



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 50 OF 2015

BETWEEN

JULIUS CHARITO KANYONGO.....APPELLANT

AND

EMMANUEL M. LOUSOT.....RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Kitale,

(Obaga, J.) dated 5th March, 2015

in

HCCS NO. 9 OF 2011)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the High Court, Kitale, (Obaga, J.) dismissing both the appellant's suit and the respondent's Counter-claim in a dispute relating to land title No. **West Pokot/Chepareria/1563 (suit land)** registered in the name of the appellant and measuring approximately 0.07 Hectares.

[2] The appellant averred in the plaint that he intended to sell a portion of the land measuring 50 feet x 100 feet to the respondent; that the respondent became unco-operative by claiming the whole land and that the transaction had been rendered void since the consent of the Land Control Board was not obtained. He sought an order of eviction against the respondent.

[3] The respondent in his defence and counter-claim averred *inter alia*, that by an agreement dated 5th February, 2001, the appellant sold the whole land to him and surrendered the title deed to the respondent; that the respondent took possession of the land; that the transaction was not a controlled transaction as the parcel of land is not agricultural land and falls within a township, and that the appellant failed to transfer the land. By the counter-claim, the respondent sought a declaration that the sale of land was not a controlled transaction; that the appellant be ordered to transfer the land or alternatively, the court do extend the period within which to make an application for consent of the Land Control Board.

[4] The appellant testified that by an agreement dated 5th February, 2001, he sold a portion measuring 50 ft. x 100 ft. to the respondent at a consideration of Shs. 200,000/= which was paid to him. He called one witness, **Michael Muriithi**, a Land Adjudication officer who testified that the suit land is an agricultural land. The respondent testified that the land is a commercial plot within **Chapareria Market** and produced a letter from the Town Clerk confirming so; that he has constructed a shop, butchery and residential houses, and that he tried several times to obtain the consent of the Land Control Board but it was not granted.

[5] The learned trial Judge considered the evidence and essentially made the following findings:-

i. The appellant sold the whole of his land to the respondent.

ii. The said land is agricultural land which required consent of the Land Control Board. The minutes of Chepareria Land Control show that a meeting was held on 15th December, 2010 at which the application for consent of the Land Control Board was deferred because of the dispute between the parties as to the area sold.

iii. Under the Land Control Act, it is an application for consent which should be made within six months and there is no requirement that the consent must be given within six months.

iv. As the Land Control Board did not finalize the matter and did not reject the application, there was no need for the court to extend the time.

v. As the court has resolved the issue of the area sold, there is nothing preventing the Board from revisiting the postponed matter and deal with it to finality.

On the basis of those findings, the court dismissed both the appellant's suit and the respondent's counter-claim and ordered each party to bear his own costs. In addition, the court made the following order:

“Either party should move the Chepareria Land Control Board for consideration of the application for consent which was deferred in view of the decision of the Court as regards what interest was sold in the suit land.”

[6] The appellant appeals from the decision on three grounds namely:-

i. The learned Judge misdirected himself in law when he held that the transaction between the parties required consent of the Land Control Board, yet went ahead to dismiss the appellant's suit.

ii. The learned Judge misdirected himself in law when he held that the six (6) months period stipulated in the Land Control Act was for application to be made and not consent to be obtained.

iii. The learned Judge misdirected himself in law when he directed the parties to move the Land Control Board for consideration of the application.

It is clear from the grounds of appeal that there is no appeal against the finding that the appellant sold the whole land and not merely a plot measuring 50ft. x 100ft. The whole land is less than an acre. There is also no cross-appeal by the respondent against the finding that the land sold is agricultural land requiring the consent of the Land Control Board.

[7] The three grounds of appeal are related and will be considered together.

Section 8 (1) of the Land Control Act provides that an application for consent in respect of a controlled transaction shall be made in the prescribed form within six months of the making of the agreement. However, the proviso thereto gives the High Court power to extend the period for a sufficient reason.

Section 8 (2) provides:

“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.”

Further, **Section 9 (2)** provides that where an application for consent has been refused, the agreement for a controlled transaction becomes void on the expiry of the time under **Section 11** limited for appeals or where an appeal has been entered and dismissed, on expiry of time limited for appeal under **Section 13** or where a further appeal is entered under **Section 13** and dismissed on dismissal of that appeal.

Ms. Arunga, learned counsel for the appellant submitted that the provisions of **Section 8 (1)** means that the application has to be made and consent obtained within six months of the agreement. Counsel relied on the case of **Rose Wakanyi Karanja v. Geoffrey Kirundi & Another [2016] eKLR** where this Court said:

“We have come to the conclusion that the consent obtained on 16th December, 1993 was not valid and the purported validation of a consent obtained outside the stipulated period is without the force of law.”

On the other hand, **Mr. Ingosi**, learned counsel for the respondent contended that **Section 8 (1)** does not provide for time for granting or otherwise of the consent. The learned Judge made a finding that there is no requirement that the consent must be obtained within six months.

[8] **Section 8 (2)** of the Land Control Act does not prescribe the time within which the Land Control Board should determine the application or give or refuse the consent. However, under **Article 47 (1)** of the Constitution and **Section 4 (1)** of the Fair Administrative Action Act – Act No. 4 of 2015, it is a legal requirement that the decision of the Land Control Board should be expeditious. Looking at the averments in the plaint, it was the appellant's case that the transaction had been rendered void since no consent of the Land Control Board had been obtained within the required time. It was not his case that an application for consent of the Land Control Board had been made outside the stipulated six months. It transpired at the hearing of the suit that an application for consent had in fact been made, considered and deferred. It is apparent that the application for consent was not produced before the trial court nor the date of the application established. Furthermore, the minutes of the Land Control Board which were produced before the trial court were not made part of the record of appeal.

It follows that there is no material on which the trial court or this Court could have made or make a judicial finding that the application was not made within the stipulated time.

Furthermore, the application for consent is pending determination before the Land Control Board and this Court cannot usurp the powers of the Land Control Board and make a determination on a matter not before it. The decision in **Rose Wakanyi Karanja's** case in which the Land Control Board consent was sought and obtained outside the statutory 6 months period is distinguishable from this case, in that, the Land Control Board has not yet granted the consent and is yet to exercise its jurisdiction to grant or not to grant consent.

[9] For the foregoing reasons, we are satisfied that the findings and orders made by the trial Judge were correct in the circumstances. Consequently, the appeal is dismissed with costs to the respondent.

Dated and Delivered at Eldoret this 17th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR