IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CIVIL APPEAL NO 25 OF 1981

BETWEEN

HARAMBEE CO-OPERATIVE

SAVINGS & CREDIT SOCIETY.....APPELLANT

AND

MUKINYE ENTERPRISES LTD.....RESPONDENT

JUDGMENT

The appellant, as plaintiff in Civil Suit No 3523 of 1979, in the High Court of Kenya at Nairobi, claimed from the respondent, the defendant in that suit, specific performance of an agreement in writing dated March 7, 1975, whereby the appellant agreed to purchase and the respondent agreed to sell a parcel of land LR 8788/5 Kasarani, Kiambu, for a consideration of Kshs 2,520,000. The appellant has paid Kshs 2,460,000, retaining the balance of Kshs 60,000 to offset the cost of road construction which in terms of the agreement the respondent was obliged to carry out. It has not been suggested, either in the High Court or in this court that this retention was unjustified and it is common ground that the purchase price was paid in full.

The respondent resisted the claim for specific performance on the pleaded ground that the transaction, being controlled transaction in terms of the Land Control Act, cap 302 (hereinafter referred to as the Act) was null and void as the consent of the Land Control Board was not obtained within three months as required by section 6 of the Act and the respondent also contended at the trial that in any event the appellant's claim for specific performance was barred by laches.

We are no longer concerned with the question of laches, as the learned trial judge (Simpson J as he then was) decided this point in the appellant's favour, and there has been no cross-appeal.

The learned judge however dismissed the claim for specific performance, holding that as the land was agricultural, within the definition of that term in section 2 of the Act, and as the requisite consent had not been obtained under section 6 of the act within three months of the date of the agreement or for that matter, at all, the transaction of sale was void for all purposes. He rejected the submission made by Mr Muite for the appellant that the obtaining of consent by the respondent for change of user of the land from agricultural to residential purposes was a condition precedent to the agreement, which did not accordingly come into force until that consent was obtained, allegedly on March 8, 1979, when the Director of Physical Planning in the Ministry of Lands and Settlement wrote to the appellant's advocates informing them that he had no physical objection to the change of user from agricultural to residential and Mr Muite

went on to submit that the agreement then became an agreement for the sale of land which was not agricultural, so that the consent of the Land Control Board to the transaction of sale was not necessary.

The learned judge held that the transaction was a controlled transaction and that the appellant's only remedy was that provided by section 7 of the Act, namely return of the consideration paid under the void transaction, and he accordingly gave judgment for the appellant for Kshs 2,460,000 with interest from the date of judgment.

The appellant has appealed to this court, the grounds of appeal being succinctly stated as follows:

1. "The learned trial judge erred in law in making the finding that the transaction was a controlled transaction.
2. The learned trial judge erred in law in failing to appreciate and/or accept the agreement of sale was subject to a condition precedent either express or implied that change of user was to be obtained and consequently the transaction was not a controlled transaction.
3. The learned trial judge erred in law in permitting the statute to be used as an instrument of fraud."

Mr. Muite, who argued the appellant's case with much persuasiveness and ability, did not press the third ground, rightly in my opinion. As I said in *LN Kariuki v N Kariuki*, Civil App No 26 of 1979, Court of Appeal, unreported:

> "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."

Before us, Mr Muite did not allege fraud on the part of the respondent. He contented himself with submitting that laws which are manifestly unjust should be mitigated so far as the courts are able to do so, without doing violence to the word of the Act and he relied on certain dicta to this effect in the judgment of Lord Denning MR in *Eddis v Chichester Constable* [1969] 2 Ch D 345. That may be so, but I do not think that the clear words of the Act as to the necessity for consent to controlled transactions could be ignored with/out doing violence to those words. It is one thing to mitigate, but it is not for the courts to legislate.

The main burden of Mr Muite's submissions, applicable to the first two grounds of appeal, was that the agreement between the parties must be read and construed as being subject to the implied condition that the agreement would not come into effect until consent was obtained from the competent authority to change of user from agricultural to residential, thus removing it from the operation of the Act and from the requirement of Land Control Board consent. A condition precedent is defined in the textbooks as an obligation or a right suspended until the happening of a stated event. Mr Muite submitted that although no such condition was expressed in the agreement, such a condition must necessarily be read into it, and is inescapable from the correspondence and other evidence.

This submission did not commend itself to Simpson J. I am of the same view. The agreement for sale, which is basically a printed form stated to be "subject to the Law Society Conditions of Sale", provides in section 5 that the transaction is to be completed "within six months from the date of execution of these presents". Nothing is said about the coming into effect of the agreement being subject to consent to change of user from agricultural to residential, not even in the last section headed "Special Conditions", which is blank, and where one would have expected to find the alleged condition precedent to have been inserted, had such a condition been in the contemplation of the parties. What is more, the existence of such a condition, whether express or implied, was not asserted in the original plaint. It was asserted for the first time in the amended plaint, filed without leave on July 29, 1980.

I do not see, in these circumstances, how the condition precedent contended for by Mr Muite can possibly be imported into the agreement. Even if I am wrong on this, I do not think that the Director of Physical Planning's letter referred to earlier in this judgment amounts to a "limitation imposed by law" within the

definition of “agricultural land” in section 2 of the Act, so as to remove the suit land from the operation of the Act. The letter is purely permissive (“I have no physical objection to the change of user from agricultural to residential”). It does not impose any legal limitation on agricultural user, and does not have the effect of altering the status of the land, which was and still remains agricultural land as it always has been. The transaction and, as the learned trial judge held, no Land Control Board consent having been obtained, the transaction was void for all purposes.

Mr Muite further submitted that as a respondent had not denied the allegation contained in paragraph 5A of the amended plaint that the agreement was subject to a condition precedent, that allegation must be deemed to be admitted under order VI rule 9(1). This submission was not made in the court below and was not made in Mr Muite’s opening address in this court, he mentioned it for the first time in his final reply. It was clearly an afterthought, and with respect I do not think it has any merit. The amended plaint, having been filed without leave, did not become part of the pleadings until leave to file it was given. This only happened in the course of the hearing in the High Court, with the respondent’s consent. It was then too late for the respondent formally to plead to the new paragraph 5A, and it is clear from the record of the arguments in the High Court that the respondent strongly denied the allegation of the existence of a condition precedent, and that this denial became an issue in the suit and was one of the main issues left to the learned trial judge for decision.

For these reasons, I would dismiss this appeal, with costs. I would not certify for two advocates. As Miller JA and Potter JA agree, it is so ordered.

I would only add that, in my view, this is a case in which His Excellency the President might well have been asked, under section 24 of the Act, to exempt the controlled transaction, the subject of this appeal, from the provisions of section 6 of the Act which require Land Control Board consent. The appellant is a society composed of civil servants, and it entered into the agreement to purchase the suit land, which was admittedly agricultural, with the object of developing it as a housing estate for its members, an object which was well known to the respondent. We are informed by Mr Muite that no request for exemption has been made, nor did he ask for an adjournment to enable one to be made. This is unfortunate, as an order of exemption might well have been made in the peculiar circumstances of this case, but it is now too late as the judgments of this Court have the effect of finally disposing of the litigation between the parties. I can only express the hope that now that this litigation has been concluded, the respondent will see fit voluntarily to honour the contractual obligations which it freely entered into, but from which obligations it has been relieved by an Act of Parliament which has often been the subject of adverse criticism by the courts in Kenya because of the sometimes harsh and oppressive manner in which it interferes with freely-negotiated contracts.

Miller JA. Litigation leading up to this appeal arose from yet another of countless transactions touching or affected by the provisions of the Land Control Act of 1967 (cap 302), hereinafter referred to as the Act.

The Act is entitled “An Act of Parliament to provide for controlling transactions in Agricultural Land;” and the grounds of appeal fairly indicate the nature of the instant case. The appellant company as plaintiff, approached the High Court praying for judgment against the respondent company, by way of specific performance of an agreement for sale of land; and an order that the respondent do execute the relevant transfer of the land, in favour of the appellant. There was a further prayer for damages for breach of contract: but this was deferred at trial. The learned trial judge adhering to provisions of section 6 of the Act, refused to grant specific performance and gave judgment for the appellant limited to the amount of Kshs 2,460,000 i.e. the return of the deposit paid to the respondent, consonant with the provisions of section 7 of the Act. The appellant now seeks reversal of that decision on the following grounds:

1. The learned trial judge erred in making the finding that the trial transaction was a controlled transaction.
2. The learned trial judge erred in law in failing to appreciate and/or accept the agreement of sale was subject to a condition precedent either express and/or implied that the change of user was to be obtained and consequently the transaction was not a controlled transaction.
3. The learned judge erred in law in permitting the statute to be used as an instrument of fraud.

