IN THE COURT OF APPEAL

AT NYERI

CIVIL APPEAL NO. 24 OF 2016

(CORAM: WAKI, NAMBUYE, & KIAGE, JJ.A)

BETWEEN

ZACHARY WARWIMBO RUHANGI.....APPELLANT

AND

CLEMENT MUTURI KIGANO.....RESPONDENT

(An appeal against the ruling and order of the High Court of Kenya at

Kerugoya (Olao, J.) dated 4th December, 2015

in

E.L.C. NO. 33 OF 2015)

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JUDGMENT OF THE COURT

This appeal is against a ruling by the Environment and Land Court at Kerugoya (Olao, J) by which the appellant's plaint was struck out and the respondent was ordered to refund to the appellant or his advocate the sum of Kshs.400,000 being purchase price of Land Parcel **No. Loc. 12 SUB/LOC 1/GAKIRA/T.48**.

That ruling followed an application by Notice of Motion brought by the respondent dated 15th April, 2015 on the basis; first, that the contract giving rise to the cause of action concerned a controlled transaction under the Land Control Act but for which the requisite Land Control Board consent had not been obtained; and second, that agreement for the sale of the suit property was unenforceable, not having been signed by the parties as required by **Section 3 (3)** of the Law of Contract Act.

Aggrieved by that ruling, the appellant filed a notice of appeal and subsequently lodged this appeal charging that the learned Judge erred by;

"1 … failing to note that the agreement for sale of land was finalized

and performed between the parties.

2 … expressly disregarding the Court of Appeal judgment in the case of

Macharia Mwangi Maina and 87 Others versus Davidson Mwangi

Kagiri Civil Appeal No. 6 of 2011

3 ... failing to appreciate the essence of interest on the consideration

paid 10 years prior to the ruling.

4... failing to grant the appellant the costs of the suit."

Arguing the appeal before us, **Mr. Njengo** the appellant's learned counsel first submitted that even though the learned Judge properly appreciated the jurisprudence on striking out of pleadings as enunciated in ***D.T. DOBIE (KENYA) vs. JOSEPH MBARIA MUCHINA & ANOTHER*** **[1982] KLR 1**, to the effect that a suit ought not to be dismissed unless it is so hopeless, plainly disclosing no reasonable action, weak beyond redemption and incurable by amendment, he erred in applying it to the case before him that did not fit that description.

Counsel then pointed out that the learned Judge in his ruling considered two decisions of this Court namely; ***MACHARIA MWANGI MAINA & 87 OTHERS vs. DAVIDSON MWANGI KAGIRI*****, [2014]eKLR (Supra**) delivered on 22nd January 2014, which held that a controlled transaction that lacked the requisite consent under the Land Control Act could still be enforced under the equitable doctrine of constructive trust where the purchaser had paid the full purchase price and was in actual occupation, on the one hand; and ***DAVID SIRONGA OLE TUKAI vs. FRANCIS ARAP MIBE & 2 OTHERS*** **[2014]eKLR,** decided by a different bench on 18th December, 2014, which held that in light of the express terms of the statute, a controlled transaction without the requisite consent is void for all purposes and unenforceable with no room for the importation of any equitable doctrines. It was Mr. **Njengo's** contention that the learned Judge was wrong to prefer the latter decision which counsel criticized as being by a bench that "***overreached itself***" in purporting to overrule the former.

Counsel faulted the learned Judge for not paying due regard to the fact that full consideration had been paid under the contract of sale, which should have rendered the agreement enforceable, and for ordering a refund, which had not been prayed for. When we questioned him on the said agreement, counsel conceded that it was not signed by the parties but nevertheless urged us to find that the intentions of the parties were clear and ought to be given effect to. His view was that the parties ought to have been "***given an opportunity to supplement the terms of the agreement during the hearing***", instead of the suit being struck out.

