IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Madan, Miller & Potter JJA)

CIVIL APPEAL NO. 25 OF 1980

BETWEEN

KARURI.....APPELLANT

AND

GITURU.....RESPONDENT

JUDGMENT

Madan JA The appellant agreed to purchase and the first respondent and the late Mr Kithaka Nyaga (represented in these proceedings by his two sons the second and third respondents) each agreed to sell for the agreed price of Kshs 3,750 their respective parcels comprising five acres approximately of agricultural land being subdivisions of Kabare/Nyangati/259 and Kabare/Nyangati/260. After approval of the proposed subdivision by the land control board the two parcels came to be known as Kabare/Nyangati/892 and Kabare/Nyangati/893 respectively.

The respondents refused to transfer their respective portions to the appellant who as plaintiff instituted Civil Case No 890 of 1976 against the first respondent as the defendant, and Civil Case No 891 of 1976 against the second and third respondents as the defendants. In both suits the appellant asked the court for a declaration against the defendants concerned that he was entitled to be registered as proprietor of parcels 892 and 893 which were occupied by him. The appellant further asked for an order for specific performance of the contract of sale in each case. In the alternative, the appellant in both cases asked for judgment against the first respondent and jointly and severally against the second and third respondents for Kshs 3,750 each, and judgment also for the value of all unexhausted improvements made by him on each portion, and his assets damaged and/or taken by the respondents.

The first respondent in his defence inter alia denied that he agreed to sell any land to the appellant. The second and third respondents in their defence inter alia admitted payment to them of Kshs 3,750 in 1970 but, they alleged the same was deposited by their late father before his demise with his advocate to be refunded to the appellant who refused to collect it.

As counterclaim the respondents in each case asked for orders that the appellant give vacant possession to them of their respective parcels of land, and damages for unlawful occupation thereof.

The Land Control Act (Cap 302) has been amended. At the time relevant to these proceedings Sections 6, 7, 8 and 9(2) of the Act provided:

“6. (1) Each of the following transactions, that is to say

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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) ……..

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.

(2) 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 the appropriate land control board’s consent has not been made within that time; or

b) if application for the appropriate land control board’s consent has been made and consent has been refused

i) at the end of thirty days from the date of refusal; or

ii) where a party has appealed under Section II against the refusal of consent, on the dismissal of the appeal; or

iii) where a party has appealed under Section 13 against the dismissal of the appeal, on the dismissal of that appeal.

(3) ……..

7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void by virtue of subsection (1), or under any agreement that becomes void by virtue of subsection (2) of Section 6, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid but without prejudice to Section 22.

8. An application for consent in respect of a controlled transaction shall be made to the appropriate land control board, and the board, acting in its absolute discretion, shall either give or refuse its consent in respect of the transaction, and, subject to the right of appeal conferred by Section 11, the decision of a land control board shall be final and conclusive and shall not be questioned in any court.

9. (2) Where the application for consent in respect of a controlled transaction is made to a land control board, and the board does not determine the application within a period of three months after the application is made, the application shall be deemed to have been refused at the expiry of that period.”

Regulation 2(1) of the Land Control Regulations provided:

“2. (1) An application for consent to a controlled transaction shall be in form 1 in the Schedule, and shall be sent to or left at the appropriate office of the Commissioner of Lands.”

No appeal was filed herein. The two suits were consolidated by consent of the parties. Kneller J was the judge.

After wading through several wrongly dated documents and sorting out various clerical slips in the office of the Gichugu land control board, Kneller J reached the conclusion that the applications for consent of

the land control board for the sale of parcels 892 and 893 were made on October 27, 1970, and the board gave its consent to both transactions on February 13, 1971, ie 3 months and 16 days later.

Kneller J dismissed both suits of the appellant. He also dismissed the Respondents' counterclaim for damages but allowed their counterclaims for an order for vacant possession of the two parcels.

On the appeal before us the appellant's advocate Mr Muthoga has argued, first, that the trial judge erred in holding on the evidence that consent of the land control board was given out of time, and not upon the oral renewal of the application which enabled the board to grant its consent on February 13, 1971; that the judge also misconstrued Section 9(2). Further, that the judge erred in failing to find he was precluded by Section 8 from enquiring whether or not the consent was regularly and properly given, also in not applying the doctrines of equity to obtain a just result in the circumstances.

With respect, I am of the opinion that Kneller J correctly interpreted the Act.

The consent of the land control board was clearly given out of time on February 13, 1971 on the appellant's own sowing by documents issued by the board. The board not having given its consent within a period of three months after the application was made, the application had already expired on February 13, 1971, as a result of it having been deemed to have been refused under Section 9(2). There was no application before the board, to which it could give its consent and the consent given on February 13, was a nullity. The decision of a land control board is final and conclusive in respect of consent validity given and it cannot be questioned in any court. While the court may not inquire into the correctness of the consent, the court is not precluded from inquiring into the validity of the consent to determine whether it was regularly and properly given.

I am further of the opinion that application for consent of the land control board cannot be properly made orally. It must be made in compliance with Regulation 2(1) (supra). If an application can be made or renewed orally from time to time the limitation of the three months period for its determination would become meaningless as also the penal provisions of Section 22 of the Act. The provisions of the Land Control Act are of an imperative nature, there is no room for the application of any doctrine of equity to soften its harshness. As regards the appellant's claim against the Respondents under Section 7 of the Act for the value of unexhausted improvements made by him on the land, Mr Muthoga referred to the following passage in my judgment in *Elizabeth Cheboo v Mary Cheboo Gimnygei*, Civil Appeal No 40 of 1978 (Kisumu) (unreported):

"I do not think money or other valuable consideration referred to in Section 7 is limited to the purchase price only. Such a restricted interpretation would be an abhorrent affront to judicial conscience. This may be a bold and new interpretation to place upon Section 7 but it is consonant with justice and equity. As was said in *Chemilil Sisal Esate Ltd v Makongi Ltd* [1967] EA at p 171, the improvements though they have some connection with the land, they do not appear to arise under an agreement made void in relation to them."

Miller and Potter JJA were also the other two members of the court in Elizabeth Cheboo. My foregoing view did not find favour with them. I understand they both still look askance. I would dismiss the appeal with costs.

Miller JA. I have had the benefit of reading in draft the judgment of Madan JA in this appeal and I agree with it.

Potter JA. The appellant was the purchaser of two parcels of agricultural land, one being sold by the first respondent and the other by the father of the second and third respondents. Both transactions were controlled transactions as defined in the Land Control Act (Cap 302, herein referred to as "the Act"), and required the consent of the appropriate Land Control Board. The questions raised on this appeal concern the interpretation of the Act, as it was before the amendments made on December 24, 1980 by the Statute Law (Repeal & Miscellaneous Amendments) Act, 1980 (No 13 of 1980).

In 1976 the appellant, being in possession of both plots, but all the Respondents refusing to transfer the properties, commenced one action against the first Respondent and another against the other respondents. The two suits were consolidated and tried by Kneller J. In each case the appellant's principal claim was for specific performance of the agreements for sale, with an alternative claim for the return of the purchase price and for the value of unexhausted improvements made by him and of assets damaged or taken by the Respondent(s). In each case there was a counterclaim for vacant possession of the land and for damages unlawful occupation.

The learned judge found that in each case application was duly made to the appropriate board for consent on October 27, 1970, and that in each case the consent of the board was given on February 13, 1971, three months and 16 days later. Although the records of the board are in a sorry state we are fully satisfied that these findings of the judge are correct.

The questions of interpretation of the Act may be dealt with shortly

as follows:-

1) Could a valid consent be given in 1971 more than three months after the date of the application?

Section 9(2) of the Act then provided that where a board does not determine an application within a period of three months after the application is made, the application shall be deemed to be refused at the expiry of that period. Thus the appellant's applications were deemed to be refused on January 27, 1971. The appellant did not appeal against these refusals, and so Section 6 (2)(b) of the Act as it then was had the effect that at the end of 30 days from the refusals, ie on February 27, 1971, both land transactions became void for all purposes. The answer to this question is clearly no.

2) Can an application be made orally?

Regulation 2(1) of the Land Control Regulations requires that an application "shall be in Form 1 in the Schedule, and shall be sent to or left at the appropriate office of the Commissioner of Lands". Clearly an application must be in writing. (Section 8(1) of the Act as amended in 1980 requires an application to be made in the prescribed form).

3) Can the Doctrines of Equity be applied to the interpretation of the Act?

The provisions of the Act have on occasions caused undeserved hardship, particularly to those who purchased agricultural land a few years ago, when it was cheaper, and failed for one reason or another to secure land control board consent to the transaction. However, that can be no reason, and in my opinion there is no other reason, why the Act should not be construed according to the same canons of construction as any other statute and the first of these is that where the meaning of the words is plain, there cannot be more than one construction.

4) Can the purchaser in a void transaction recover from the vendor any compensation in respect of unexhausted improvements made to the land by him while in possession?

The relevant provision of the Act is Section 7 which provides:

"7. If any money or other valuable consideration has "been paid in the course of a controlled transaction that becomes void .... that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid ...."

(The above words of the section have not been amended). This question has been settled in the negative in this Court in *Elizabeth Cheboo v Mary Cheboo Gimnygei*, Civil Appeal No 40 of 1978 (Kisumu, unreported). What is recoverable under this provision is only the money or other valuable consideration which has been paid in the course of a controlled transaction. The appellant also argued that the counterclaims were not properly pleaded. As this complaint was not made to the trial judge, who could

have allowed amendments of the pleadings, this point was not worthy of our consideration.

The learned judge dismissed both suits of the appellant, and on the counterclaims made an order for the vacant possession of the parcels. In my opinion he was right to do so and he did so for the right reasons.

Dated and Delivered at Nairobi this 15th day of July 1981.

C.B.MADAN

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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