Karanja & 3 others (As Legal Representative of the Estate of the Late Walter Karanja Muigai) v Kirundi & another (Civil Appeal 172 of 2010) [2016] KECA 292 (KLR) (29 July 2016) (Judgment)

Rose Wakanyi Karanja & 3 others v Geoffrey Chege Kirundi & another [2016] eKLR

Neutral citation: [2016] KECA 292 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 172 OF 2010

MA WARSAME, PM MWILU & F SICHALE, JJA

JULY 29, 2016

BETWEEN

ROSE WAKANYI KARANJA ..... 1ST APPELLANT

GRACE WANGARI KARANJA ..... 2ND APPELLANT

KENNETH NDICHU KARANJA ..... 3RD APPELLANT

WILLIAM MUIGAI KARANJA ..... 4TH APPELLANT

AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE WALTER KARANJA MUIGAI

AND

GEOFFREY CHEGE KIRUNDI ..... 1ST RESPONDENT

LUCY WAMAITHA CHEGE ..... 2ND RESPONDENT

(Being an appeal against Ruling and Decree of the High Court (K. H. Rawal, J) dated 31st March 2009 in SUCCESSION CAUSE NO. 3608 OF 2003)

JUDGMENT

1. This is an appeal arising from the ruling of Rawal, J (as she then was) dated 31st March, 2009.

   Briefly, the background to this appeal is that on 18th December, 2003 the appellants herein filed High Court Succession Cause No. 3608 and sought to be appointed as the legal administrators of the estate of the late Walter Karanja Muigai (hereinafter the deceased) who died on 21st June, 1996. Annexed to the Petition for letters of administration was an affidavit in support of the Petition which listed the assets of the deceased and indicated that the deceased had 'nil' liabilities.

2. On learning of this „omission?, Geoffrey Chege Kirundi, the 1st respondent herein, swore an affidavit dated 29th April, 2004 under Rule 16 of the Probate and Administration Rules in protestation to the omission. He averred:

> " That inspite of the fact that the petitioners had full knowledge and had fully participated in the events leading to this sale and execution of transfer forms by deceased they have not included myself and my wife as creditors and LR. No.10090/23 as part of the deceased?s liabilities."

3. It would appear that this protest provoked the amendment of the Petition for letters of administration vide a Notice dated 23rd September, 2004 to include L. R. No. 10090/23 (the suit property) as one of deceased's assets. The 1st respondent filed a further affidavit of protest dated 7th December, 2004 and vehemently protested the inclusion of LR No.10090/23 as part of the deceased's assets as opposed to it being listed as the deceased's liability.

4. Be that as it may, on 24th September 2004 the respondents filed High Court Misc. Case No. 1277 of 2004 by way of an originating summons. They sought orders against Rose Wakanyi Karanja (the 1st appellant herein), Grace Wangari Karanja (the 2nd appellant herein), Daniel Muigai and William Muigai Karanja (the 4th appellant herein), the then 1st, 2nd, 3rd and 4th defendants respectively in their capacity as the legal representatives of the deceased. The respondents sought the following orders:-

> " 1. That this Honourable Court be pleased to give leave to the Applicants herein, Geoffrey Chege Kirundi and Lucy Wamaitha Chege to file suit out of time for an order that the respondents herein, being the Legal Administrators for the estate of the late Walter Karanja Muigai be ordered to execute fresh Transfer Documents for L.R. No.10090/23 situate in South West of Thika Municipality in favour of the applicants jointly and in default, the Deputy Registrar of the High Court of Kenya to effect the transfer in favour of the applicants.
>
> 2. That the period of the earlier application for the Land Control Board?s consent dated 16th December, 1993 be and is hereby extended and the subsequent Land Control Board?s consent issued by the Board on 16th December, 1993 for the Sale of L.R. No.10090/23 aforesaid be and is hereby extended and validated respectively.
>
> 3. That in the alternative and without prejudice to prayer (2) herein-above, this Honourable Court be pleased to extend time for the application of the Land Control Board?s consent for the sale of L.R. No.10090/23 situate in South West of Thika Municipality between the respondents herein, acting for and on behalf of the estate of the late Walter Karanja Muigai as Vendors and Geoffrey Chege Kirundi and Lucy Wamaitha Chege as purchasers.
>
> 4. That the costs of this application be in the cause."

5. On 24th December 2004 the respondents filed another originating summons the same being HCC Suit No.1401 of 2004 against Rose Wakanyi Karanja , Wangari Karanja , Kenneth Ndichu Karanja

and William Muigai Karanja (all the appellants herein and who were named as the 1st, 2nd, 3rd and 4th respondents respectively) . The orders sought were as follows:

> " 1. That the defendants jointly and severally be and are hereby ordered by this Honourable Court to comply with Section 54 of the Registration of Titles Act, Chapter 281 of Laws of Kenya and do hereby make the application accompanied by the Grant of Letters of Administration to the Registrar of Titles for registration against L.R. No.1009/23 situated in Thika District within ten (10) days of this Order and in default the Deputy Registrar of this Honourable Court do execute and make the application to the Registrar of Titles.
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> 2. That the defendants namely Rose Wakanyi Karanja , Grace Wangari Karanja , Kenneth Ndichu Karanja and William Muigai Karanja jointly and severally do hereby execute fresh Transfer Document of L.R. No.1009/23 situate in Thika municipality in favour of the plaintiffs, namely Geoffrey Chege Kirundi and Lucy Wamaitha Chege as joint tenants within ten (10) days of this Order and in default the Deputy Registrar of this Honourable Court be and is hereby ordered to execute the transfer for registration of L.R. No.1009/23 with Registrar of Titles.
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> 3. That the Registrar of Titles do raise the injunction order registered against L.R. No.1009/23 under HCCC No.3398 of 1998.
>
> 4. That the defendant?s jointly and severally be condemned with costs of this suit."

6. Subsequently and with the consent of the parties High Court Succession Cause No. 3608 filed by the appellants was consolidated with HCCC No. 1401 of 2001 (OS) filed by the respondents. The two suits having been consolidated, the respondents sought further consolidation vide a Chamber Summons application filed on 10th September, 2008 and sought to have

> " ... the Succession Cause as consolidated with HCCC No. 1401 of 2004 (OS) be consolidated with High Court Miscellaneous Application Number 1277 of 2004 (OS)"

7. On 25th November, 2008 the two consolidated suits i.e Succession Cause No. 3608 and HCCC No. 1401 of 2001 were consolidated with High Court Misc. Application No. 1277 of 2004 filed by the respondents.

8. In order to progress the hearing of the consolidated suits and with consent of counsel on record, on 26th February, 2008 Rawal, J ordered that the consolidated suits proceed by way of affidavit evidence as well as filing of skeleton submissions. The skeleton submissions were duly filed and the court proceeded to record oral submissions on 9th June, 2008, 1st July 2008 and on 14th August, 2008. Upon conclusion of the submissions, the trial court rendered its ruling on 31st March 2009 and found as follows:-

> " The upshot of all the aforesaid is that the Applicant?s originating summons in HCCS No. 1401 of 2004 is allowed as per prayers numbers 1, 2 and 3.
>
> 1. That the defendants jointly and severally be and are hereby ordered to comply with Section 54 of the Registration of Titles Act, Chapter 281 Laws of Kenya and do hereby make the application accompanied by the Grant of Letters

of Administration to the Registrar of Titles for registration against L.R. No.1009/23 situate in Thika District within ten (10) days of this order and in default the Deputy Registrar of this Honourable Court do execute and make the application to the Registrar of Titles.

2. That the defendants namely Rose Wakanyi Karanja , Grace Wangari Karanja , Kenneth Ndichu Karanja and William Muigai Karanja jointly and severally do hereby execute fresh transfer document of L.R. No.1009/23 situate in Thika Municipality in favour of the plaintiffs, namely Geoffrey Chege Kirundi and Lucy Wamaitha Chege as joint tenants within fifteen (15) days of this order and in default the Deputy Registrar of this Honourable Court be and is hereby ordered to execute the transfer for registration of L.R. No.1009/23 with Registrar of Titles.

3. That the Registrar of Titles do raise the injunction order registered against L.R. No.1009/23 under HCCC No.3398 of 1998.

It is further ordered that:

(a) The applicant do pay forthwith the remaining sums found due on the agreed purchase price to the respondents.

(b) As regards the Succession Cause No. 3608 of 2003 I allow the protest and direct the Administrators to remove the suit land from the list of assets of the estate.

As I have granted main prayers made by the Applicants, I need not dwell on the issue of the alternative prayers made in HC Misc. Application No. 1277 of 2004. The same be thus marked as appropriately dealt with."

9. The learned judge also dismissed the appellant?s contention that the procedure of instituting HCCC No. 1401 of 2004 by way of an originating summons was inappropriate.

10. It is the said outcome that provoked the appeal before us.

11. In a memorandum of appeal dated 15th July 2010 the appellants raised the following grounds of appeal;-

(i) The Learned Judge erred in law and fact in holding and finding that the procedure of Originating Summons, with which the respondents commenced HCCC No.1401 of 2004, was appropriate instead of finding and holding that the case principally concerned the validity and enforceability of the sale agreement dated 26th October, 1990, the procedure of originating summons was inappropriate and proceed to strike out the same.

(ii) The Learned Judge erred in law and fact in holding and finding that, as the parties had agreed to dispose of the matter by way of submissions and on the basis of the affidavits on record, that,ipso facto, was sufficient for the respondents to commence the suit by way of an originating summons. The Learned Judge should instead have found and held that the nature of the dispute as disclosed by the pleadings, affidavits and submissions, showed that the dispute did not fall within the ambit and purview of order XXXVI of the Civil Procedure Rules and was therefore incompetent.

(iii) The Learned Judge erred in law and fact in failing to find that consent of the Land Control Board, obtained on 16th December, 1993, over three years from 26th October, 1990, the date of

the sale, was invalid as the sale had become void for all purposes by dint of provisions of Land Control Act, Cap 302 Laws of Kenya unless an order for extension of time to apply for the same had been made and granted under section 8 of the said act.

(iv) The Learned Judge erred in law and fact in failing to find and hold that the act of entering into the sale agreement between the applicants and Walter Karanja Muigai (deceased) was a dealing and therefore prohibited by section 52 of the Transfer of Properties Act as, at the time of the sale agreement, there was a pending suit, being HCCC No.3398 of 1988 between Mugo Kirika & Another and the late Walter Karanja Muigai over the same subject matter, the suit land herein. Consequently the learned judge should have held that the agreement between the respondents and the deceased was void, invalid and therefore unenforceable.

(v) The Learned Judge erred in law and fact in failing to find and hold that the sale of the suit land to the respondents, who are husband and wife, was prohibited by Section 46 of the Advocates Act Cap 16 Laws of Kenya, as at the time of the sale agreement, the 1st respondent, was the advocate acting for the late Walter Karanja Muigai in HCCC No. 3398 of 1998 afore said. The learned judge should have further found that the 1st respondent took advantage of the deceased?s predicament and the sale was against public policy.

(vi) The Learned Judge erred in law and fact in failing to hold and find that the respondents claim was time barred by dint of the provisions of the Limitations of Actions Act Cap 22, Laws of Kenya, as the same should have been filed within six years from the date of cause of action, that is, 26th October, 1990.

(vii) The Learned Judge erred in law and fact in ordering the respondents to pay forthwith the remaining sums found due on the agreed purchase price despite the fact that, from the documents produced by the respondents and submissions, it was not possible to ascertain how much had been paid towards the purchase price and how much was due. The order is therefore vague and unenforceable. In any event, the applicants had not, in their pleadings, prayed for payment of the balance of the purchase price.

(viii) The Learned Judge erred in law and fact in abdicating her responsibility as a judge to make a decision/findings in respect of the prayers sought by the respondents in High Court Misc. Case No. 1277 of 2004 (OS) despite having earlier ordered that the same be consolidated with Succession Cause No.3608 of 2003 and HCCC No. 1401 of 2004 (OS) and despite the parties having made submissions in respect thereof."

12. On 4th November, 2015 and with the consent of counsel, this Court directed that the appeal be disposed of by way of written submissions. Thereafter the appeal was to be listed for highlighting of the respective submissions. The appellant filed their submissions on 23rd November, 2015, their list of authorities on 26th April 2016 whilst the respondents filed their submissions on 3rd November, 2015 and on 22nd December, 2015 and their lists of authorities on 3rd November, 2015 and 22nd December, 2015.

13. On 26th April, 2016 the appeal came before us for the highlighting of the respective submissions. Mr. Githinji, learned counsel for the appellants urged the appeal whilst Mr. Gatheru Gathemia, learned counsel for the respondents opposed the appeal.

14. Mr. Githinji contended that the learned trial judge erred in finding that the institution of the suits by way of an originating summons was not irregular on the basis that the parties had agreed to dispose of the matters by way of affidavit evidence and submissions, more so even after noting that the issues raised were "verycomplex in nature". He relied on the authority of Wepukhulu Vs Secretary,board

Of Governors Buruburu Secondary School for the proposition that an originating summon should not be used for complex issues such as those involving serious questions or determination of disputed questions of fact.

15. Secondly, the appellants faulted the purported consent of the Land Control Board. According to Mr. Githinji, this consent was obtained way after the six (6) months period stipulated under Section 6 of the Land Control Act as the sale agreement was dated 26th October, 1990 whilst the consent was obtained on 16th December, 1993. The appellants further faulted the trial judge for finding that the six (6) months period began to run on 28th October 1993, the date when HCCC No. 3398 of 1988 filed against the deceased and seeking an order for specific performance in respect of the suit property was dismissed. It was their contention that the enlargement of time sought in High Court Misc. Civil Application No 1277 of 2004 (originating summons) for the validation of the Land Control Board consent was made 11 years after the consent was obtained. Thirdly, the appellant contended that since HCCC 3398 of 1988 was still pending in court, the deceased was barred from transferring or dealing in the suit property as it was the subject of contentious proceedings in HCC No. 3398 of 1988, as to do otherwise would offend the provisions of Section 52 of the Indian Transfer of Property Act. Forthly, the trial judge was faulted for not giving Section 46 of the Advocates Act its full meaning and import. The section provides as follows:-

> " Nothing in this Act shall give validity to –
>
> (a) any purchase by an advocate of the interest, or any part of the interest, of his client in any suit or other contentious proceedings"

16. It was argued that the 1st respondent represented the deceased in his capacity as an advocate in HCC No. 3398 of 1988 and that the purported sale agreement dated 26th October, 1990 and executed by the deceased and the respondents was made during the pendency of HCC NO. 3398 of 1988. In conclusion, the appellant faulted the trial judge for failing to find that the respondents? claim, if any, was time barred as the purported sale agreement was entered into on 26th December, 1990 and the suit seeking specific performance, namely HCC No. 1401 (originating summons) was filed on 24th December 2004, a period of 14 years, well outside the period of 6 years for filing of a suit for breach of contract.

