



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 998 OF 2012

DAVID RANDICH::::::::::::::::::PLAINTIFF/RESPONDENT

VERSUS

JOEL TIROP BUSIENEI::::::::::::DEFENDANT/APPLICANT

RULING

David Randich, (*hereinafter referred to as the respondent*) sued Joel Tirop Busienei (*herewith referred to as applicant*) claiming that he was the registered owner of all that parcel of land known as Nandi/Kamoiywo/1114 measuring approximately 2.4 Ha or thereabout and that he had the title to the said property. In the plaint the respondent stated that sometimes back he entered into an agreement to sell parcel Nandi/kamoiywo/1114 to the applicant and which agreement the applicant made part payment leaving a balance of Kshs. 200,000/-. It was the respondents statement that the applicant had never completed payment of the purchase price for the agreed property.

Further that there had been no Consent of Land Control Board to sub divide and Transfer the portion paid for by the applicant and or the whole of the suit property. It was the respondent's contention that the Defendant had refused, neglected and or declined to pay the outstanding balance despite several demands, requests and a suit by way of Land Disputes Tribunal Case. The respondent was categorical that the transaction had been frustrated and ought to have been declared as such and vitiated. The respondent's claim against the applicant was for the rescission of the said contract and a refund of the part purchase price paid to the applicant. The respondent further prayed for the Eviction and removal of the applicant, his servants, agents, personal or legal representatives, assigns or nominees and whether by himself or whomsoever acting on his instructions from that portion of parcel NANDI/KAMOYWO/1114 then possessed by the applicant.

The respondent prayed for judgment against the applicant for orders that the contract to sell parcel NANDI/KAMOYWO/1114 be rescinded and refund of the part purchase price made to the applicant. That there be an Order of Eviction and removal of the Defendant whether by himself or through his agents, servants, assigns, nominees and or whomsoever acting on his instructions from parcel NANDI/KAMOYWO/11 and Costs of the suit.

In his defence the applicant averred that the respondent had refused to hand over the title to the defendant despite receiving the purchase price and signing all the relevant forms to effect transfer to the defendant who was in occupation of the parcel and that the entire parcel belonged to the respondent pursuant to the agreement of sale and signing of the transfer forms for the entire parcel and that the prayers sought were not available to the respondent having given possession to the applicant.

The Learned Judge Justice Munyao heard the parties and found that the agreements entered between the respondent and the applicant for the sale of the land NANDI/KAMOYWO/1114 were null and void for

want of consent of the Land Control Board. That the respondent had received a sum of Kshs. 555,000/- which the learned judge ordered him to refund within a period of 90 days and in default the applicant was at liberty to execute. Moreover the court found that the applicant had no right whatsoever over any part of the land parcel NANDI/KAMOYWO/1114 and if at all he or his servants/agents/assigns were in possession, then they were to move out forthwith or else the plaintiff was at liberty to apply for their eviction. That a permanent injunction was issued barring the applicant his servants/agents/assigns from entering, being upon, utilizing or in any other way dealing with the land parcel NANDI/KAMOYWO/1114. The applicant was to bear the costs of the suit.

The application dated 30/7/2014 seeks to set aside review, and or vary the judgment dated 10/7/2014. The same is supported by the affidavit of Joel Tirop Busienei and based on grounds that he was sued on 19th September 2012 by the Respondent seeking *inter-alia* that the contract to sell Parcel NANDI/KAMOYWO/1114 be rescinded and refund of the part purchase price made to the applicant and that he be evicted from the said parcel.

Upon hearing both sides, this Honourable Court gave its finding on 10th July, 2014. He is aggrieved because the court was not given an opportunity to examine the consent which had been issued by the Land Control Board chairperson on 2nd March, 2012. That previously he had informed the court of the existence of the said consent as it had been noted in his pleadings particularly the affidavit dated 10th October 2012 but was not eventually availed by his then Advocates on record. That he has since approached the area District Officer in Charge of the Land Control Board who has issued him a copy of the consent.

That he has been advised by his advocate herein which advise he truly relies on that indeed when the matter was before the Land Dispute Tribunal, consent had already been issued within the requisite six months. The Land Dispute Tribunal was properly seized with requisite jurisdiction since he was in occupation of the suit land as evidenced by the Respondent's pleadings and that the dispute before the Land Dispute Tribunal was for claim of ownership of NANDI/KAMOYWO/1114 and not agreements. The complain having been instituted it was held on 17th August 2011 by which time the Land Dispute Tribunal had not been repealed. Sufficient and proper evidence was availed in court on the land dispute and the award which the court considered in its ruling of 13th February 2013 and in any case, this Honourable court stayed the execution of the award and subsequent decree and orders from the Land Dispute Tribunal Case No. 59 of 2011.

The recourse sought by the Respondent before the High Court was not an appeal from the decision of the said dispute tribunal's award filed in Kapsabet Land Dispute Tribunal No. 59 of 2011. Proceedings of the land dispute tribunal were finally subjected to the Chief Magistrate Court, Kapsabet Land Dispute Tribunal NO. 59 of 2011 whose findings were relied upon by the court at the interlocutory stage.

It is the applicant's evidence that the failure to attach the consent and application forms was an error which ought not to be visited upon him as a litigant as he had produced the consent and handed it over to his previous advocates M/s. Cheluget & Company Advocates who failed to attach the consent in pleadings and that the consent is genuine and ought to be admitted as his evidence, the District Officer can attest to its authenticity.

On the issue of the Land Disputes Tribunal, he states that there was humble evidence on record to confirm that indeed the basis of the Respondent presence in court is the proceedings emanating from Land Dispute Tribunal No. 59 of 2011 and not any other decision and that nowhere in the Respondent's proceedings has he faulted the jurisdiction of the Land Dispute Tribunal and that the decision by the Land Dispute Tribunal squarely fell within the jurisdiction of the tribunal as he was claiming occupation of the land having received the consent from the Land Control Board.

The respondent filed a replying affidavit whose gist was that the applicant was well represented and therefore cannot be heard to blame the advocate who conducted the hearing rather well in the circumstances and who at the time worked in the law firm of the present Counsel who has made the Application. That, an application for Review shall be made only to the judge who passed the Decree, or

Order sought to be reviewed and the present application ought not be made to this court. That it appears counsel for the applicant waited since July, 2014 to make this Application as he knew that the then Trial Court was on Transfer and obviously would dismiss the application as unmerited.

The respondent argues that there is nothing new therefore to be reviewed as there is no new consent of land control board to transfer. That the application for consent to transfer is undated save for the purported consent to transfer allegedly issued in respect of an application of 2nd March, 2011 and that whereas the court found that the plaint was filed on the 24th September 2012 the consent is purported to have been issued on the 2nd March, 2011 and simple math show that even the same consent is more than 6 months old and therefore a nullity in itself. The respondent claims that he has never attended any land control board to transfer his land to the applicant as there has been a suit pending in court and therefore the consent is nullity, not enforceable in law and the position remains as per the judgment of the honourable court. That further to all the foregoing the application to review has not brought anything new that was not within the court's knowledge and or was not brought to its attention during the main hearing.

The applicant filed a supplementary affidavit whose gist is that the advocate referred to in his previous affidavit was Mr. Cheluget who has not worked in the firm of M/s Rotuk and Company Advocates, he is the current speaker, Nandi County. He deposes that the Respondent ought not to have altered the suit property in any way as the matter was pending before this Honourable Court even after judgment had been rendered on 10th July 2014. his advocate had been duly served.

The **gravamen** of the submission by **Mr. Bitok** for the **applicant/Judgment debtor** is that the judgment debtor had the opportunity to demonstrate that he had been provided with a consent. **The applicant/judgment debtor** admitted as much in the affidavit dated 10/10/2012 that he had obtained a consent of the **Kapsabet Division Land Control Board**. He submits that there is new evidence which he was not in a position to produce before the decree was made. The application for consent and the consent were made and granted respectively but he was not in a position to produce the same in court. He submitted the documents to his advocates office M/s. Cheluget and Company Advocates and for reasons unknown to him, were mistakenly not included by the said firm of advocates.

