**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

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

**CIVIL APPEAL NO 155 OF 2014**

**BETWEEN**

**HANNAH MUGURE KARAGO ……APPELLANT**

**AND**

**PETER KARURI WAWERU**

**MARY NYAMBURA KARURI……RESPONDENTS**

*(Being an appeal from the High Court of Kenya at Nakuru (Wendoh, J.) dated 27th April, 2012*

in

**Nakuru HCCC No 106 of 2008**

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**JUDGEMENT OF THE COURT**

This is a first appeal. Its genesis is at the High Court where Peter Karuri Waweru and Mary Nyambura Karuri (the Respondents) sued Hannah Mugure Karago (the appellant) seeking to restrain her or her agents from interfering with their proprietary rights over all those parcels of land known as ***Njoro/ Ngata Block 1 / 1141 (New Kiambu)***; and ***Njoro / Ngata Block 1 / 1136 (New Kiambu)*** ('the suit lands') measuring **half an acre** and **3 acres**, respectively.

They also sought an order authorizing the Deputy Registrar, or the Executive Officer of the High Court to sign and effect transfer of the suit lands in their names, in the event that the appellant refused to do so within a stipulated period of time.

By Sale Agreements dated **13th June, 1992** and **9th October, 1992**, the appellant sold two and a half acres and one acre, respectively, out of the undivided **L.R. No 6217 /8,** as the suit lands were then known, which was registered at the time in the name of **Kuria Karago** (deceased) who was husband to the appellant.

The purchase price for the former piece of land was Ksh 250,000 while the price for the latter was Ksh

100,000, which amounts were duly paid by the respondents.

Thereafter, the appellant through her Advocates Messrs Karigo Thuo & Co Advocates applied for the consent of the Land Control Board to transfer the suit lands to the respondents, which consent was granted on **15th May, 2008**.

Instead of now moving with haste to complete the transaction, the appellant reneged on her agreement to sell those pieces of land to the respondents contending, instead, that she was yet to obtain letters of administration over her late husband's Estate and therefore had no capacity to sell it. She, however, allowed the respondents to take possession of the half acre portion of the suit lands on account, according to the appellant, of the kinship bond which subsisted between the 2nd respondent and herself. They were niece and aunt.

It is the appellant's said refusal to transfer the suit lands to the respondents that gave rise to the suit at the High Court wherein Wendoh, J. found for the respondents as prayed. That decision of the High Court is the subject of the present appeal. The appellant's Memorandum of Appeal contains complaints that the learned Judge erred by;

- ***Reaching a finding that the appellant had a right to sell a portion of LR 6217 /8 in 1992 while she was not one of the ten partners and while her husband the late Timothy Kuria Karago was already deceased and no administrator had been appointed;***

- ***Finding that as at the time of filing the pleadings the respondent had a title deed to a portion of plot No 1141;***

- ***Finding that the application to the Land Control Board which was undated and the consent for sub-division of plots No 1136 and 1141 issued on 15 / 5 / 08 were genuine documents and failed to consider that plot No 1141 had already been sub-divided and titles issued following the consent given on 16 / 1 / 07, and there could be no other sub-division of the same title in 2008;***
- ***Finding that though the agreements were void for want of consent, the application for consent in 2008 validated the action which evidence was not proved on a balance of probability;***

- ***Finding that the appellant still recognized the agreements entered in 1992 by attending the board in 2008 and failing to consider the serious differences and disagreements between the appellant and the respondents immediately after the Sale Agreement;***

- ***Finding that the Land Control Board gave a consent to sub-divide and transfer a portion of plot No 1136 while consent presented to court was only on sub-division to two portions and not transfer;***

- ***Coming to a conclusions(sic) that the Land Control Board consent issued in 2008 effected transfer of half acre while the said portion had already issued a title No NJORO / NGATA BLOCK 1 / 4265 in 2007;***

- ***Arriving to the conclusion that the respondents were entitled to 3 acres out of plot No NJORO / NGATA BLOCK 1 / 1136 ( New Kiambu) which fact had not been proved on a balance of probability;***

- ***Failing to consider all the evidence before her before arriving at the judgment, and considered matters which did not form part of the proceedings in court.***

At the hearing of the appeal, Mrs. Ndeda, learned counsel appeared for the appellant, while Mr. Kayai, learned counsel appeared for the respondents.

