



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MADAN, MILLER JJA & KNELLER Ag JA)**

**CIVIL APPEAL NO 33 OF 1981**

**OLE NGANAI .....APPELLANT**

**VERSUS**

**ARAP BOR.....RESPONDENT**

**JUDGMENT**

**Madan JA** The appellant as the plaintiff in High Court Civil Suit No 98 of 1971 filed by him at Eldoret against the twenty nine respondents as the defendants, claimed to be the owner of farm land reference number 673 situated at Kipkabus in the Uasin Gishu District. He complained in his plaint that sometime in 1968, the defendants jointly and severally forcibly compelled him to sign an application for consent of the land control board to transfer his farm to the defendants who took possession thereof thereafter together with some loose assets, and forced the plaintiff and his family out of and prevented him from returning to the farm. The plaint also contained other averments which I do not consider are relevant for the decision in this appeal. Among his prayers the plaintiff sought an order for eviction of the defendants and their agents from the farm, and possession thereof.

The defendants admitted in their written statement that the plaintiff was the sole registered owner of the farm but they said in fact he was not its sole owner. The defendants also denied that they forced the plaintiff out of the farm or to sign the application for consent of the land control board. Finally, the defendants denied generally each and every allegation contained in the plaint. These averments were the sum total of the written statement of defence.

The suit was part-heard by Nyarangi J. On January 28, 1981, it was Mead J in court. The defendants' advocate informed the learned judge that the dispute between the parties was settled. The plaintiff denied the settlement. The defendants' application to try it as a preliminary issue was granted. After hearing evidence the judge proceeded to adjudicate whether the application for consent of the board was not signed by the plaintiff as challenged by him. The judge held that the plaintiff did sign the application which was approved by the board, that the same constituted an agreement between the parties and that the land be transferred from the plaintiff to himself and the defendants, two of them not being persons whose names appeared in the application, to hold the same "as partners". The judge also held the plaintiff had no case against the defendants and he dismissed the plaintiff's suit.

The defendants had not asked for an order either in their defence or during the trial of the preliminary issue, of the kind made by the judge. What exactly were the terms of the settlement, for example whether the farm was to be held by the parties as joint tenants or as tenants in common and if so in what shares,

the defendants' advocate was unable to tell us. He said the terms of the settlement were to be inferred. The judge's order also overlooked the plaintiff's claim for Kshs 208,000, the value of the loose assets. The defendants advocate conceded that no understanding was reached between the parties about the value of the loose assets. The effect of the judge's order was nebulous, indefinite and uncertain. It would not enable a sensible decree to be drawn up. It may be for this reason that the decree included in the record of appeal merely states the plaintiff's suit be dismissed with costs. If a draft of the decree was approved by the defendants' advocate, it surprises me. The defendants did not get any order giving them any kind of title to the farm. They were left in exactly their position as when the suit was filed against them. The defendants' advocate agreed that it is so. He added that if the defendants wanted anything further they would have to sue the plaintiff for it.

I am of the opinion that both the proceedings and the result reached by the judge were a nullity, his order being meaningless. The preliminary issue decided by the judge does not amount to a settlement at all. I would allow the appeal, set aside the order of the High Court, remit the suit for hearing *de novo* by a different judge. The defendants must pay the costs of the appeal. The costs of the previous proceedings will be in the discretion of the trial judge.

**Miller JA.** I have read in draft the judgment of Madan JA in this appeal. I agree with it and have nothing useful to add.

**Kneller Ag JA.** I agree with the judgment of Madan JA.

Dated and Delivered at Nairobi this 12<sup>th</sup> July, 1982

**C.B. MADAN**

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**JUDGE OF APPEAL**

**C.H.E. MILLER**

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**JUDGE OF APPEAL**

**A.A. KNELLER**

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**Ag. JUDGE OF APPEAL**