IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJA

CIVIL APPEAL NO 18 OF 1979

LIFICO TRUST REGISTERED .....PLAINTIFF

VERSUS

PATEL.....DEFENDANT

(Appeal from the High Court at Nairobi, Miller J)

JUDGMENT

July 8, 1980, **Law JA** delivered this Judgment.

This is an appeal by the fourth, fifth and sixth defendants in a Civil suit against a ruling and order made by a judge of the High Court (Miller J) dismissing an application made by them to set aside a temporary injunction obtained *ex parte* by the plaintiff under order XXXIX rules 1-5 restraining the defendants from parting with any of the assets of the sixth defendant, and from transferring the shares in the capital of the sixth defendant to any other person than the plaintiff or his nominees.

The first defendant is an advocate practicing in Nairobi and is a director of the second defendant, a limited liability company registered in Kenya. Between them they hold the totality of the issued share capital of the sixth defendant, a limited liability company incorporated in Kenya, as nominees and in trust for the fourth defendant, a corporation established under the law of Liechtenstein, which corporation is allegedly "wholly owned and controlled" by the third defendant, who is resident in Greece. The first and second defendants have not filed defence or joined in this appeal; they are presumably content to abide by the final decision in the suit. The third defendant has not been served and is not a party to this appeal. The fifth defendant, a Kenya resident, is alleged to be a director of the sixth defendant through a nominee, and the sixth defendant (hereinafter referred to as "Nesco") is a limited liability company incorporated in Kenya. The plaintiff, the respondent in this appeal (to whom I will refer as "Mr.Patel") alleged in his plaint that by an oral agreement made at Nairobi on or about June 16, 1976, between one Mr.Horne on his behalf and the first defendant on behalf of the third and fourth defendants it was agreed that the third and fourth defendants would sell and Mr.Patel would purchase the shares in Nesco for 100,000 United States dollars, which sum was duly paid to and accepted by the third and fourth defendants on or about July 26, 1976 in Greece, whereupon the first and second defendants held the shares as nominees and in trust for Mr. Patel absolutely. The plaint goes on to aver that on a subsequent unknown date the third and fourth defendants purported to sell the shares to the fifth defendant or his nominees for 140,000 dollars, and that in breach of the trust whereunder the first and second defendants held the shares for Mr. Patel they have delivered to the fifth and/or third and /or fourth defendants or their nominees transfers in blank of the shares executed by the first and second defendants or their nominees transfers in blank of the shares executed by the first and second defendants, and have caused nominees of the fifth and/or third and fourth

defendants to be appointed as directors of Nesco. The plaint then alleges that Nesco at all material times was the registered owner of a coffee plantation known as Kiaora Estate at Thika, in Kenya, and that on or about the January 30, 1977, Nesco sold it's Kiaora Estate for K£ 715,000 and that since then Nesco has no other assets than the proceeds of that sale. The plaint goes on to claim a declaration that Mr. Patel is absolutely entitled to the shares in Nesco, and other consequential relief including an injunction in the form of the temporary injunction the subject of this appeal.

By their joint defence, the fourth, fifth and sixth defendants have denied that the alleged oral agreement was made, and say that if such an agreement was made it was illegal and void.

(a) as being in breach of the Exchange Control Act and

(b) for want of consent by the Land Control Board under the Land Control Act.

The plaint was filed on July 29, 1977, and the interim injunction was prayed for by a chamber summons filed on the same day. It was granted on August 3, 1977. By a chamber summons filed on September 21, 1977, the present appellants applied for the order of August 3, to be set aside.

The hearing of this application was concluded on November 3, 1977, but the ruling dismissing the application was not delivered until May 15, 1979. From this ruling the appellants have appealed. The appeal was argued on their behalf by Mr.Couldrey, and the respondent Mr. Patel was represented by Mr.R Scott QC.

Mr.Couldrey submitted that the learned judge erred in law in refusing to set aside the temporary injunction. He based his submissions on section 6 of the Land Control Act (cap 302), hereinafter referred to as "the Act". By subsection (1) (c) of section 6 of the Act,

> "the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company…..which for the time being owns agricultural land within a land control area"

is void for all purposes unless the land control board for that area hasgiven its consent in respect of the transaction. By subsection (2) any agreement to be part 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"

By section 7 of the Act, any consideration paid in the course of a transaction which becomes void under section 6(1) or under any agreement which becomes void under section 6 (2) shall be recoverable as a debt by the person who paid it form the person to whom it was paid.