Mr. Amuga, learned counsel for the respondent commenced his submissions by pointing out that the appellant's pleaded case at the High Court was that the parties had entered into a written agreement, which the respondent expressly denied in his statement of defence. On the issue of Land Board consent, which is the gravamen of the dispute between the parties, counsel pointed out that its absence or non-obtainance was pleaded by the appellant in his plaint which went on to pray that;

> ***"An order do issue directing the District Officer Kangema to issue a consent for land parcel No. Loc 12/ SUB.LOC 1/GAKIRA/T.48 to effect transfer to the plaintiff."***

He pointed out that the said prayer as couched was not even an application for extension of time for the application for the said consent and was itself ungrantable by the court.

Without consent having been obtained, asserted counsel, the transaction was void for all purposes and the case as filed against the respondent was therefore hopelessly bad and frivolous to the core. It made things no better that the appellant has never been in possession of the suit land, in counsel's submission. What is more, the refund of the purchase price that the learned Judge ordered to be made had already been made. **Mr. Amuga** defended the learned Judge for preferring the **SIRONGA** decision

(supra), which he had good reason to, in light of the express provisions of the statute. He therefore urged us to dismiss the appeal with costs.

To those submissions, **Mr. Njengo** briefly replied that even though they did receive the refund cheque on behalf of the appellant, they had not yet encashed it. On the issue of occupation, he stated that it is a matter that ought to have been left to evidence and, finally, that the requirement for the agreement to have been evidenced in writing was satisfied by the transfer document signed by both parties.

This being a first appeal, it proceeds before us by way of a retrial and we are enjoined by **Rule 29 (1)** of the Court of Appeal Rules to subject the entire record to a fresh and exhaustive scrutiny and analysis before arriving at our own independent conclusions. The matter before the High Court having been dealt with on the basis of filed affidavits and having involved the construction of the Land Control Act and the Law of Contract Act, our task is a lot easier as we stand in no disadvantage *vis-a-vis* the learned Judge since no oral evidence was tendered to give him the advantage of seeing and hearing the live witnesses and placing him at the vantage point of determining credibility. We, of course, do pay due respect to the conclusion he arrived at and would depart only if they are plainly wrong or proceed from a misapprehension of the evidence on record or are erroneous in law.

Having perused the record before us and the ruling of the learned Judge as well a considered the submissions made by counsel and the authorities cited, it is clear that this appeal turns on the interpretation of the relevant sections of the two statutes we have mentioned. The facts themselves appear straight-forward enough: there was a handwritten document dated 6th December, 2006 headed "***To Whom It May Concern***" referring to the suit land and stating that it was *"witnessing an agreement of buying the above land"* between the parties. The price is mentioned as Kshs.400,000. The authors of the document then say they have also witnessed the handing over of the title to the land and a land transfer form. The document is then signed by its authors who call themselves witnesses namely; **Peter Njuki Njoroge** and **James Michuki Macharia**.

Tellingly, if fatefully and decisively, the said document is not signed by the parties to the said transaction, the disputants herein. That immediately gives the lie to the pleadings in the plaint that;

> *"**3. That on or around 6th December, 2006 the plaintiff and the defendant entered into a written agreement for the sale of the Parcel No. loc.12/SUB-LOC 1/GAKURA/T.48 for a consideration of Kshs. 400,000***
>
> ***….***
>
> ***7. That the defendant's intention to evict the plaintiff is an***
>
> ***afterthought in that they duly executed an agreement, signed the***
>
> ***transfer form and even handed over the title to the plaintiff"***
>
> (Our Emphasis)

The undisputed and indisputable fact is that the parties did not execute any agreement. They are mentioned on the witnesses' document but they themselves neither signed the said document nor executed an agreement of their own. The effect of this is that there was no contract between the parties that could be enforced by way of suit given the express provisions of **Section 3 (1)** of the Law of Contract Act;

> ***"No suit shall be brought upon a contract for the disposition of an interest in land unless;***
>
> a. ***(a) The contract upon which the suit is founded –***
>
> ***i. Is in writing***

ii. Is signed by all the parties thereto, and

iii. The signature of each party who signed has been attested by a witness who is present when the contract also the contract was signed by such party."

What we have before us is a document that purports to be an attestation by some two witnesses of the non-existent signatures of the parties to the alleged agreement. That is a fact so plain the learned Judge had no choice but to hold, as he did, that the agreement between the parties was not enforceable.

On that basis alone, the suit was incompetent and had to be struck out. We do not think that the signed transfer form, which is the formal standard document for the conveyance of land from one party to another, in any way cures the absence of a written and signed agreement between the parties. Were that the case, **Section 3 (1)** of the Law of Contract Act would be rendered an irrelevant superfluity as all land transactions get to be effected by way of signed transfers under our system of registration. Such a conclusion would be illogical and lead to an absurdity and we therefore cannot hold, as urged by the appellant, that the transfer form supplants the absence of a written agreement. It does not, and cannot.

We now turn to the issue of land board consent which, it is common ground, was neither sought nor obtained for the transaction. **Section 6 (1)** of the Land Control Act, which is the relevant statute, is couched in the following terms;

"6 (1) Each of the following transactions: -

(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 divisions 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 for the time being apply.

(c) The issue, sale transfer mortgage, or any other disposal of or dealing with any share in a private Company or Co-operative Society which for the time being owns agricultural land situated within a Land Control area, 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."

On the import of the above provision, the learned Judge had before him two conflicting decisions of this Court on the effect of lack of consent for a controlled transaction, which is arguably one of the most litigated issues in land law in this country. In the end the learned Judge elected to follow the **SIRONGA** decision (supra), which, to the credit of the bench of this Court that decided it, presents by far the most comprehensive and exhaustive analysis of the jurisprudence on the vexed question of lack of consent that has proceeded from this Court. The **SIRONGA** bench very specifically dealt with the decision of ***MACHARIA MWANGI MAINA & 87 OTHERS*** (Supra) which it found was wrong in at least three aspects. Owing to the importance of the Court's reasoning in that regard, we set it out in ***extenso***;

> ***"For several reasons, we are, with respect, unable to agree with the above reasoning. First and foremost, we have already stated that in our opinion, granted the express, unequivocal and comprehensive provisions of the Land Control Act, there is no room for the courts to import doctrines of equity into the Act. This is the simple message of section 3 of the Judicature Act. Consequently, invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the Land Control Act has, in our view, no legal foundation. We have also noted that this Court had previously held in a long line of consistent decisions and in very clear terms, that there was no room for application of the doctrines of equity in the Land Control Act. Those previous judgments were not referred to in the judgment in MACHARIA MWANGI MANA & 87 OTHERS vs. DAVIDSON MWANGI KAGIRI (supra).***

Secondly, in holding that there was an implied or constructive trust which did not require the consent of the Land Control Board, the Court not only ignored previous decisions of itself on the point, but also completely ignored the express terms of section 6(2) of the Land Control Act which provides as follows:

'For the avoidable of doubt, it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purpose of subsection (1)"

As this Court explained in <u>DANIEL NG'ANG'A KIRATU vs. SAMUEL MBURU</u> (supra) Section 6 (2) of the Land Control Act was introduced on 24th December, 1980 by Act No. 13 of 1980 to undo the judgment of the High Court in <u>GATIMU KINGURU vs. MUYA GATHANGI</u> (supra) where Madan, J., as he then was, held that creation of a trust over agricultural land in a land control area did not constitute 'other disposal of or dealing' for the purposes of section (1) of the Land Control Act and therefore did not require the consent of the Land Control Board. In <u>DANIEL NG'ANG'A KIRATU vs. SAMUEL MBURU</u> (supra) this Court, relying of section 6(2), of the Land Control Act reiterated that declaration of trust over agricultural land requires consent of Land Control Board. By relying of <u>GATIMU KINGURU vs. MUYA GATHANGI</u> (supra) whose effect had been undone by the amendment, which brought in section 6 (2), the decision of this Court in <u>MACHARIA MWANGI MAINA & 87 OTHERS vs. DAVIDSON MWANGI KAGIRI</u> (supra), was clearly** *per incurium.* ***On (sic) the same vein even the judgment of the High Court in <u>MWANGI & ANOTHER vs. MWANGI</u> [1986] KLR 382 which was cited in <u>MACHARIA MWANGI MAINA & 87 OTHERS</u> was also** *per incurium* ***because it was based on <u>GATIMU KINGURU</u> without realizing that the latter decision had been overriding by Act No. 13 of 1980.