17. In opposition to the appeal, Mr. Gathemia, learned counsel for the respondents contended that the „irregularity?(if any) of bringing the suit by way of an originating summons is cured by Article 159 of the Constitution and further that in any event the appellants acquiesced by having the consolidated suits proceed by way of affidavit evidence and written submissions. It was learned counsel? s submissions that the consent of the Land Control Board was obtained within the stipulated time and that in any event the learned judge had rightfully extended the period of obtaining the Land Control Board consent thus rectifying any anomaly that may have existed; that there was no breach of lis pendens rule as the respondents obtained the consent of the Land Control Board (LCB) when there were no orders barring them. Further, that the consent of the LCB was obtained after HCCC No. 3393 of 1988 was dismissed in the High Court and before an appeal was filed and hence the consent of the Land Control Board was not obtained during the pendency of a suit; that the sale agreement was an inchoate agreement whose validity was conditional upon the conclusion of HCCC No. 3398 of 1988; that Section 46 of the Advocates Act was inapplicable as the 1st respondent did not act unprofessionally; that no complaint was ever lodged as regards the conduct of the 1st respondent. Counsel relied on the authority of Eva Kimea & Another V Nawal Abdulrahman Abdalla [2015] eKLR in Koinange & 13 Others V Koinange [1986] KLR 23 for the proposition that an allegation of fraud must be specifically proved on a standard beyond the usual standard in civil proceedings

of balance of probability. It was the respondent?s further submission that the cause of action was not time-barred as the "...agreementfor sale was still alive by the time the suit was instituted." On acquiescence and estoppel, it was the respondents? contention that the appellants had knowledge of the agreement executed on 26th October 1990 by the respondents and the deceased and hence are estopped from reneging on it. In conclusion the respondents contended that the suit land had since changed hands.

18. On our part, we have considered the record, oral and written rival submissions of counsel and the authorities cited therein, as well as the law. This being a first appeal, the position of the law as regards a first appeal is that we are entitled to re-evaluate and re-analyze the evidence tendered in the trial court and come to our own conclusion bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of the witnesses (see Selle & Another vs Associated Motor Boats Co. Ltd [1968] EA 123). In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown to have acted on a wrong principle in reaching the findings he did (see Jabane vs Olenja [1986] KLR 661).

19. The facts of this case are fairly straightforward. The 1st respondent is an advocate of many years standing. His relationship with the deceased was essentially that of an advocate and client. On 15th February, 1985 the deceased entered into a sale/ purchase agreement of the suit property with Mr and Mrs Mugo Kirika(hereinafter the Kirikas). The land was 47 acres. The agreed purchase price was Kshs.35,000/= per acre. The deceased received Kshs.405,000/= from the Kirikas as part payment. The balance of the purchase price was to be paid on or before 30th May, 1985. However, the Kirikas failed to pay the balance of the purchase price and the completion period was by consent extended to 16th September, 1985. Again, there was default on the part of the Kirikas and the deceased rescinded the sale agreement. The rescission of the sale agreement provoked the filing of HCCC No. 3398 of 1988 by the Kirikas against the deceased. This suit was determined by Aluoch, J (as she then was) in a judgment dated 28th October, 1993. The learned judge found in favour of the deceased whom he directed to refund the sum of Kshs.405,000/= being the sum received from the Kirikas. The Kirikas were dissatisfied with the outcome of the case and filed an appeal in the Court of Appeal, namely Nai Civil Appeal No. 140 of 1994. Contemporaneously with the filing of the Notice of Appeal, the Kirikas filed an application for stay under Rule 5 (2) (b) of this Court's Rules. On 7th July, 1994, Gachuhi, Kwach and Akiwumi, JJ.A granted an order of stay in the following terms:

> "... we allow the application and issue an injunction restraining the respondent by himself, his servants and/or agents or otherwise howsoever from disposing of, alienating or parting with possession of the property known as plot No. LR. No.10090/2 (sic) Kiambu until final determination of the intended appeal or further order."

20. The substantive appeal was subsequently heard by Omolo, Lakha and BosireJJ.A who on 21st January 2000 dismissed the appeal filed by the Kirikas. Unfortunately and in the meantime Walter Karanja (the deceased) died on 21st June, 1996. However, the determination by the Court of Appeal brought to an end the legal tussle between the deceased and the Kirikas. So how did the respondents enter into the fray? On 26th October, 1990 the deceased executed a sale agreement with the respondents for sale/ purchase of the suit property for a consideration of Kshs.2,500,000/=. According to Clause 1 of the Sale Agreement the consideration of Kshs.2.5m was payable as follows:

    (a) Kshs.450,000/= on execution of the sale agreement

    (b) Kshs.405,000/= to be paid to the Kirikas as a refund

(c) Kshs.1,635,000/= was to be paid on registration of the Transfer.

21. According to the respondents, on the date of execution of the sale agreement (26.10.1990) the deceased brought with him 10 members of his family together with his wives who consented to the sale of the suit property. The sale was meant to raise funds so as to forestall the foreclosure by Kenya Commercial Bank who were threatening to sell the suit property as well as another land in Kabete being the deceased?s ancestral land. The respondents agreed to bail out the deceased as the Kirikas had breached the sale agreement between them and the deceased thus the imminent foreclosure by Kenya Commercial Bank.