It is not in dispute that the third appellant Nesco is a private company and that its Kiaora Estate was agricultural land within a controlled area, nor is it seriously contended that consent was ever given by the appropriate land control board either to the acquisition by Mr.Patel of the shares in Nesco or to the agreement for the sale of these shares to Mr.Patel. Nor is it seriously in dispute that when Nesco sold the estate on January 30, 1977, no consent had been obtained by Mr.Patel to any transaction whereby Nesco's shares were transferred to him, and that the time for applying for consent to the agreement for such a transaction had expired. In these circumstances, Mr.Couldrey's submission was that, in the absence of the requisite consents, the transaction and agreement were void for all purposes, the suit had no prospect of success whatsoever against the three appellants, and the temporary injuction must be set aside.

Mr.Scott for Mr.Patel based his submissions on the proposition that full payment of the purchase price by Mr.Patel constituted the vendor a bare trustee for Mr.Patel, and that the trust subsisted independently of completion of the agreement and notwithstanding the absence of consent thereto. He submitted that the agreement was valid at its inception, and that although it may have become void after three months, it did not become *void ab initio.* Payment having been made under the agreement whilst it was valid, the vendor

became a trustee for the purchaser. There has been no divesting so as to discharge the trust, which subsists. Mr.Patel could not get a transfer of the shares for want of consent to the transaction, and was in a sterile position. That position changed, in Mr.Scott's submission, when Nesco sold its land at the end of January, 1977. It then ceased to be a land-owning company, and became a cash-owning company. The transfer of shares in a cash-owning private company is not affected by the Act.

The equitable interest arising from payment of the purchase price for the shares subsists, and can be enforced against the cash-owning company, as there is nothing in the policy or letter of the Act to prevent this. Mr. Scott further submitted that the fact that the agreement may have become void cannot affect the validity of an equitable trust arising by operation of law in the course of the existence of the agreement, before it became void.

Mr.Couldrey's answer to these submissions was, in short, that equity cannot intervene in the face of the clear words of the Act, as was held by Harris J in *Githuchi Farmers Co Ltd v Gichamba* [1973] E A 8. He submitted that the fact of payment of the purchase price could not create a trust subsisting after the expiry of three months, because the payment was made under the agreement, and the agreement then became void for all purposes.

The purchase price paid ceased to be trust money and was converted into a recoverable debt, by section 7 of the Act, which provided the remedy and excluded any possibility of trust subsisting.

With regard to *Githuchi Farmers* case (*supra*) this court in another appeal not long ago was referred to a number of unreported High Court decisions in which the judgment of Harris J was not followed. This gives some support to Miller J's comment in the ruling the subject of this appeal that:

> "…..the moot question in this case cannot on the evidence before the court be now decided."

Mr.Couldrey, relying on *Cow v Casey* (1949) 1 K B 474, submitted that a decision not only could have been but should have been taken in favour of the appellants, as the case is so clear. I cannot, with respect, agree. I am not sure that the point is as clear as Mr.Couldrey submits it is. There is a divergence of opinion in the High Court as to whether section 6 of the Act precludes a party from seeking to enforce an equitable trust relating to land subject to the Act. Miller J, in exercising his discretion against setting aside the interim injunction, considered that the appropriate time for deciding the weighty issues of law raised before him would be at the trial of the suit and not in the course of interlocutory proceedings. I find myself unable to say that Miller J wrongly exercised his discretion in holding as he did. Nor do I think that undue prejudice will be caused to the appellants if the temporary injunction remains in force until the suit is tried and finally disposed of. The proceeds of the sale of Nesco's land, or as much of the proceeds as remain within the jurisdiction, are "frozen" and are available towards satisfaction of the eventual decree. In any event, Mr. Patel is admittedly entitled to a refund of the purchase price of 100,000 dollars paid by him, together possibly with a further sum by way of interest.

There is no evidence on record to show that Nesco's frozen assets within the jurisdiction are sufficient even to meet that part of Mr.Patel's claim. In all the circumstances, I see no justification or necessity for interfering with Miller J's exercise of his discretion, and I would dismiss this appeal, with costs.

Madan JA. I agree with the judgment just delivered by Law JA.

As Potter JA also agrees, the appeal is ordered to be dismissed with costs.

Potter JA. I have had the advantage of reading in draft the judgment of Law JA , and I agree that this appeal should be dismissed with costs.

Dated and delivered at Nairobi this 8th day of July, 1980.

C.B MADAN

.....

JUDGE OF APPEAL

E.J.E LAW

.....

JUDGE OF APPEAL

K.D POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR