



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MADAN, LAW & POTTER JJA)

CIVIL APPEAL NO. 26 OF 1979

KARIUKI..... APPELLANT

VERSUS

KARIUKI.....RESPONDENT

JUDGMENT

Law JA This appeal vividly illustrates the injustice which so often flows from the operation of the Land Control Act (cap 302), hereinafter referred to as “the Act”. That Act, as its long title indicates, is intended to provide for controlling transactions in agricultural land. It was not, and cannot have been, intended to apply to land such as the suit premises, which consist of a plot of 1/4 of an acre, one of some two hundred similar plots which were made available, at the time of land consolidation, to homeless people so that they should have somewhere to live. Before consolidation, the land was agricultural. Now it is residential. The plots have become a village. Unfortunately, the area in which these plots are situated has never been designated as a municipality, township or trading centre, and it does not fall within any of the exceptions to the definition of agricultural land contained in section 2 of the Act. It is therefore agricultural land, transactions in which are controlled by the Act, and subject to the consent of the Land Control Board, which was not obtained in this case.

The facts of this case are sadly familiar. The registered owner of the plot, reference number Muguga/Kanyariri/T 191, is the respondent. In 1971 the respondent, by an agreement in writing, agreed to sell this plot to his brother, the appellant, for Kshs 5,000. The appellant paid Kshs 3,000 and went into possession. He has built a house or houses on the plot. The respondent has refused to complete the transfer, no doubt because the value of land has gone up considerably since 1971. He contends that it is agricultural land, and that as the consent of the Land Control Board was never obtained to the transfer, the transaction is void for all purposes under section 6(1) of the Act. The appellant sued in 1975 for an order that the contract of sale be specifically enforced, in the court of the resident magistrate at Kiambu. The learned resident magistrate gave judgment for the appellant. He held that although the consent required by section 6 of the Act had not been obtained, the Act could not be used as an instrument of fraud, and he relied on the judgment of Sachdeva Ag J (as he then was) in *Munana Kimani v Wahothi Kimani and another* (High Court Civil Case No 19 of 1975). In that case, the learned judge said:

“For the appellant to now come before the Court and attempt to seek refuge under the Land Registration Act or the Land Control Act, is tantamount to fraudulently backing out of commitments which he has knowingly entered into. This court will do substantial justice to the parties and will not countenance such attempts which clearly negate the spirit of section 3 of the Judicature Act.”

With respect, the learned judge was in error. When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked. This was appreciated by the learned first appellate judge, who held that as the transaction was void under section 6 of the Act, specific performance should not have been decreed. He allowed the appeal against the order for specific performance, but made no order as to costs. He went on to express the view that damages was the proper remedy, and that as the respondent to the appeal before him (the appellant in this appeal), had not claimed damages in his suit, he should file a separate suit for damages.

With respect, I do not agree. No general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. The only remedy open to a party to a transaction which has become void under the Act is that he can recover any money or consideration paid in the course of the transaction under section 7 of the Act. See also the decision of this Court in *Cheboo v Gimnyigei* (Kisumu Civil Appeal No 40 of 1978) in which a majority of this Court disagreed with the view expressed by Madan JA that compensation for improvements was recoverable in addition to the money or other consideration paid in the course of a transaction which has become void under the Act. Had the Act so intended, it would have so provided. See also *Karuri v Gituru and others* (Nairobi Civil Appeal No 25 of 1980) which is to the same effect.

On appeal to this court against the decision of Hancox J, we had the benefit of hearing additional evidence given by the Chief Commissioner of Lands, Mr Murage. He inspected the land in question and deposed that it was in a village which came into existence as a result of land consolidation. Plots in the village were given a registration including the letter "T", for township. In the view of his department such plots do not require Land Control Board consent, being residential rather than agricultural in nature. He had issued a practice note, dated September 24, 1977, to the effect that, so far as his department was concerned, it was not necessary for consent to be applied for or obtained in respect of parcels of land with "T" registrations. He said that the practice note was designed to modify the Act, but that the Act was not amended by any legal instrument, so that the suit plot was and remained agricultural land, not being excluded from the definition of agricultural land in section 2 of the Act.

I fear that Mr Murage is right. Although his department would register the transfer of the suit plot without requiring the consent of the Land Control Board, as a matter of administrative practice, in law the plots in Muguga/Kanyariri are agricultural land and controlled transactions affecting those plots are void for all purposes in the absence of such consent. The respondent, unmeritorious as he may be, is entitled to possession of plot number Muguga/Kanyariri/T 191. I would dismiss this appeal, with costs. The appellant can set off the Kshs 3,000 which he has paid under the void transaction against those costs. I would not interfere with the orders for costs made in the courts below.

I would also grant a stay of execution of the orders made by this court for six months from the date of this judgment to enable the appellant, if so advised, to apply to the President under section 24 of the Act for exemption from the requirement for Land Control Board consent in respect of the transaction of sale of plot number Muguga/Kanyariri/T 191 the subject of this suit. I would grant a general right to the parties to apply to this court for directions in the event of such an application being timeously made.

Madan J. I have had the advantage of reading the judgment of Law JA in draft. I agree and have nothing useful to add.

Potter JA. I have had the advantage of reading in draft the judgment of Law JA and I agree with it. I also agree with the orders proposed.

Dated and Delivered at Nairobi this 21st April, 1982

C.B. MADAN

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JUDGE OF APPEAL

E.J.E. LAW

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JUDGE OF APPEAL

D.C. POTTER

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JUDGE OF APPEAL