22. One of the grounds of appeal raised by the appellants was that the learned judge erred in failing to find "that the procedureof originating summons with which the respondents commenced HCCC NO. 1401 of 2004, was ..." inappropriate and the suit ought to have been struck out. The respondents countered this by invoking Article 159 of the Constitution and further that the appellants had acquiesced the modus operandi of the court. It is common ground that HCCC NO. 1401 OF 2004, was commenced by way of an originating summons. In the originating summons the respondents sought orders, inter alia, to have the appellants execute fresh transfer documents of the suit land in favour of the respondents. In her judgment, the learned judge found that the suit was properly commenced by way of an originating summons and that in any event the parties had agreed to dispose of the matter by way of submissions and on the basis of the affidavits on record. It is true, as the learned judge stated, that the parties agreed to dispose of the suit by way of submissions and on the basis of the affidavits on record. However, it is not lost to us that the issues raised in the three separate suits which were consolidated were indeed complex. The deceased had entered into a sale/purchase agreement with the Kirikas for the sale of the suit property. The Kirikas breached the sale agreement by failing to pay the balance of the purchase price as per the sale agreement and the deceased rescinded the agreement. The Kirikas filed suit against the deceased. At the time the sale agreement was entered into between the deceased and the respondents, the suit filed by the Kirikas was still pending in court. There was also the issue that the 1st respondent had entered into this sale/purchase agreement in violation of Section 46 of the Advocate?s Act as he was the deceased?s advocate in the suit filed by the Kirikas. There was also the issue of the consent of the Land Control Board not having been obtained within the stipulated 6 months of the date of the sale agreement between the deceased and the respondents. On the other hand, the respondents argued that the consent had been obtained within time. They had also sought an order for extension of time within which to obtain the consent in High Court Misc. Case No. 1277 of 2004 (originating summons). On her part, the learned judge of the High Court appreciated the complexity of the consolidated suits and stated in her judgment:

> "I shall humbly admit that the issues raised are very complex in nature which became more challenging in view of the facts before the court."

23. However, inspite of noting the complexity of the issues, the learned judge rendered herself as follows:

> "It was stressed that as the Administrators have raised the issue of validity of contract of sale in view of the provisions of Section 8 of the Land Control Act (Cap.302), the originating summons is improperly before the court.
>
> The facts and issues raised in the referred case are quite different to those raised in these causes namely;
>
> 1. The three matters are consolidated raising same or similar issues of facts and law.
>
> 2. Different procedures are provided for those matters.

3. The issue of validity of contract of sale is purely an issue of law as the facts are in all relevant aspects, undisputed or indisputable.

4. Despite the directions taken for viva voce evidence, the counsel agreed to determine all the matter by submissions based on the affidavits on record.

With the aforesaid observations and also relying on the holding in the referred case that „the procedure of originating summons is designed for summary or ad hoc determination of points of law, construction of certain facts of obtaining specific directions of the court?. I would not be able to say that the process adopted is not a summary process. If not then what or how could it be called or described? Once the matter is to be determined by submissions only, it should or could be properly described as a summary one.

In view of the peculiar facts before this Court, in my humble opinion, I shall hesitate to dismiss the originating summons as unprocedural or improper.

I thus reject the contention raised by Mr. Musyoka the learned counsel for the administrators, and shall proceed to determine the substantial issue raised before this Court."

24. The learned judge was faulted for not finding that the institution of Misc. Case No. 1227 of 2004 by way of an originating summons was not unprocedural or improper.

25. This court has had occasion to address the issue of bringing a suit by way of an originating summons when the case is fret with complex issues. In the case of Wepukhulu Vs Secretary Board Of Governors Buruburu Secondary School [200] 1KLR 473-the Court of Appeal held:-

> " The procedure of originating summons is designed for summary or ad hoc determination of points of law, construction of certain specific facts or obtaining specific directions of the court such as trustees, administrators or the courts execution officers. The procedure should not be used for the determination of matters that involve serious questions or determination of disputed questions of fact. See Kenya Commercial Bank Ltd – vs – Osebe (1082) KLR 296. What happened in the trial is that the issues of fact were fully determined by way of a trial by production of oral evidence. Though no objection was raised as to the appropriateness of the originating summons before the trial commenced or at the first instance, the fact remains that the dispute before the learned judge was outside the ambit of the originating summons and the procedure was wrong."

26. We too are of the view that there were serious contestations on the facts and we are in agreement with the learned judge?s finding that the issues were complex.

27. In view of the above, it is our view that an originating summons was ill-suited for the determination of the dispute. Although the appellants acquiesced by agreeing to have the suit disposed of by way of affidavits and oral submissions, that did not change the fact that the suit was complex as there were serious disputed questions of facts.

28. The other ground of appeal was that the learned judge failed to find that the sale agreement between the deceased and the appellant offended Section 46 of the Advocates Act (Cap 16) of the Laws of Kenya as well as Section 52 of the Transfer of Property Act. In her judgment, the learned judge dealt with these two issues not disjunctively as her summation of the two issues will show.

She stated:

> " The stress was placed that such contracts are against public policy because an Advocate is also supposed to be an officer of the court and if an advocate has also an interest in a contentious suit, he shall not be expected to act with scrupulous, fairness and integrity. Even though it was not an express term of the Agreement, it is clear by implication that the Applicants were to get the land only in the event the deceased won the case against Kirika?s.

Further, the learned judge found as follows:

> " The sale agreement undoubtedly was executed during the pendency of the Kirika?s suit and it is equally indisputable that the said agreement was conditional to the outcome of the said suit. The agreement did not thus vest immediate right to the deceased to sell or impose an immediate obligation on the objector to purchase. To comply with the law of contract which stresses that unless there is a contract the parties are under no obligation and thus the sale agreement was entered. That contract was conditional and this has given rise to what is known as inchoate agreement wherein parties proceed by agreeing on differing the matter in turn and which agreements in general would be regarded as disreputable for a party to go back on something which already has been agreed.
>
> The sale agreement in question is somewhat a conditional agreement which could be loosely worded as an inchoate agreement. The obligation of the parties herein materialized when the High Court gave its judgment and consent was then obtained when there was no suit or a contentious proceeding. An action or a step towards the enforcement or completion of the contract was thus taken, which action was, in my human view, outside the ambit of inhibition of Section 46 of the Advocates Act. I say no, simply because, the agreement was enforced or became enforceable after the completion of the suits."

29. With all due respect to the learned judge, it was not "... clear by implication that the ..." respondents "... were to get the land only in the event that the deceased won the case against the Kirikas." We are at a loss as to the said conclusion and we find that the learned judge, with respect, introduced „implications? that were outside the terms of the agreement entered into by the deceased and the respondents.

Section 46 of the Advocates Act provides:

> " Nothing in this Act shall give validity to (a) any purchase by an advocate of the interest or any part of the interest of his client in any suit or other contentious proceedings."

30. On the other hand Section 52 of the Transfer of Property Act provides:

> " During the active prosecution in any court ... of a contentious suit or proceeding in which any right to immovable property is directly & specifically in question, the property cannot be transferred or otherwise be dealt with by any party to the suit or proceeding so as to affect the rights of any other party therein under any decree or order which may be made thereto except under the authority of the court and on such terms as it may impose."

31. Suffice to state that the sale agreement between the deceased was entered into on 26th October, 1990. As at this date, HCC No. 3398 of 1988 filed by the Kirikas against the deceased was still pending. The judgment thereof was delivered by Aluoch, J on 28th October, 1993. The Kirikas were not satisfied with the outcome of the case and they filed Civil Appeal No. 10 of 1994 which appeal was determined on 21st October, 2000. It is instructive to note that both at the High Court and in the Court of Appeal, the

deceased was represented by the 1st respondent. Indeed, in a schedule of payments attached to the 1st respondent?s responding affidavit in HCC No. 1401 of 2004 (OS) dated 15th February, 2005, a charge of Kshs. 596,691.00 is made being "our fees on legal matter, VAT and Disbursements." Clearly, there is no denying that the 1st respondent acted for the deceased in the suit filed by the Kirikas. Further, in the agreement between the respondents and the deceased, it was a specific term of the agreement that the respondents would refund the sum of Kshs. 405,000.00 to the Kirikas. The proceedings between the deceased and the Kirikas were contentious and the purchase by the 1st respondent of the deceased?s land who was the 1st respondent?s client clearly offended the provisions of Section 46 of the Advocates Act.

32. As regards the appellant?s complaint that the sale/purchase agreement between the deceased and the respondents offended the provisions of Section 52 of the Transfer of Property Act, it is not disputed that the agreement between the deceased and the respondents was made during the subsistence of HCCC No. 3398 of 1998. Section 52 of the Transfer of Property Act cited above categorically forbids any dealing on immovable property during the pendency of a suit touching on the immovable property, unless it is with the consent of the court. The rationale for this is not difficult to discern. Supposing the Kirikas had won the suit against the deceased, what would have been the respondents? recourse? Would they have filed another suit against the Kirikas and for what? Would they have sued the deceased for a refund of the purchase price paid to him? We say this because even when Kirika's suit was still pending (it was finally determined in the Court of Appeal on 21st October, 2000), the respondents had obtained the consent of the Land Control Board in respect of the suit property on 16th December, 1993.

33. It is therefore our considered finding, and we hold that the deceased and the respondents could not deal with the suit property as it was the subject of contentious litigation pending in court.

34. In the High Court decisions of Mawji v US International University &Another [1976] KLR Page 199 it was held:-

> " Until the court is able to determine the issue both justice and the equities in the case demand that the status quo be preserved so that if the plaintiff succeeds, he will not be left with an empty victory, the just fruits of which he cannot realize, and justice would be defeated.
>
> Further, it would be a poor and insufficient system of justice, enethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit. If the property in dispute is transferred to a third party."

35. The doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendent lite were permitted to prevail.

36. In Bellamy v Sabince IDeG & J566 it was held:

> " The doctrine of lis pendens intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party ..."

37. In addition to the above observations, there is something of greater significance to this appeal which is whether the Land Control Board consent obtained on 16th December, 1993 was valid as it was

not obtained within the six months from the date of the agreement as stipulated in Section 6 of the LandControl Act. It is undisputed that the date of the sale agreement between the deceased and the respondents was 26th October, 1990. The consent of the Land Control Board was obtained on 16th December, 1993. According to the respondents this was within six months of the date of judgment in HCCC No. 3398 of 1988 which was delivered on 28th October, 1993, as according to the respondents this lifted the embargo to deal with the suit land.

38. In their submissions filed on 2nd February, 2009, the respondents gave the reasons for the delay in applying for consent of the Land Control Board as follows:-

> "(a) There was statutory injunction and prohibition not to deal with the suit property until HCCC No. 3398 of 1988 was determined.
>
> (b) Full determination of HCC No. 3398 of 1988 was made on 28th day of October, 1993. Thereafter a stay was granted by Court of Appeal.
>
> (c) On 7th day of July, 1994 the Court of Appeal in Civil Application No. NAI 22 of 1994 (14/94 UR) issued stay of the decree in HCCC No.3398 of 1988 pending the hearing and full determination of the filed Court of Appeal Civil Appeal No. 140 of 1994 whose decision was delivered on 21st January, 2000 by the Court of Appeal. The stay invoked Section 52 of Transfer of Property Act which remained in force until full determination of the matter by the Court of Appeal.
>
> (d) Death of Walter Karanja Muigai on 21st June, 1996 which necessitated an application for Limited Grant to enable the deceased?s son, Samuel Muigai Karanja , proceed with the matter in the court. The Grant was issued by the High Court on 30th March, 1994. The Administrators could not move the court until Limited Grant was obtained.
>
> (e) The Administrators did not apply for Letters of Administration for 8 years after the demise of the deceased on 21st June, 1996. The Letters of Administration were issued on 15th March, 2004 by the High Court."

39. It was the respondents? further contention that Section 8(2) of the LandControl Act Cap 202 Laws of Kenya (LOK) gives the court a special jurisdiction to extend the period of six months reserved for the application for Land Control Board. Section 8(2) thereof provides:

> "... that the High Court may not withstanding that the period of six months have expired, extend that period where it considers that there is sufficient reason to do, upon such consideration if any, as it may think fit."

40. As stated above, it was the respondents? case that the Land Control Board consent was obtained within time and in the alternative, they contended that if the court was to find otherwise, the period of six months had been extended by court and hence the consent obtained on 16th December, 1993 was valid.

41. They further relied on Section 59 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya which provides:-

> "Where in a written law a time prescribed for doing an act or taking a proceeding and power is given to the court or of the authority to extend that time, then, unless a contrary intention

appears, the power may be exercised by the court or other authority although the application for extension is not made until the expiration of the time prescribed."

42. The purpose of the Land Control Act is to control transactions in respect of agricultural land. Section 6 therefore provides that

(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 for the time being apply;

(c) –

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.

(2) For the avoidance of doubt it is cleared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) –

(7) If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act,that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.

(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 the period of six months may have expired, extend that period where it considers that there is sufficient reason to do so, if any, as it may deem fit."

43. There is a long line of authorities on the effect of lack of consent of the Land Control Board. Initially, one had to obtain the consent within three months but this period was later enlarged to six months. In Hirani Ngaithe Githire v WanjikuMunge [1979] KLR 50, Chesoni, J (as he then was) stated at page 52:

> " Section 6 of the Land Control Act is an express provisions of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The court cannot do that; for it is not for us to legislate but to interpret what parliament has registered. So in this case that agreement between the parties having being entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and since no consent had been obtained within that time, nothing can revise or resurrect such an agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes."

44. Similar sentiments were expressed in Onyango & Another v Luwayi [1986]KLR 513 at page 516 Nyarangi, J stated:

> " The appellants admitted that no consent for the proposed transaction concerning agricultural land had been given by the Divisional Land Control Board. The transaction was therefore void for all purposes under Section 6(1) of the Land Control Act, Cap 302 because the transaction was not excluded by Section 6(3). An application for consent in respect of the proposed sale of the material parcel of land had to be made to the appropriate Land Control Board within six months of the making of the agreement ... No such application was made. That agreement therefore is of no effect and no question of specific performance can lawfully arise."

45. It is common ground that the suit property was agricultural land and the transaction was a sale which required the consent of the Land Control Board. The respondents explained their predicament for not obtaining the consent within 6 months of the agreement on the basis that HCCC No. 3398 of 1988 between the Kirikas and the deceased was pending in court. The respondents termed the pendency of the suit as a "legal disability." Indeed, in their submissions filed on 23.4.2008 the respondents stated as follows:

> " The deceased could not deal with the land while the High Court case was subjudice due to Section 52 of Transfer of Property Act. The agreement was voidable until judgment was delivered on 28th October, 1993. It is only then that the deceased was able to deal with the land. The Agreement was valid after this date and that is when time started running. On 16th December, 1993, it was within 6 months statutory time. Time was not over. Land Control Board was obtained on time. The Estate?s Submission losses this mi nor point. At no time was Land Control Board obtained out of time."

46. The respondents further contended that they obtained the consent of the Land Control Board on 16th December 1993 well within the three months from the date the „disability? ceased i.e. on 28.10.1993 when HCC 3398/98 between the Kirikas and the deceased was determined by Aluoch, J. The respondents cited

> " Whartons?s Law – Lexicon 10th Edition by J. M. LELY at page 461 on Limitations of Actions and Presentations."
>
> > " By the Real Property Limitations Act, 1874, 37 & 38 vict, C57, S3, persons who at the time their right to recover land, etc first accrues, are under a disability of infancy, covertive, idiotcy, lunarcy, or unsoundnesss of mind are allowed six years from determination of their disability and their representatives the same time from their death."

47. In determining the issue of the consent having been obtained outside the six months period, the learned judge rendered herself as follows:

> " If so, would the time for limitation prescribed by any other laws stop running? Would that inhibition prescribed by Section 52 create a legal disability and if so, would it again stop the time prescribed by law from running? The Applicant contend (sic) that Section 52 of Transfer of Properties Act overrides the other provisions of law and the Administrators are of opposite views by saying that time does stop only against the disability specified in

Section 2 (2) (b) of the Limitations Act and not against any other disability. I have detailed hereinbefore their opposite views and I do not need to reiterate the same.