By these grounds of appeal, the appellant is seen to take the stand that by reason of the nature of the agreement for sale and purchase, and steps taken attending that agreement, the transaction as a whole should not have been deemed caught by the provisions of the Act and should at all events be enforceable in equality.

The Act being in operation, the parties entered into a written agreement dated the March 7, 1975 for the sale and purchase of the parcel of land known as LR 8788/5 Kasarani, Kiambu. The fixed purchase price was Kshs 2,520,000 of which the appellant retained Kshs 60,000 for road making; the respondent to retain Kshs 1,512,000 and the transaction to be completed within six months from the date of execution of the agreement. With respect to the control of dealings in Agricultural land section 6(1) of the Act provides:

"6(1) Each of the following transactions –

a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area.
b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area of which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;
c. is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. "

Consent of a relevant Land Control Board to a controlled transaction should be given within three months of application made for the same. In the present case, however, it was common ground at the trial and before this court that the consent of the relevant Land Control Board, Kiambu, was neither sought nor obtained in respect of the sale agreement.

Pursuant to naturally expected prior negotiations, and as alleged in the appellant's amended plaint in the High Court, the parties formally entered into the written agreement for sale of the parcel of land "in or about November, 1975." The agreement recites, *inter alia*, that "the property sold" is all that parcel of land comprising 622 plots of 100 ft x 100 ft equivalent to 0.25 of an acre of thereabouts, Primary School Site consisting 7 acres, Nursery School site consisting 2.5 acres situated on plot Number LR 88788/5 Kasarani, Kiambu District, Kiambu. It also recites that "the property is sold" in vacant possession and subject to roads development to murram standard and sub-division of 0.25 acre plots. This finalembracing condition of sub-division into 0.25 acre plots, appears to conflict with that of 7 acres earmarked for the Primary School site. Be that as it may, the appellant purchaser, paid its position of the agreed purchase price ie Kshs 2,460,000. From the date of the agreement onwards, the question of transfer of the parcel of land was for one reason or another, delayed; and was never effected. In the interim the agreement executed to the date the appellant filed suit in the High Court and to the knowledge of the parties and their advocates, the following significant matters occurred:

a. Advocates for the appellant submitted to advocate for the respondent the relevant draft transfer for approval.
b. Alleging that there was no response, advocates for the appellant lodged a caveat on the September 22, 1979 against the title to the land claiming purchaser's interest.

I find it difficult to conclude which party may have been to blame for the necessity to lodge the caveat, because as early as April 4, 1976 advocate for the respondent wrote to the appellant company informing it, that he was in possession of the relevant title deeds and was awaiting the consent of the Commissioner of Lands "for the transfer" to draw up and register the same in favour of the appellant immediately thereafter.

The question of the consent of some authority was therefore obviously being contemplated as necessary to the transaction; and the appellant's views of at least one necessary consent is clearly shown by what immediately follows in this judgment:

"It appears clear to me that the caveat having been lodged on September 22, 1979 the Registrar of Titles in exercise of his duty and powers under section 15, Registered Land Act (cap 300) and section 57 Registration of Titles Act (cap 281) sought certain information from the appellant's advocate as caveator on behalf of the appellant and this was the reply:

> "September 26, 1979
> Principal Registrar of Titles
> Lands Office,
> NAIROBI.
>
> Dear Sir,
>
> RE: LAND REF NO 8788/5, LR 30793
>
> On September 22, 1979 we lodged a Caveat against the above title on behalf of our client M/s Harambee Cooperative Savings & Credit Society Limited. Our client claims purchaser's interest on the basis that:
>
> 1. There exists an agreement for sale and
> 2. It has paid the purchase price in full in the amount of Kshs 2,520,000.
>
> We are aware that there is no letter of Consent from the relevant land control Board. This is explained by the facts that our client has:
>
> a. Applied exists the change of user from Agricultural to Residential user.
> b. Applied for sub-division.
> c. Applied for a conversion of the title from RTA to RLA.
>
> We enclose herewith copies of correspondence between ourselves and the relevant authorities concerning the three applications listed herein.
>
> We have advised our client that after getting the approval of change of user, and consent to sub-divide we shall apply for the conversion from RTA to RLA and then lodge a formal transfer when the Certificate of Title shall issue in our client's favour. This explains why we have not applied for the consent particularly as at the time of transfer the change of user have been approved.
>
> If our approach to the entire matter is correct we hope that in fact the Caveat falls outside the ambits of the recent judicial decisions on these matters.
>
> Yours faithfully,
> WARUHIU & MUITE"

From the text of this letter, I can think of no clearer an admission, that it was known and appreciated, that despite whatever had transpired between the parties, and the steps up till then taken towards performance of the agreement, the consent of the Land Control Board was necessary and still outstanding. Indeed it is also apparent from the text of the letter, that in another breath, the appellant's advocates were conscientiously of opinion that there was no need to apply for the Board's consent, particularly as it was anticipated that a letter of consent to change of use of the land was forthcoming, and shall have fallen into possession at the time of the transfer of title. Throughout the entire case, no suggestion was made that the parcel of land may not be *in specie* "agricultural land" within that meaning attributed by section 2 of the Act (cap 302). The above advocates' letter on behalf of the appellant confirms this.

The appellant filed suit in the High Court about nine months after this letter, alleging that the respondent had refused and/or neglected to execute the transfer in the sale. The plaint further averred that

> "it was a condition precedent and both the plaintiff and the defendant proceeded on the basis that

> the said agreement was conditional on the defence undertaking to obtain, and obtaining change of use".

The respondent then made application to strike out the plaint and dismissal of the suit, on the grounds that as no consent of the relevant Land Control Board was ever given, the contract was therefore void, and could not be validated by any proposed change of user. In opposition to this it was averred for the appellant that an approval for change of user granted by the Commissioner of Lands (four years after the execution of the agreement) and dated March 8, 1979 (exhibit J01) sufficed, because

> "an agreement to buy agricultural land on the condition that the approval for the change of use from agricultural to residential is first obtained, is not a controlled transaction within the meaning of section 2 of the Act."

The approval of "the Commissioner of Lands" relied upon by the appellant issued from the Department of Physical Planning of the Ministry of Lands and Settlement in compliance with Regulations made under the Lands Planning Act (cap 303); and was captioned, *inter alia*, "Proposed Sub- Division and Change of User from Agricultural to Residential Purposes." The document states that on a study of the plans submitted, the Director of Physical Planning found them in order and he therefore had not physical objection to the change of user from agricultural to residential purposes "subject to satisfying the necessary development conditions that might be stipulated by the Local Authority." It is enough to observe that the text of this approval, does not assume omnipotence as to change of user of the land, etc, with respect to restrictions whatsoever.

As in the above letter addressed to the Registrar of Titles, Mr Muite for the appellant has strenuously urged this Court to construe this letter of the Commissioner of Lands, as equivalent to, and a valid substitute for the Land Control Board's consent to the sale transaction in respect of the land. He has also suggested that both parties were all along of the same opinion. I however think that any such mutual conception though probable, does not necessarily or automatically spell compliance with the provisions of the Act.

With respect to the sufficiency or otherwise of the "approval" of the Commissioner of Lands (exhibit J01), for purposes of this case, I think that a principle of construction of statutory provisions may be of assistance in answering that question; in that one party looks to the provisions of chapter 302 and the other party to the authority of action under Chapter 303. The Act, chapter 303 is entitled "An Act of Parliament to make provision for planning the use and development of land." It appears that there may have been a misconstruction of the phrase - "for planning the use and development of land" in the title to the Act (cap 303) as it literally appears to encompass change of user generally. The Act (cap 302) however, specifically treats of, and relates to transactions towards the acquisition of agricultural land for conversion to uses other than agricultural. I would say that there arises a critical point in the transformation of use of the land; and as to this, the purpose and intendment of the Act (cap 302) are expressly directed, since land-holding or the right thereto are both prior to use and development of the land. Accordingly, although the two statutes are in pari materia, I lean towards the construction which leads to the reasonable and practical result unless the Act (cap 302) is to be deemed meaningless. I therefore do not subscribe to the view that the approval of the Ministry of Lands and Settlement put in evidence, is a valid substitute authority for the change of user here involved when the legislature has specifically imposed the duty of approving upon the Land Control Board.

From the standpoint of the parties themselves, and as I have recently pointed out in Civil Appeal No 57 of 1981 (as yet unreported), the purpose of the Act (cap 302) reaches out to agreements to deal with agricultural land. Section 6(2) of the Act provides, *inter alia*, that 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." Mr Muite for the appellant urged that "the courts should imply a condition precedent in the agreement, particularly as in this case, both parties would say that the agreement was subject to change of user." As I see it, there can be no doubt that the parties in fact contemplated change of user of the land from the outset of their negotiations; but as I have already pointed out, therein lies the difficulty; because

it is with respect to the said change of user that the Act was promulgated. The learned trial judge correctly observed that change of user which is the *sine quo* non to the performance of the agreement, was "not so provided in the agreement." It is obvious to me that he considered that the interpretation of the written agreement was the firm and best basis not only for determining what the parties had bargained for, but also the applicable ambit of the agreement itself. The authorities we follow are at one, that where a contract is wholly in writing, its interpretation is exclusively within the jurisdiction of the judge; and that courts insist that "the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement."

I have earlier pointed out that the parties in this case, were clearly both aware that the parcel of land was agricultural land at the time of their entering upon the agreement for its sale. The letter of the appellant's advocate to the Registrar of Titles makes this clearer still. For the purposes of the Act "land" is defined as including "an estate, interest or right in land." I would therefore go further and intimate that an agreement itself even though pending the Board's consent, may well in certain circumstances eg for conveyancing, constitute a transaction of a "dealing" with agricultural land within the provisions of section 6(1) of the Act. On the basis of many decided cases Mr Muite has urged, that a case was made out for implying a condition precedent in the agreement, and enforceable at the instance of the purchaser appellant.

He referred us to the local case *Jiwaji v Jiwaji* [1968] EA 547. I think it is enough to say that although therein reminding that "the courts will not of course make contracts for the parties" and by majority this Court's predecessor did imply a term in the written agreement, the ambit of the agreement in that case was primarily limited to the ascertainment of rights as between the parties themselves. There was not as in the present case, a duty case upon the Court, to view the agreement with specific regard for statutory provisions governing the transaction quo a transaction per se. The learned trial judge treated this proposition in the instant case and concluded:

The words of the Act however cannot be construed contrary to their meaning. If the meaning is clear as I think it is, I must give effect to it whether or not I approve of the result. I cannot see that either the description of the land contained in the agreement or the intention of the parties is material to the actual status of the land at the time.

It is therefore obvious to me, that the learned judge had in the mind the established principle that courts will not relieve against express statutory provisions.

This view however, does not exhaust consideration of the essence of Mr Muite's contention and urgings. Assuming that the learned trial judge was wrong or that I am myself in error in adhering to the established mode of interpreting written agreements between parties, the appellant's approaching the courts must be seen as indeed it is, on appeal to equity throughout. It is a quest for the equitable remedy of specific performance. Mr Muite has currently cited a number of cases where courts have in the circumstances implied conditions precedent with a view to doing justice as between the parties. He has also quite properly pointed out as I understand him, that even although fraud was not alleged in the court below or in this Court, a statute should not be used to defeat genuine rights; and that laws which are manifestly unjust should be mitigated so far as that can be done, without doing violence to the provisions of statute. This is perfectly true, but not without limitations; and I must observe, that in Kenya as elsewhere, it is no phenomenon that persons either seek to avoid, or to profit, from statutory provisions no sooner than they appear. It is nevertheless the duty of the judge to interpret the law as it stands; even although he may entertain reservations as to the effects of certain of its provisions in certain cases. I am of opinion that in a case as this, although the court might well have implied a timeous applicable condition precedent if possible, the court would still have had to be satisfied that the contract to which the agreement relates is of its own nature enforceable by the court. The Act is a policy statute and the words of section 6(1) of the Act are positive and prohibitory. The historical reasons for the introduction of the Act by the legislature are beyond question; but I think that compliance with the express provisions of the Act is of even greater importance for effecting the intentions of Parliament.

In this vein, I adopt in part, the dictum of Mellish LJ in *Edwards v Edwards* [1875-6] 2 CH D291 at page 297 and say for purposes of this appeal - the Act must be presumed to have been framed with recognition

of equitable as well as legal doctrines. If the legislature says that a transaction is void for all purposes unless the consent of the relevant Land Control Board is given to it, how can a court say that although no consent has been given, in certain circumstances it shall be valid?

For the reasons I have given, I would dismiss this appeal and I agree with the orders proposed by Law JA.

I should also like expressly to associate myself with the observations made by Law JA on the perplexing aspect of the case. I view this case as extremely unfortunate. Doubtless, it spells a catastrophe for the appellant company, and at the same time, striking an incidental blow at the laudible active policy of housing for *Wananchi*.

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

Dated and delivered at Nairobi this 28th day of May, 1982.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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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