Mrs. Ndeda submitted that as at 1992, **L.R. No 6217 / 8** was co-owned by 10 partners including the appellant's husband (now deceased).The deceased was polygamous, with the appellant having two co-

wives. A succession dispute arose with regard to his Estate, which was resolved much later with the appellant getting three pieces of land, two of which were the subject of the suit before the High Court.

Counsel further submitted that as at 1992, when the sale agreements to sell the suit lands were entered into, succession proceedings over the deceased's Estate were yet to be completed and so the appellant lacked capacity to enter into the said agreements. She also submitted that as the requisite consent of the Land Control Board was not obtained within six months, the intended sale was null and void.

It was not until the year 2007 that the appellant obtained consent to sub-divide the suit lands, into 13 parcels, two of which she transferred to the respondents on her own volition even as the dispute over the intended sale continued in court.

Counsel contended that it was agreed at the time the sale agreement was being entered into, that the respondents would occupy half an acre of the suit lands but not **Njoro / Ngata Block 1 / 1136 (New Kiambu)** which remains undivided to date as Land Control Board Consent has not been obtained. Counsel termed as erroneous the High Court's finding that there was consent to transfer and sub-divide the said land parcels in the year 2008 since the subject title had been closed on **12th March, 2007**.

Mrs. Ndeda submitted that land parcel 1136 was still intact, as the trial Judge found, and that the purported consent produced by the respondents at page52 of the record was for sub-division, not transfer. She faulted the trial Judge's finding that the consent in question validated the sale agreements. Learned counsel concluded her submission by stating that the provisions of the Land Control Act are mandatory, and in the absence of consent from the Land Control Board the sale of the portion of the suit lands measuring three acres was void.

Mr Kayai, learned counsel for the respondents opposed the appeal by stating at the outset that whereas the law is clear with regard to the consent of the Land Control Board, the circumstances obtaining in the present appeal were unique, in that two sale agreements had been entered into in 1992 and the parties had prepared two sets of forms to apply for the consent of the Land Control Board. The said forms remained open for presentation at the appropriate time, principally because the suit land (parcel 1136) had not been sub-divided. Sub-division took place only in 2002.In the year 2008 two applications for consent of the Land Control Board were presented and the appellant appeared before the board where consents were granted for sub-division but the appellant still refused to perform.

Upon approaching the High Court for relief, the parties entered into a consent that half an acre be excised from land parcel 1141.

Counsel submitted that by dint of the appellant's appearance before the Land Control Board later, she had recognized and validated the agreements entered into with the respondents, and her refusal to perform her obligations thereunder was an afterthought. He thus averred that the authorities cited by the appellant's counsel were distinguishable, as no consent of the Land Control Board had been sought and obtained therein unlike in the present case. Counsel contended that the parties to the sale transaction could validate the consent by tendering prior consent applications which in this case had been left undated for that purpose. He concluded by submitting that the respondents had title to half an acre of the suit lands, with the remaining portion of three acres still intact and available for transfer to them.

In a brief rejoinder, Mrs. Ndeda, submitted that parties cannot by conduct extend time, as the mandate for extension of time vests upon the High Court exclusively and that the parties herein could not validate that which was invalid by operation of law.

The role of a first appellate court involves analyzing and re-assessing the evidence on record in a fresh and exhaustive manner, with a view to arriving at an independent conclusion on a matter. In doing so, the first appellate court should give allowance to the fact that it does not have benefit enjoyed by the trial court of seeing the demeanour of the witnesses as they testify. See ***SELLE VS ASSOCIATED MOTOR BOAT CO*** *[1968] E.A. 123;* ***MWANASOKONI VS KENYA BUS SERVICES*** *(1982-88) 1*

***KAR 870*** and ***EPHANTUS MWANGI VS DUNCAN MWANGI WAMBUGU (1982-88) 1 KAR 278***.

Having perused the record, the following issues can be termed as uncontested:-

- ***There were two sale agreements namely:- that of 13th June, 1992; and that of 9th October, 1992 entered into between the appellant and the respondents herein over the suit lands;***

- ***The said agreements received validation from the appellant courtesy of her appearance at the Land Control Board on 15th May, 2008, on which occasion the board granted consent for her to transfer the suit lands in the names of the respondents.***

- ***The respondents paid the full purchase price for the suit lands. No evidence to the contrary was led by the appellant during the trial at the High Court.***

- ***The appellant had not at the time, taken out Letters of administration.***

- ***The appellant failed, refused and or neglected to transfer the suit lands in the name of the respondents.***

- ***Out of the total acreage of three and a half acres which were on sale, the appellant delivered vacant possession of only half an acre.***

The following issues were in contention:-

- ***The act of seeking the consent of the Land Control Board on 15th May, 2008 and its effect on Sale Agreements entered into in the year 1992.***

- ***Whether the respondents were entitled to an order for specific performance in view of the appellant's failure to comply with Section 6&8(1) of the Land Control Act-Cap 302.***

**Section 6 (1)** and **Section 8 (1)** of the **Land Control Act-Cap 302** have received judicial consideration on many occasions. The two provisions are as follows;

***"6. (1) Each of the following transactions-***

- ***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;***
- ***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 for the time being apply;***
- ***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."***

***" 8. (1) 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:***

***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."***

Not surprising, there now exists a body of precedent which supports or opposes the strict application of the said provisions in equal measure.

Among the decisions propounding a strict and uncompromising application of the letter of the law is ***KARURI V GITURA*** ***[1981] KLR 247*** where this Court concluded that the provisions of the Land Control Act are of an imperative nature and that there is no room for the application of any doctrine of equity to soften them. In the same vein is ***KARIUKI V KARIUKI*** ***[1983] KLR 225*** where at **page 227**; **Law, J.A**. opined that when a transaction is stated by the express terms of an Act of Parliament to be void for all purposes for want of necessary consent, a party to that transaction cannot be guilty of fraud if he relies on the statute to argue that the transaction is void.

Similarly in ***MUNYORORO V MURAGE*** ***[1988] KLR 180***, strictness held sway with this Court holding that the consent of the Land Control Board had to be obtained within the prescribed time (three months at the time) and that the sale of agricultural land pursuant to consent purportedly obtained outside the prescribed period was void. That strict positivist approach is neither aberrant nor novel as it finds ready precedent elsewhere. Reflecting this school of thought, the words of the great American jurist, **Benjamin Cardozo** in ***GRAF V HOPE BUILDING CORPORATION*** ***254 N.Y. 1 at Page 9 [1930]*** are instructive:-

> ***"Equity works as a supplement for law and does not supercede the prevailing law".***

**Sir Robert Edgar Megarry**, a renowned English jurist and judge of the Chancery division quoting the 3rd Edition of **STORY ON EQUITY** also furthers that cause by stating that:-

> ***" Where a rule, either of the common or statute law, is direct and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it".***

See **RE MEGARRY& P.V. BAKER SNELL'S PRINCIPLES OF EQUITY**, 25th Ed. Sweet & Maxwell, 1960, page 26.

Not all Judges and jurists embrace such a hard and fast approach to the law even when its consequences appear to be plainly unjust, however.

In ***WESTLANDS RESIDENTIAL RESORT LIMITED V KAWAKANJA LTD&2 OTHERS [2013] eKLR***, this Court tempered the strictness of Section 6 of the Act somewhat, by accepting submissions by counsel for the appellant which relied on a number of authorities including:-

- The holding in ***MOHAMED VS BAKARI &2 OTHERS(2008)3 KLR (EP) 54*** to the effect that:-

  > ***"No man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man".***

- ***Cheshire and Burns Modern Law of Real Property by E.H. Burn 16th Edition*** at **page 130**:

  > ***"If a contract for sale is capable of specific performance, an immediate equitable interest passes to the purchaser and an order for specific performance can be decreed on that basis"***.

- ***Chitty on Contract, 30th Edition, Vol 1 at paragraph 27-003:***

  > ***"The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract…… it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality which makes the contract invalid or unenforceable"***.

- **Fry L.J.'s <u>Specific Performance</u>** as quoted in Chitty on Contracts that;

> ***"If a contract be made and one party to it make default in performance, there appears to result to the other party a right at his election either to insist on the actual performance of the contract, or to obtain satisfaction for the non-performance of it"***.

The case of ***<u>MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI</u>, CA No 26 & 27 of 2011 (Nyeri)*** presented a situation similar to the one herein and this Court upheld the transaction notwithstanding non-compliance with Section 6 on the basis that;

- ***The appellants were in possession of the suit properties as bona fide purchasers;***
- ***They were put in possession by the respondent; and***
- ***The doctrine of proprietary estoppels applied in the case and stopped the respondent from reneging on the agreements.***

It is worthwhile to examine the rationale behind the Land Control Act and place its troubling provisions in proper context. Before its enactment in its present form, the statute was known as the Land Control (Native Lands) Ordinance (No 28 of 1959) and the eminent Kenyan legal scholar, the late Prof H.W.O. Okoth Ogendo identified the purpose of the legislation as follows:

> ***"The purpose of the Land Control (Native Lands) Ordinance was to protect uninitiated peasants from improvident use of their rights under the new tenure system. Even though individualization was seen as necessary precondition to the planned development of the African areas, it was also appreciated that it could lead to many other problems more difficult to solve than the ones it was intended to eliminate. The Royal Commission had warned, for example, that in many peasant communities individualization had led to 'the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little income-earning opportunity for those who have parted with the land'. See <u>TENANTS OF THE CROWN</u>, Acts Press (1991) page 74***.

There is no doubt that the Ordinance later re-enacted as the Land Control Act of 1967 Cap 302, was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land by, inter alia: - avoiding sub-division of land holdings into uneconomical units, thus undermining agricultural production; mitigate the danger of landlessness inherent in unchecked sale and alienation of land and controlling land holding by non-Kenyans.

The statutory provisions for attaining these salutary considerations do however provide fertile opportunity for unscrupulous persons to use them as a cloak for mischief. Whereas Section 7 of the Land Control Act provides for the recovery of monies paid in the course of a controlled transaction which becomes void under the act; and Section 22 provides sanction for anyone who acts in furtherance of a void transaction, fraud or unjust enrichment on the part of any such vendor remain a real risk. What would stop a knowledgeable vendor from delaying the process of obtaining consent from the Land Control Board with a view to selling a given property at a higher price; or benefiting from improvements made to a given property by the purchaser?

It appears that human greed or inconsistency and perfidy have found a powerful tool and ally in the provision that declares void all transactions without timely or any consent. The question becomes whether a court of justice would so interpret the provision as to aid a fraudster, mischief maker or a contract breaker.

We are not prepared to hold that courts should provide judicial approval to such dishonesty and lack of integrity and approve of results that are plainly unjust. Nor should they wring their hands and emit impotent sighs in the face of such injustice.

We are persuaded that on the facts of this case the learned judge properly analyzed the evidence on record and, after considering the credibility of the witnesses who testified before her, correctly arrived at this conclusion;

> ***"As earlier noted, the said agreements 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 the 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.***
>
> ***Although DW 1 acknowledged that she had entered into an agreement for sale of land with the plaintiffs, she said she was only willing to transfer to him half acre which had been done and no more. DW 2 on the other hand said that the plaintiff had had disagreements with the defendant and the family decided that they will only let him have half acre but no more. The defendant had no good reason for reneging on the agreement. The defence raised was that the defendant had no capacity to sell the land is dishonest because the defendant must have been aware of that fact and yet she went ahead to receive money from the plaintiffs and several years later, the defendant decided to opt out of the agreement. The land parcel 1136 is still available for sub-division and the Land Control Board has already given its consent to sub-divide and transfer and therefore the defendant should go ahead and effect the transfer of the 3 acres to the plaintiff".***

Those findings and conclusions accord with the evidence on record as well as our concepts of substantial justice and we would be remiss to disturb them. The upshot is that this appeal fails. It is accordingly dismissed with costs to the respondents.

**Dated and delivered at Nakuru this 12th day of February, 2016.**

**P.N. WAKI**

**…….**

**JUDGE OF APPEAL**

**R.N. NAMBUYE**

**…….**

**JUDGE OF APPEAL**

**P.O. KIAGE**

**……**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

***DEPUTY REGISTRAR***