



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram:Madan, Law & Potter JJA )**

**CIVIL APPEAL NO. 35 OF 1982**

**BETWEEN**

**KATHLEEN ISABEL SPIERS.....APPELLANT**

**AND**

**NJOKERIO FARMERS COMPANY LTD.....RESPONDENT**

**(Appeal from the High Court at Nairobi, Nyarangi J)**

**JUDGMENT**

This is another case concerning the effect of the Land Control Act (cap 302) (hereinafter referred to as “the Act”) on a purchase of agricultural land by a public company. In *Nyakinyua and Kang’ei Farmers Company Limited v Kariuki and Gatheca Resources Limited*, Civil Appeal No 16 of 1979 (unreported) this court held that a land control board is prevented by section 9(1) (c) of the Act from consenting to the purchase of agriculture land by a public company, and that the only course open to a public company is to petition the President under section 24 of the Act for the transaction to be exempted from the application of the Act. In this appeal the question which arises for decision is whether a public company which has contracted to purchase agricultural land must make its application to the President within any specified time, and if so, and if the company fails to apply within that time, does the contract become void.

The appellants are the executors of the estate of the late Mrs Kathleen Isabel Spiers. That estate included some 533 acres of agricultural land, in the Nakuru District, which is bounded on one side by the Njoro river.

By an agreement for sale dated December 23, 1976 Mrs Spiers sold to the respondent company an area of some 343 acres further from Njoro river and retained some 190 acres, being the land nearer the river. The land sold was LR 6998 less 34 acres (which may conveniently be called the “back land”). The land retained (which may conveniently be called the “front land”) was three adjacent parcels bordering on the Njoro river, LR 7013/2 being some 44.5 acres, the 34 acres of LR 6998 excluded from the sale, and LR 7448 being some 111 acres.

As regards the three plots of land retained by Mrs Spiers, the agreement for sale contained the following special condition:

“The purchaser in consideration of the payment to the vendor of Kshs 1,000 shall have the first refusal to purchase the remaining 34 acres of LR No. 6998. LR Nos 7103/2 and LR No. 7448 at a fair valuation carried out by an independent valuer agreed upon by the parties hereto as and when the vendor wishes to dispose of the same or any part thereof.”

The provision for completion was contained in clause 5 of the agreement as follows:-

“5. The completion date is thirty days after Presidential consent to the transfer or thirty days after the exercise of the first refusal hereafter contained whichever is the later.”

The essential facts would not appear now to be in dispute. On March 11, 1979, some 26 months after the agreement for sale, Mrs Spiers executed a codicil to her will (which had been made on March 4, 1977). She recited the agreement for sale of December 23, 1976, and averred in a further recital that:-

“B. The said agreement has become void because land control consent thereto or exemption therefrom was not obtained within the time limits prescribed by law.”

Mrs Spiers then directed her trustees to refund the sum of Kshs 1,000 to the respondent company which it had paid as consideration for the first refusal, and gave the option to purchase at a fair market valuation of the three plots constituting the front land “to my old servant Mochu Kiriro.” On May 20, 1979, Mrs Spiers died. On July 24, 1979 the respondent’s advocates wrote to the advocates for the executors indicating that the respondent wished to exercise its right of first refusal to purchase the front land retained by Mrs Spiers, and asking the price. On August 2, 1979, the advocates to the executors replied, saying:-

“The Agreement for sale between your clients and the deceased has become void for want of land control consent.

By a codicil to her will, a copy of which is enclosed, Mrs Spiers directed that her Trustees should refund to your clients the Kshs 1,000 which your clients gave to the option and by will she granted the option to another party.

Without prejudice to the strict legal position, the Trustees propose to honour the agreement for sale in so far as it relates to the back land of LR 6998.”

By Legal Notice No 266, dated September 25, 1979, and apparently published in the Kenya gazette on about October 5, 1979, the President exempted from the provisions of the Act the “proposed sale” by Mrs Spiers to the respondents of LR Nos 6998, 7103/2 and 7448, ie the whole estate including the front land and the back land.

On November 2, 1979, the appellants filed a plaint against the respondent seeking a declaration that the agreement for sale of December 23, 1976, was void for all purposes, a perpetual injunction restraining the respondent, its servants or agents from trespassing on LR Nos. 6998, 7448 and 7103/ 2, eviction of the respondent, its servants or agents from that land, and other relief. On November 15, 1979, upon ex parte application by the appellants, the appellants were granted a temporary injunction restraining the respondent, its servants or agents from trespassing on the front land. The respondent company was in fact then in possession of the back land in accordance with clause 3 of the agreement for sale, having paid the purchase price of Kshs 180,000 in full.

At the trial Mr Hewett, who appeared for the plaintiff executors, stated that although the executors contended that the agreement for sale of December 23, 1976 was void for want of land control board consent, they were ready and willing to transfer the back land (LR 6996 less 34 acres) to the defendant company upon the satisfaction of the requirements of the Act. On this appeal Mr Hewett has informed us that the executors and the respondent company have agreed to the sale and purchase of that part of the front land represented by LR 7103/2, and that Mr Kiriro had renounced any claim he may have had to that plot.

Consequently the sole issue before us is whether the first refusal granted to the respondent company by Mrs Spiers in the agreement for sale of December 23, 1976, is or is not still a valid agreement, by virtue of the Presidential exemption dated September 25, 1979, in respect of that part of the front land represented by the 34 acres of LR No. 6996 and the 111 acre plot LR 7448. The position taken up by the appellant executors is a very proper one. They have no axe to grind. It is their duty to carry out the wishes of the testator. Her wishes are clearly expressed in the codicil, and Mr Kiriro wishes to have the benefit of the option bequeathed to him. So Mr Hewett very properly argues that the testator was advised that the agreement for sale was void for want of consent or exemption under the Act, and that Mrs Spiers was free to bequeath the option by codicil to Mr Kiriro as she did, leaving the respondent company to argue their case. Before the trial judge and before us Mr Hewett has submitted that under the terms of the Act as it was in force at the material time in 1976 and 1977, the agreement for sale of December 23, 1976 became void for all purposes at the expiration of three months after the making of the agreement, because

- (i) application for the appropriate land control board's consent had not been made within that time; and
- (ii) the Presidential exemption could not have retrospective effect.

Mr Mukunya, who represented the respondent, submitted in reply that

- (i) a Presidential exemption could be given at any time to a land transaction affected by the Act, without any time limit as to the making of the application or the granting of the exemption; and
- (ii) that when the Presidential exemption was granted on September 25, 1979, the agreement of sale of December 23, 1976 was still in force.

In order to decide between these opposing contentions, it is necessary to look at the provisions of the Act as in force in 1976 and 1977. Let it be said at once that the land the subject of this appeal is "agricultural land" within the meaning of the Act, and the sale and the granting of a first refusal under the agreement of December 23, 1976 were "controlled transactions" within the meaning of the Act.

Reducing section 6 of the Act to the minimum necessary for the purposes of deciding the issue in this case, we have the following:-

"6. Each of the following transactions, that is to say (a) the sale, ....or other disposal of or dealing with any agricultural land..... is void for all purposes unless the land control board.... has given its consent in respect of that transaction in accordance with this Act.

(b) An agreement to be a party to a controlled transaction becomes void for all purposes –

(a) at the expiration of three months after the making of the agreement, if application for appropriate land control board's consent has not been made within that time; or..."

Mr Hewett's strong point is that section 6(1) of the Act refers in its plain terms to the transaction with which this case is concerned and the effect of the failure to apply to the appropriate land control board within the stipulated time must take effect.

But the absurdity of the situation, if this is how the Act must be read, is that the effect of section 9(1) of the Act, as this court decided in the *Nyakinyua and Kang'ei Farmers Company* case referred to above, is that a land control board is obliged to refuse consent to the sale of agricultural land to a public company. Mr Hewett's argument seems to me to amount to this. Although the land control board was bound by law to refuse consent to the transaction, the public company was bound to apply for the forbidden consent within three months of agreeing the transaction, and if within that three months the land control board did not, as it by law could not, give its consent, and by inference, if Presidential exemption was not obtained within that period, section 6 of the Act rendered the transaction

void for all purposes. On the other hand, section 24 of the Act provides in equally plain terms:-

“24. The President may, by notice in the Gazette, exempt-

(a) any land .....; or

(b) any controlled transaction....; or

(c) any person in respect of controlled transactions....;

from all or any of the provisions of this Act,....”

The agreement for sale was made subject to the Law Society Conditions of Sale, and condition 25 was not excluded. Under the agreement time was not made of the essence, and the completion date under Clause 5 was “Thirty days after Presidential consent to the transfer or Thirty days after the exercise of the first refusal hereinafter contained whichever is the later”. Clause 25 of the Law Society Conditions entitled the vendor to give the purchaser reasonable notice making time of the essence of the contract where the purchaser has failed to perform his obligations under the contract. No such notice was given and no suggestion has been made that the respondent company was in any way in default under the agreement for sale. The appellants rely entirely on their interpretation of the relevant provisions of the Act.

In a case such as the one before us, where the land control board is prohibited by the Act from giving consent, there is an apparent conflict between section 6, which requires land control board consent to be given within three months of the agreement being made, and section 24 which empowers the President, without limitation of time, to exempt the agreement from the provisions of the Act. In my view that conflict can and should be resolved by holding that subsection (2) of section 6, which contains the time limits, does not apply to cases where a presidential exemption must be and is obtained. In my judgment section 24 provides an exception, at least in cases where the land control board is prohibited from giving its consent, from the general provisions as to the time within which a consent must be obtained. Accordingly in my judgment, the agreement for sale of December 23, 1976 is still a valid agreement and is now one to which the Act does not apply. Accordingly I would dismiss this appeal with costs; the costs of course to be paid out of the estate of the late Mrs Spiers.

**Madan JA.** Inasmuch as section 9(1) (c) of the Land control Act imposes an absolute duty upon a land control board to refuse consent in any case in which agricultural land is to be disposed of to a public company, the only method open to the public company, in order to legalise the transaction, is to seek Presidential exemption under section 24. If the vendor gives notice to make time of the essence it would be for consideration that His Excellency the President acts at his pleasure both as to time and extent of the exemption. I also agree with the order proposed by Potter JA. The appeal is ordered to be dismissed with costs.

**Law JA.** I have read in draft the judgment prepared by Potter JA. I agree with it, and with the order proposed, and cannot usefully add anything.

**Dated and Delivered at Nairobi this 16th day of February 1983.**

**C.B.MADAN**

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**JUDGE OF APPEAL**

**E.J.E.LAW**

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**JUDGE OF APPEAL**

**K.D.POTTER**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**