In my humble view giving disability the restricted interpretation shall be definitely against public policy and constitutional right of preserving and protecting proprietary rights of citizens and people of Kenya. The law cannot give one thing by one provision and take the same thing away by the by the other provision. As Madan J.A. has held that would be a poor and insufficient system of justice.

If a party is prohibited to transfer or deal with property Lis Pendense then the same party? s rights or obligations do remain suspended till the finalization of the pending suit. I do agree with the said proposition with my full conscience and conviction. I can give a simple example, if parties enter into an agreement of sale and before its completion, a third party files a suit claiming some interest, and it takes more than six years to finalize the suit, can the purchaser loose (sic) his/her right to enforce the said agreement? They are barred or, if I can say, disabled to fulfill their respective rights and/or obligations and their rights or obligations remain suspended to be revived after that bar or disability is lifted. No law could or should be interpreted in a manner which obviously is unjustified and is obviously inequitable. This position cannot have a place in a fair system of justice. Thus I find that the time prescribed under the Land Control Act, stops running during the period of disability created by a substantive law."

48 With all due respect to the learned judge, we think she misdirected herself in finding that there was a "legal disability" as this is a phenomenon unknown in law. Section 22 of the Limitation of Actions Act provides that:

> " If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under disability or dies, whichever event first occurs, ..."

49 Firstly, it is important to point out that the period of six months for the obtaining of a consent is stipulated in the Land Control Act. Secondly, the disability envisaged in Section 22 of the Limitations of Actions Act is not "limitation" occasioned by the pendency of a suit. The learned judge justified her finding that there was "legal disability" by her argument that "disability" should not be construed in a restrictive manner. Even if that were so, we do not see how the pendency of a suit would give rise to what the learned judge referred to as a "legal disability." It cannot be argued that during the pendency of HCCC No. 3398 of 1998 filed by the Kirikas against the deceased, that there was "legal disability" that disabled the parties from obtaining the consent of the Land Control Board. Moreover the Transfer of Property Act forbids the dealing of immovable property during the pendency of a suit and it was wrong for the learned judge to term what the law forbade as a "legal disability."

50. It was the respondents? further submission that if the court was to find that the consent was obtained outside the statutory period of 6 months, the period of obtaining the consent had been extended by the court. They relied on the provision of Section 8 which provides:

> " ... provided that the High Court may, notwithstanding the period of six months may have expired, extend that period where it considers that there is sufficient reason to do so, if any, as it may deem fit."

51. The above provision makes reference to the period being extended but not validation of a consent irregularly obtained. The application for consent herein was made on 16th December, 1993 and obtained on the same day. It is noteworthy to state that the Land Control Board was not a party to the suit that sought the extension of time namely, HCC Misc. Case No. 1277 of 2004 filed on 24th September 2004.

52. It is also important to state that the learned judge validated a consent obtained outside the stipulated period. It did not extend the period of six moths within which to seek consent. Had the period been extended, assuming that there were good reasons to do so, the deceased (or his representatives) would then have presented an application to the Land Control Board, but as it is, the Land Control Board was not a party in HCC Misc 1277 of 2004 and is unaware of the validation of the consent obtained by the respondents. Moreover, there is no provision in the Land Control Act for validation of consents obtained outside the stipulated period. If this practice was to be encouraged, then one can foresee anarchy as the records in the Land Control Board would show that the consent was obtained outside the six months period and hence is invalid. Such consent is bound to be successfully challenged for its validity.

53. In Karuri v Gituru [1981] KLR 247 this Court held that:

> " The court is not precluded from inquiring into the validity of the consent to determine whether it was regularly and properly given. As the Land Control Board did not have the power to grant consent after six months when the same became void the purported consent cannot be interpreted to have given life to the sale. The same was dead and the consent could not revive it."

54. We have therefore 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. The upshot of the above is that the sale of the suit property being agricultural land became null and void on expiry of six months from the date of the agreement i.e. 26th October, 1990.

55. However, this is not to say we are unsympathetic to the respondents but this being a Court of Law, our sympathies have no place. Suffice to state that the provisions of the Land Control Board Act are harsh, but regrettably equity cannot be of any help. In Karuri v Gituru (Supra), this Court held that:

> " The provisions of the Land Control Board Act are of an imperative nature, there is no room for the application of any doctrine of equity to soften its harshness."

56. One more issue deserves our mention. The respondents contended that the suit property had since changed hands. This was a statement from the bar as this issue was not canvassed in the suit in the High Court and we shall say no more on this, save to wonder how the transfer to a third party could have been possible when the dispute over the suit property was still pending in court (lis pendens). We are also at a loss as to who may have caused the transfer bearing in mind that the respondents? complaint was that the appellants had failed and/or neglected to transfer the suit property to them. Indeed, one of the respondent?s prayers in HCC No. 1401 of 2004 (O.S) wasthat the appellants to jointly "... execute fresh Transfer Document of LR No. 1009/23 ... in favour of ... Geoffrey Chege Kirundi and Lucy Wamaitha Chege ..."

57. Absent such a transfer, who executed the transfer forms in favour of the respondents and/or in favour of the third party? Be that as it may, and given our observation that the issue of a transfer to a third party was a statement from the bar, we do not wish to belabour the point.

58. We believe we have said enough to show that this appeal is for allowing. Accordingly the appeal is allowed with costs to the appellants.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2016.

M. WARSAME

.....

JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR