



REPUBLIC OF KENYA

IN THE HIGH COURT OF NAIROBI

CIVIL APPEAL NO 158 OF 1977

HIRANI NGAITHE GITHIRE.....APPELLANT

VERSUS

WANJIKU MUNGE.....RESPONDENT

JUDGMENT

This is an appeal from the ruling of the Resident Magistrate at Kiambu. Briefly, this is what the suit is about. In 1969 the appellant and respondent who are brother and sister entered into an agreement for sale of agricultural land by the appellant to the respondent.

The land is situate in the Kabete/Karura area. They did not seek the consent of the Land Control Board of the area as required under section 6 of the Land Control Act. The respondent paid the full agreed sale price and took possession of the land, on which she has carried out some development, or so Mr Itotia told this Court. The appellant refused to effect a legal transfer of the land to the respondent, however, and the latter filed a suit for specific performance. When the matter went before the Resident Magistrate at Kiambu for hearing, Mr Daine for the appellant raised a preliminary point of law that there can be no specific performance in the absence of consent from the Land Control Board. Mr Thimba, who appeared for the respondent in the lower court, submitted that there were decided cases which state that section 6 of the Land Control Board Act should not be used as an instrument of fraud.

The trial magistrate after finding that the parties did not obtain the consent of the Land Control Board and after considering three unreported High Court cases, ie *Mungai Mukiri v Njoroge* by Muli J, *Re Kihara Gathenge's Estate* before Miller J and *Munana Kimani v Wahothi Kimani* by Sachdeva J, made an order for specific performance, and ruled that lack of consent by the Land Control Board was not fatal to the agreement and equity and substantial justice supported specific performance. He gave costs to the respondent. The appellant appealed.

My understanding of the three High Court cases to which the magistrate referred is that they were not on the Land Control Board Act; and, if they were, the Court was never requested to make a finding on them. They are distinguishable, and as in fact they are irrelevant I need not consider them.

In the passages quoted, Muli J expressed an opinion on the need to decide certain cases according to substantial justice, without paying attention to technicalities of procedure. Here we are dealing with substantive law and not procedure. Miller J talked about cases where customary law was strict and harsh, and Sachdeva J echoed what other judges would say, namely, that an Act of Parliament should not be used to perpetuate fraud.

Mr Itotia has argued that at the time the Resident Magistrate made the ruling there was no East African Court of Appeal case on the point. That is immaterial for the statute was there and there was the High

Court case *Rioki Estate Co (1970) Ltd v Kinutia N joroge* (unreported) in which I had held that the agreement between parties was void for all purposes under section 6(2) of the Land Control Act for lack of consent. On appeal, I was upheld by the Court of Appeal, [1977] Kenya LR 146. In that case the plaintiff sought vacant possession of a house he had let to the defendant forming part of agricultural land. There was no consent of the land control board and the plaintiff argued that that being the case the defendant's tenancy was illegal and void; and I agree to that contention. The Court of Appeal agreed to it too. Section 6 of the Land Control Act is very precise.

It reads (section 6(1) and (2):

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 for the land control area ... has given its consent ...

(2) An agreement to be a party to a controlled transaction becomes void for all purposes at the expiration of three months after the making of the agreement if application for the appropriate land control board's consent has not been made within that time.

We all agree to this, even the trial magistrate; but the trial magistrate feels that that provision is strict and harsh, and ought to be softened by equity. His views do not agree with it. With respect, we are not concerned with what the trial magistrate's views are; nor are we concerned with whether the provision is harsh. We are not condoning the parties. The position is simple and clear. Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The Courts cannot do that; for it is not for us to legislate but to interpret what Parliament has legislated. So in this case that agreement between the parties having been entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and, since no consent had been obtained within that time, nothing can revive or resurrect such agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural Land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes. This means that by virtue of section 6(2) of the Act, an agreement in respect of a controlled transaction, where the necessary consent of the land control board has not been obtained within the stipulated time, becomes an illegal contract for all purposes. No specific performance can be ordered in respect of an illegal contract. As the agreement between the parties in this case had become an illegal contract the trial magistrate grossly erred in law in ordering specific performance, and his order cannot stand. In his ruling the trial magistrate said, "To invoke section 6 of the Land Control Act would be most unjust and [the respondent] cannot be compensated."

I do not agree with the trial magistrate. The respondent has a remedy under section 7 of the Act, whereby she can recover the consideration paid; and I can see no reason why she cannot recover her expenses. Section 6 is not harsh because the duty to seek the board's consent is on both parties.

The parties had not used section 6 to perpetuate a fraud as fraud was never pleaded and proved (which is necessary where fraud is alleged by a party in a civil case). I do not know how the trial magistrate found fraud where no evidence of it was adduced. Fraud cannot be implied, but it must be proved by evidence. Mr Daine's point should have been upheld, namely that in a contract relating to a controlled transaction no specific performance can be ordered in the absence of the necessary Land Control Board consent.

For these reasons the appeal must be and is allowed. The lower court's order is set aside. Costs of the appeal and in the lower court are awarded to the appellant.

Appeal allowed with costs.

Dated and delivered at Nairobi this 16th day of February 1979.

Z.R CHESONI

JUDGE