The decision of the High Court in <u>MUTSONGA vs. NYATI</u> (supra), which held that equitable doctrines of implied, constructive and resulting trusts are applicable to registered land, did not involve the Land Control Act and is therefore not relevant. In addition, that judgment cannot apply in cases involving the Land Control Act because of section 6 (2) of the Land Control Act, which expressly requires consent of land control board even in cases of declaration of trusts.

Thirdly, for actual possession of land to amount to an overriding interest within the meaning of section 30 (g) of the repealed Registered Land Act, that occupation must be occupation, which in law, is not declared to be illegal. We have already noted that under section 22 of the Land Control Act, occupation of agricultural land pursuant to a transaction, which has not obtained the consent of the relevant control board, is a criminal offence. To that extent, such occupation cannot, with respect, constitute an overriding interest. Accordingly, the decisions in <u>MWANGI & ANOTHER vs. MWANGI</u> (supra) and <u>KANYI vs. MUTHIORA</u> (supra) on overriding interests are not relevant because the occupation in those cases was not illegal like the occupation contemplated by section 22 of the Land Control Act.

Faced with that categorical and iron-clad pronouncement from the **<u>SIRONGA</u>** bench, the learned Judge, very correctly in our view, and as bound by the doctrine of <u>*stare decis*</u>, found and held that the transaction between the parties herein was void for all purposes. Such a finding meant that the fate of the appellant's suit was sealed and it had to be struck out. With respect the learned Judge was perfectly right to so find and he cannot be faulted on that account.

As we considered this appeal, we recalled our recent decision of ***<u>HANNAH MUGURE KARAGO vs. PETER WAWERU & ANOTHER</u>*** [2016] eKLR which we delivered at Nakuru on 12th February, 2016 and wondered whether it runs counter to the decision we are reaching herein. Happily for us, it does not. In that case the consent of the Land Control Board was applied for and obtained and the only issue that arose was whether the seeking and obtaining of consent much later had the effect in the circumstances of that case of validating the sale agreements between the parties, and we upheld the

conclusion reached by the High Court (Wendoh, J.) that;

> ***"As earlier noted, the said agreement were void for want of consent, however, since the defendant went ahead to apply for consent in 2008 even after the period had lapsed, that action had the effect of recognizing and validating the sale agreements entered into 1992. By giving the plaintiff open forms for application for consent, I believe the defendant was aware of status of the land and did not bind herself with the time. The act of attending the Land Control Board on 15/05/08 was evidence that the defendant still recognized the agreements entered into with the plaintiff and they were validated."***

In that case we did express our own reservations about the justice of persons reneging on their contractual obligations on the strength of absence of consent, which reservations have been expressed by many Judges of our superior courts for decades, but the *ratio decidendi* is neither in conflict nor at variance with our decision herein. We add, also, that the **SIRONGA** decision had not at the time been brought to our attention and we did not therefore express any opinion on it. Suffice to say that from the point of view of, and considering where he stood vis-a-vis this Court, the learned Judge was in duty bound to follow and apply **SIRONGA,** and correctly so.

The upshot of our consideration of this appeal is that it is devoid of merit. It is accordingly dismissed with costs.

Dated and Delivered at Nyeri this 25th day of January, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR