 1984 for the same reasons) run counter to the Land Board consent of December 2, 1983. I should deal only with the order of June 20, 1984, since the proceedings of November 1984, are not in issue nor ancillary. It was a further dealing in the land of this Farm. It may be that the consent order of June 20, 1984 represented a new agreement between the Committee and Nduati. As such, the parties might have got consent to it. As far as is known at present, no consent was obtained. The order of June 20, 1984 therefore stands to be void for lapse of time, unless the High Court can give leave to apply for consent out of time. The real answer to this case is that the learned judge can record such genuine consent orders as the parties put before him, to conclude the business of his court; but such order, if they involve a transaction in agricultural land caught by section 6 of the Land Control Act, become void for all purposes as provided by the Act, in the same way as agreements outside the court, unless consent is acquired within time. The parties to this case were aware of the rules; they had gained consent in both 1977 and December 1983. Therefore if no consent has been obtained to the transaction presented by the consent order of June 20, 1984, it will have become void. The position of this appeal seems to be then, that the learned judge was entitled to entertain the

application and record the consent order which by-passed the certiorari proceedings. The learned judge was also entitled to dismiss the application for review, on the grounds that review was sought for the wrong reasons.But the order that he made will be unenforceable unless the Land Control Board gave consent to it. It would probably be wise for the parties to present their plan for the division of the land bringing up to-date the 1977 and December, 1983 consents granted. But whether they do so or not, is a matter for them. Mr Gatimu asks for the restoration of the order of the learned Magistrate. It was never set aside; but it may be queried whether that order supported the land board's shipment of December, 1983. It seems to me to be arguable whether it did.

For these reasons I would dismiss the appeal. As the appellant has been largely unsuccessful, I would order him to pay the costs of this appeal.

Nyarangi J A I agree and wish to guard against being supposed to say that the High Court had jurisdiction to make the order dated June 20, 1984. That order was made on a notice of motion under order 53 Rules 3,5,6 and 7 of the court procedure "Rules *inter alia* for an order that the letter of consent granted by the Uasin Gishu Land Control Board be removed to the High Court for the purpose of being quashed. In form it was an application for an order for certiorari.

R 1 of order 53 provides,

"No application for an order of *mandamus,* prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule."

The application for leave is to be made *ex – parte* to a judge in chambers and must be accompanied by a statement giving the name and description of the applicant, the relief sought, and the grounds on which it is sought and by affidavits verifying the facts relied on. The grant of leave to apply for the writ of *certiorar*i shall if the judge so directs operate as a stay of proceedings in question until the application is heard and determined.

Apart from the mandatory nature of rule 1 of order 53, it is manifest that the steps which follow the granting of leave are so crucial to the persons directly affected that without compliance with the entire Order, the rights of a party might be prejudiced.

In my judgment, the high – water mark of what was submitted is that the judge had no jurisdiction to entertain the application. Jurisdiction could not be covered on a court by a compromise on the part of the litigants.The application before the judge was incompetent, the proceedings null and avoid and the consequential order null and of no effect.

It is perfectly clear that if statutory bodies etc. Act in excess of their power or contrary to the law, *certiorari* will go to quash the Orders. A Land Control Board which either gives or refuses its consent to the controlled transaction under section 8(2) of the Land Control Act (Cap 302), is deemed to give a final, and conclusive decision which shall not be questioned in any court only if the board complies with the procedure subsequent to reaching the final and conclusive decision. Otherwise, in law, there would be no final and conclusive decision.

I too would, therefore, dismiss the appeal with costs to the Respondent and as Platt and Gachuhi, JJ A agree, it is so ordered.

Gachuhi J A I agree with the judgment of Platt J A which I had a chance to read in draft.

However, I wish to add that there is a complete muddle in this matter. There are irregularities as pointed out in the application for an order of *certiorari*.. The appellant has entangled himself in this matter by his own deed and has no way out of it. He does not appear to know what he is actually doing or does not properly pursue his rights in the right manner.

He made an application to the land board all by himself and got consent. This was contrary to the earlier

Land Board consent obtained by the Farm Committee for sub-division of the land. The latter consent cannot be implemented. A consent can only relate to a specific land reference and not to something in the air. The appellant having adopted the consent order of June 20, 1984 to his advantage, now applies for the same consent order to be set aside. This is unjust.

The end to this muddle as I see it, for the benefit of all parties, is for them to put their heads together, and have a revised plan which they can present to the Land Board for consent and upon which they can act. They should apply to the Land Board to revoke the earlier consents to give way to the new scheme.

I would also dismiss this appeal. I agree with the proposed order for costs.'

June 11, 1987

NYARANGI, PLATT & GACHUHI JJ A