The **gravamen** of the submissions by Mr choge on behalf of the decree holder respondent is that there is nothing new that has been presented to this court so as to warrant the review sought. Further that the appellants seeks this court to analyse the decree of the court in the judgment by Justice Munyao and identify the error which duly is for the court of appeal. He argues further that the decree to be reviewed is not annexed to the application and argues that there is no discovery of any new and important matter or evidence and that the applicant appears to be asking the court to re-consider the facts that were before it at the hearing alongside the new purported facts set out in the application. According to Mr. Choge, to present facts that he did not present at the hearing and consider them for review would amount to re-opening of the defendants case and admitting evidence that was not before it thus being asked to reverse the judgment and in effect sitting on appeal.

Mr. Choge is of the view that the question of ill representation by counsel is not **per-se** a ground for review unless that is a link with the adverse orders because it is based on dissatisfaction of a client with His legal counsel.

This court has considered the application, supporting and replying affidavits and the supplementary affidavit and the evidence in chief of the applicant and finds that the defendant/applicant testified that **they went to the Land Control Board for a consent which was not issued**, however the application for consent was not produced. In his judgment given on 10/7/2014 Justice Munyao found that **it was the applicants evidence that he applied for consent but he was not issued with one**. The court found that the transaction was void for operation of the law for failure of by parties to obtain the consent of the Land Control Board and therefore the only remedy was a refund of the amount paid as provided by Section 7 of the Land Control Act Cap 302 Laws of Kenya. The judgment debtor/applicant now claims that he has obtained the **application for consent** and **the consent** that was granted by the Land Control Board hereinabove mentioned.

Order 45 rule 1 of the Civil Procedure Rules provides that any person considering himself aggrieved by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

The defendant's case is that there is new and important evidence which he was not in a position to produce before the decree was made. I do find that the issue of the consent by the land control board was not new though a very important matter as it had been availed to the applicant's advocate. When the defendant testified in court on the 12th March 2014 he stated that they went to the land control board but no consent was issued. However he now seeks to produce a consent issued on the 2nd of March 2011. This implies that the defendant was not diligent enough because he was aware that it was necessary to prove that an application for consent of the land control board was made within 6 months of the agreement and that a consent was issued thereafter but did not do so. He did not endeavour to produce the consent of the land control board despite the fact that he knew or ought to have known that it was necessary to produce the same to succeed and that he knew the documents were in possession of his advocate.

Furthermore, I do find the application for consent and the consent annexed in the supporting affidavit contrary to the testimony by defendant that no consent was issued. If it is true as testified by the applicant that no consent was issued, then where did the consent annexed in the supporting affidavit come from. The applicant was represented by an advocate of the High Court of Kenya who knew or ought to have known that it was necessary to produce the application for consent and the consent itself and who according to the applicant was given copies of the application for consent and the consent aforesaid before the hearing of the suit but chose not to produce the same. The applicant appears also to be blaming his advocates on record M/s Cheluget and Company for failure to produce the consent as he had given them a copy. I do find that this is not a good reason for review as it implies lack of due diligence. Moreover I have looked at the application for consent of the land control board and do find that the same is not dated. It is important to note the date of the application and the date when the same is received by the Land Control Board because time begins running when the agreement is made and therefore the application should be made within six months of the agreement. In the absence of the date of the application and evidence of when the same was received by the land control board the document is a nullity. Section 6 of the land control Act cap 302 of the laws of Kenya provides as follows:-

Transactions affecting agricultural land

(1) Each of the following transactions that is to say—

(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 to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

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.

Section 8 of the said Act provides that:-

An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

(1) Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

e its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court

(2) The land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.

(3) For the purposes of subsection (1), an application shall be deemed to be made when it is delivered to the authority prescribed in the manner prescribed.

(4) An application under subsection (1) shall be valid notwithstanding that the agreement for the controlled transaction is reduced to writing, or drawn up in the form of a legal document, only after the application has been made.

The import of this section is that time begins running when the agreement is made and there the date of making the application is very important for computation.

I do also find that there is no error apparent on the face of record to the effect that enough evidence was produced on the existence of the land Dispute Tribunal decision and its final award. The decision of the tribunal was not produced before the court and therefore the court did not make any finding on that aspect. Though the said decision has been produced before me, it ought to have been produced before the trial judge and therefore am not in a position to find that there was an error apparent on the face of record. The Finding otherwise would amount to sitting on appeal on the decision of the court.

The upshot of the above is that no sufficient reasons has been given to this court to enable it review its decision made on 10/7/2014. The application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY 2015.

ANTONY OMBWAYO

JUDGE