



IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL 19 OF 2005

ELIJAH KIPKORIR BARMALEL1ST APPELLANT

LEAH CHEPKURUI BARMALEL

(legal representative of PAUL TAMASON ARAP

BARMALEL – DECEASED)2ND APPELLANT

AND

JOHN KIPLAGAT CHEMWENO.....1ST RESPONDENT

MICHAEL KIMUTAI RONO2ND RESPONDENT

TENNYSON KIPKORIR CHERONYEI3RD RESPONDENT

LUCIA KANGONGO SOMOGI)

STANLEY KIPTUM SOMOGI)4TH RESPONDENTS

(An appeal from the judgment and decree of t he High Court of Kenya at Kitale (Nambuye, J.) dated 29th July, 2004

in

H.C.C.C. NO. 115 OF 1997)

JUDGMENT OF THE COURT

1. Although the appeal before us ostensibly arises from the decision of the superior court sitting in Kitale in HCCC 115 of 1997, the dispute goes back more than 25 years to April, 1985 when the suit was

filed as HCCC 37 of 1985 in Eldoret. It was assigned a new number on transfer to Kitale.

2. The parties have also changed since the suit was first filed. The original defendant was **Paul Tamason arap Barmalel** (“the late Barmalel”) who died on 27th October, 1986 after filing his defence to the suit but before hearing. After almost 11 years of waiting, **Elijah Kipkorir Barmalel** (“Elijah”) one of his 22 sons, and **Leah Chepkurui Barmalel** (“Leah”) one of his four wives, were substituted as his legal representatives and the suit was revived in 1997 pursuant to the provisions of **O.XXIII**. Elijah and Leah are the appellants before us.

One of the original four plaintiffs, **Stephen Malakwen Somogi** (“the late Stephen”) also passed on in July 1998 before the suit was heard and was substituted by his wife **Lucia Kangongo** (“Lucia”) and son, **Stanley Kiptum**, (“Stanley”) who obtained letters of administration. They are the joint 4th respondent in this appeal.

3. The only constant in the suit was the cause of action despite the amendments to the pleadings consequent upon substitution of the parties. It is specific performance of a written sale agreement entered into in the year 1980 between the late Barmalel, the vendor of the one part, and four purchasers: **John Kiplagat Chemweno** (“John”); **Michael Kimutai Rono** (“Michael”), the late **Stephen** and **Tennyson Kipkorir Cheronyei** (“Tennyson”), of the other part. The agreement was in respect of an 860 - Acre parcel of land in Cherengany area, otherwise known as **LR. No. 5341**, East of Kitale Municipality registered in the name of the late Barmalel. The late Barmalel ran into financial problems with the Agricultural Finance Corporation (AFC) and Barclays Bank of Kenya (BBK) and he sought to subdivide the land and sell 300 acres of it to resolve those problems.

4. As the agreement is common ground and the interpretation of it is determinant of the dispute between the parties, we shall set out the 8 clauses of it in full. It was drawn by the advocate acting for both parties, Mr. Pursho Hem Nathobhai Gadher, T/A P.N. Gadher, Advocate (Gadher):

“1. *The property sold is a portion of L.R. No. 5341, East of Kitale Municipality being a portion comprised of 300 acres which portion shall subject to final survey comprise 300 acres or thereabouts and which portion is shown marked “A” on the sketch plan attached hereto.*

2. *The interest sold is Leasehold.*

3. *The purchase price is Shs.900,000/= i.e Shs.3000/= per acre of which, the purchaser will deposit Shs.450,000/= with Mr. P.N. Gadher within 15 days from today and out of this sum, the said advocate is duly authorized to pay A.F.C. Shs.225,000/= before the Board’s meeting on getting an assurance that the proposed sub-division and sale will be approved and Shs.225,000/= will be paid to Barclays Bank, Kitale.*

The balance of Shs.450,000/= plus half of the capital gains tax being Shs.45,000/= total Shs. 495,000/= will be deposited with Mr. Gadher when the farm is duly surveyed and the consent is obtained from the Land Control Board and the Lands dept.

The parties hereto will share equally the capital gain tax and all survey fees and costs for the separate title deeds. The purchasers will pay stamp duty and registration charges. Both parties will pay legal fees equally.

4. *The sale is subject to the Law Society Conditions of Sale in so far as they are not inconsistent with the conditions contained in this agreement.*

5. *The completion date shall take place 30 days after the receipt of all necessary consents including land control board consent and a separate Deed plan in respect of the property whichever shall be the later.*

6. *Mr. P.N. Gadher will act as advocate for both parties.*

7. The vendor will authorize the purchasers to occupy and cultivate and use the land at their costs only after the purchasers have paid and deposited the full purchase price together with their share for capital gain tax, and survey fees.

8. SPECIAL CONDITIONS: -

(1) The parties herein agree that they will join in making the necessary application for sub-division and further agree to share equally all the costs of such applications including the Surveyor's fees, condition Number 15 of the Law Society Conditions of sale is therefore hereby amended accordingly.

(2) The purchasers will deposit the purchase price as and when agreed above and if they fail, the vendor shall have right to rescind this sale agreement, if the purchasers fail to deposit after 10 days from such call. The purchasers will pay all bank commission."

The contentious clauses are emphasised.

5. The agreement was signed on 11th February, 1980. Three days later on 14th February, 1980 both the vendor and purchasers applied to the Trans Nzoia Land Control Board for its consent for "subdivision and sale". Two consents were subsequently issued out on 15th February, 1980; one for "subdivision" of the land issued to the late Barmalel, the other for "subdivision and sale to the purchaser of 300 acres as per sketch plan attached hereto" issued to the late Barmalel and the four purchasers.

6. It is common ground, and in any case it was confirmed by Gadher who acted for both parties, that the purchasers paid Shs.450,000 in accordance with the agreement, and the creditors of the late Barmalel, AFC and BBK were paid off. The process of hiring a surveyor to carry out the survey process and obtain a deed plan then commenced but took some time because of difficulties explained by the surveyor in correspondence produced in evidence. The process was not completed until March 1981 and the Deed plan was not obtained from the Director of Survey until 26th May, 1983. It is the purchasers who bore the full cost of the survey although it was to be shared.

7. The purchasers also deposited the balance of the purchase price of Shs.244,000/= with Gadher by various instalments and had paid it in full by 1983. They had also taken possession of the land, cleared portions of it and started cultivation. When Gadher invited the late Barmalel to call on him and collect the balance of the purchase price, he refused to collect it. Gadher then dispatched a cheque to him in January, 1985 but it was returned to him. He in turn attempted to refund the money to the purchasers but they also rejected it and returned it. Thereafter Gadher decided to place it in a fixed deposit account in a bank and by the time he testified in court in 1999 it had accumulated to Shs.866,970/=. As a dispute had been precipitated between the parties, Gadher withdrew from acting for either of them in January, 1985 and they instructed different advocates respectively.

8. When the late Barmalel started threatening their eviction and further refused to sign transfer forms for the parcel of land, the purchasers filed suit in Eldoret aforesaid seeking the following orders: -

"(a) specific performance of the agreement aforesaid.

(b) injunction/restraining the defendants, their agents, servants, employees and or otherwise from interfering with the plaintiffs enjoyment of the said parcel of land.

(c) an order directing the defendants to sign the Transfer forms or in default the Deputy Registrar of this court or his nominee to do so.

(d) General damages for breach of contract.

(e) costs of this suit.

(f) interest at court rates.

9. In his defence the late Barmalel acknowledged the sale agreement and the terms thereof but contended that it was the purchasers who were in breach. According to him, the balance of the purchase price was to be paid by November 1980 but only Shs.601,500 had been paid by then, prompting him to serve notice of payment of the balance by 31st December 1980 failing which the agreement would be rescinded. When the payment was not made, he sold 100 acres to other interested persons. He was therefore prepared to refund the amount paid by the purchasers as at November, 1980 or alternatively give them a portion of the 300 acres that was worth the amount they had paid. The purchasers subsequently obtained an injunction to prevent occupation or alienation of any portion of the 300 acres covered by the sale agreement.

10. Nine issues were framed and agreed for determination at the hearing as follows: -

“1. *Did the plaintiffs and defendants enter into a written agreement whereby the defendants agreed to sell to the plaintiffs 300 acres from land parcel No. L.R. 5341 situated East of Kitale Municipality at an agreed price of Kshs.900,000/=.*

2. *Did the plaintiffs deposit the sum of Kshs.450,000/= as set out in the said agreement?*

3. *When was the balance of Kshs.450,000/= plus the capital gains tax payable?*

4. *Was the grant of consent of the Land Control Board and the survey of the farm a condition precedent to the paying of Kshs.450,000/= plus the capital gains tax? And was time of essence?*

5. *When was consent of the Land control Board to the said transaction granted?*

6. *When was the survey work carried out on the said farm?*

7. *When was the balance of Kshs.450,000/= and the capital gains tax deposited with P.N. Gadher?*

8. *Did the plaintiffs in the circumstances break the contract of sale?*

9. *Who is liable to pay the costs of this suit?”*

11. To answer those issues, the superior court (Nambuye J) heard six witnesses for the purchasers who included: Gadher (PW1), the advocate who acted for both parties and drew up the sale agreement; **William Chemweno** (PW2), who provided financial assistance to the four purchasers who included his son **John** (PW5); **Michael** (PW3) who was guiding the process of obtaining the necessary consent for the sale and liaising with the surveyor; **Tennyson** (PW4) who confirmed the transaction and the occupation of the land by the purchasers; **John** (PW5) who produced a “*Practice Instruction Circular*” from the Chief Land Registrar dated 7th January, 1983 to clarify the issuance of the two consents in February, 1980; and **Shem Mutali Mutsami** (PW6), a senior clerical officer and secretary to the Land Control Board, Trans Nzoia, who processed the consent application forms and produced the minutes of the Board clarifying that the late Barmalel had not only applied for sub-division of the land but also the sale or transfer of 300 acres of it to the purchasers.

For the defence, only Leah testified and confirmed that the late Barmalel was selling 300 acres of his land to the purchasers and had received Shs.450,000/=. The purchasers however failed to pay the balance as agreed and the late Barmalel instructed Gadher to give them notice of payment of the balance which they failed to pay. The late Barmalel therefore sold 100 acres to other persons and he was only ready to release 200 acres to the purchasers, which he had already permitted them to occupy. She knew nothing about the survey process or when the deed plan was obtained nor did she have evidence of payment of the survey fees or other sums payable by the vendor under the sale agreement.

12. Upon evaluation of the evidence on record in a lengthy judgment, the superior court made several findings of fact, among them: that the purchasers moved with speed to obtain the consent of the Land Control Board soon after execution of the sale agreement; that two consents were issued by the

Land Control Board; that the purchasers paid all the requisite survey fees; that the survey work was delayed by the surveyor and the director of Surveys despite concerted efforts by the purchasers to hasten the process; that the survey process was completed when the deed plan was issued on 18th May, 1983; that the vendor had served a notice calling for payment of the balance of the purchase price by 31st December, 1980; and that the purchasers paid the balance of the purchase price to the advocate acting for both parties after they were notified of the issuance of the deed plan.

Although this is a first appeal and we are entitled to re-evaluate the evidence on record and reach our own conclusions, we must be slow to interfere with findings of fact made by the superior court, especially when the findings are based on demeanour of witnesses. The court will only do so if the findings are based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching them – see Mwangi v Wambugu (1983/84) 2 KCA 100.

On our own evaluation those findings of fact were well founded on the evidence on record.

13. The superior court also made a further finding of mixed fact and law that there was no consent sought or issued for transfer of the land the subject matter of the agreement. In making that finding, the learned Judge relied on the “*Practice Instruction Circular*” issued by the Chief Land Registrar dated 7th January, 1983 and addressed to “*All Land Registrars*”, “*with copies to all Chairmen and Secretaries of Land Control Boards.*” The circular basically lamented that land registrars were not consistent in accepting consents issued for subdivision and transfer of properties; with some accepting one consent issued for both transactions while others insisted on two. It also clarified that a consent for transfer should be issued for an existing parcel of land. In the end the following directions on procedure were given with effect from 7th January, 1983: -

“(1) *Any land owner who wishes to deal with a portion of his land by way of transfer or otherwise, will apply to the Land Control Board for the subdivision of his land. The application to the Land Control Board will not contain any other request other than the subdivision, and will only be signed by the landowner.*

(2) *Once the Land Control Board has given its consent to the subdivision, the land will be surveyed, the mutation registered and new registers opened in the name of the proprietor in the manner provided by Practice Instruction Number 79696/111/125 of December, 1979.*

(3) *It is only at this stage that the landowner can apply to the Land Control Board for transfer or other dealing. The application will give the specific parcel intended to be dealt with.*

(4) *In future, the Chairmen and Secretaries of Land Control Boards will not accept any application which requests consent for both subdivision and transfer or other dealing. If such an application is made, the Secretary to the Land Control Board should ask the presenter to delete the other requests before it is entered in the register of applications.*

The effect of the foregoing is that in future, the Land Registrars will not accept for registration any transfer or other controlled transaction on the strength of a single letter of consent issued for both subdivision and transfer or such other dealing.”

The Judge reasoned thus:

“The question to be asked here is whether the said steps were followed herein and whether the board dealt with sub-division sale and transfer at the same time. The application subject to these proceedings was produced as exhibit 2. No doubt it was in 1980 and so the old practice rules if followed would apply to it. However, it being a document it talks of itself and no oral evidence cannot be (sic) read into it. This court has revisited clause 3 of the said application and the words typed in it are sub-division and sale to the purchaser 300 acres as per sketch plan attached hereto. This exhibit 2 was endorsed by both parties and it has to be taken to mean what it says. It

means that at that point in time the parties intended to deal with sub-division and sale only. No other application for transfer has been presented to this court and it is the finding of this court that the parties had not presented to the board an application for consent after (sic) transfer as at the time they came to court.”

14. Despite that finding, the learned Judge went further and examined the terms of the agreement between the parties to determine whether the late Barmalel lawfully rescinded it. She referred to the evidence that the late Barmalel had demanded payment of the balance of the purchase price in December, 1980 against the provisions of the agreement that the balance was only payable after consent of the Land Control Board had been given and also after the survey had been completed. She held on those facts that the demand for payment in 1980 was premature since the survey process was not completed until May 1983, and therefore a nullity and that after completion of the survey, no demand was made as provided under special condition clause 8 (2). Consequently time was not of the essence and the payment of the balance of purchase price made in 1983 was a lawful completion of the contract. There was no breach by the purchasers, and they were therefore entitled to judgment as prayed in their suit except for general damages. Orders were issued accordingly.

15. The judgment was challenged on 11 grounds listed in the memorandum of appeal, but at the hearing thereof, learned counsel for the appellants, Mr. R. Kamau, argued them in two tranches. The first tranche addressed the issue of specific performance and the effect of lack of consent of the Land Control Board; while the second covered the issue of rescission.

16. On the first issue Mr. Kamau submitted that the transaction entered into by the parties was subject to three consents: that is to say, consent for (1) Sale, (2) Sub-division (3) Transfer. On the evidence however only two consents were sought and obtained and there was a finding of fact by the superior court that the third was not. In those circumstances, he submitted, **section 6 (1) and 2** of the Land Control Act applied to render the transaction void for all purposes three months after the date of the agreement, i.e by 12th May, 1980, and an order for specific performance could not be given. Several authorities were cited for that submission including:

Karuri vs. Gituru [1981] KLR 247; Kariuki vs. Kariuki [1983] KLR 225; Harambee Co-operative Savings & Credit Society vs. Mukinye Enterprises Ltd [1983] KLR 611; Wamukota v Donati [1987] KLR 280, and Elly Odhiambo Onyuka vs. Ayub Odhiambo Migwalla, Civil Appeal No. 81 of 2002 (unreported).

17. In response to those submissions, Mr. Salim Machio, learned counsel for the respondents contended that **section 6 and 8** of the Land Control Act were complied with because both parties sought and obtained the necessary consents shortly after execution of their sale agreement. One consent was issued to the seller to authorize sub-division while another consent was issued to both the seller and the purchasers authorizing the sale of 300 acres identified in the agreement. That consent, in his submission, was sufficient for purposes of the Act and it made no difference that it was not referred to as consent to transfer.

18. We think for ourselves that this is the most crucial issue which we ought to determine before we examine the second issue raised in the appeal. **Section 6 (1) (a) and (b)** of the Land Control Act provides as follows: -

“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 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.”

And **section 8 (1)** of the same Act provides:

“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;

.....”

There is a proviso for extension of time.

19. There is no difficulty in construing those provisions of the law and the five authorities cited herein by Mr. Kamau have clearly stated that those are peremptory provisions of an Act of Parliament which cannot be tempered by doctrines of equity to escape strict application. Want of consent for any of the transactions listed in the Act will therefore render the transaction void and the only remedy under **section 7** of the Act is recovery of any valuable consideration as a debt.

20. The issue arising in this matter and which we have to consider is however different. There is no claim that an application was not made to the relevant Land Control Board or that it was not made within time. It is indeed common ground that consent for subdivision of the land was granted to the vendor. There was also consent granted in respect of the proposed sale of the subdivision. The sale of the subdivision was therefore lawfully authorised and the court cannot go behind the consents issued to find out why they were issued. The issue is whether after issuing a consent for the sale, the Land Control Board should have issued another one for transfer at that point in time. In the circumstances of this case, we think not.

21. In the first place this transaction took place in February 1980 before the amendment of some provisions of the Land Control Act, viz **s. 6(2), 7, 8 and 9 (2)** by **Act No. 13 of 1980** which became operational on 24th December, 1980. Before those amendments the manner of application for consent was unclear and it is evident from the circular from the Chief Land Registrar referred to above, that consents issued in the middle of that confusion were accepted as a basis of lawful transfers of land. They did not violate the provisions of the Act as it existed at the time. The transaction in this matter was in that category and was not affected by the circular. In the second place, there was no transfer drawn up in respect of the sub-division simply because the sub-division did not exist on its own until the deed plan was approved by the Director of Surveys. By that time the dispute had been precipitated and it was erroneous for the superior court to have surmised that a consent for “*transfer*” ought to have been applied for and obtained when the sale agreement was executed.

We find in the circumstances that valid consents were issued, not only for the sub-division of the original Title LR. No. 5341 but also for the sale and consequential transfer of 300 acres of that Title to the purchaser. The sale agreement was therefore enforceable at the instance of either party and the order for specific performance was lawfully issued in favour of the purchasers who sought it. That ground of appeal lacks merit and is rejected.

22. The submissions of Mr. Kamau on the second tranche of the grounds of appeal were that although no notice calling in the balance of the purchase price was served by the vendor under clause 8 (2) of the agreement, there was still a valid rescission of the agreement when the vendor rejected payment of the balance of the purchase price which was delayed for 8 years, thus completing the rescission by making time of the essence. On this submission Mr. Kamau relied on the case of **Njamunyu v Nyaga [1983] KLR 282** in which the purchaser failed to pay the balance of the purchase price after consent was obtained and the vendor purported to rescind the contract. The purchaser’s suit was dismissed in the superior court, on appeal to this court, it was held *inter alia*:

“2. Land Control Board consent does not make an agreement for sale of land binding. The agreement is only binding between the parties who make it, though it is not enforceable until consent has been given. If consent is refused, the dealing in agricultural land becomes void for all purposes under section 6 of the Land Control Act (cap 302).

3.

4. The giving of the consent of the Land Control Board does not impose any obligations upon the seller or buyer to perform the agreement, though it cannot be performed without it. The parties are at liberty to cancel the agreement mutually even after consent has been given and not proceed.

5.

6. Refusal to sign a transfer after consent has been given is not tantamount to questioning the decision of the Land Control Board but the party so acting would be taking the risk of becoming burdened with an order for specific performance, possibly damages and costs also, if refusal is unlawful.

7. Where completion does not take place as intended by the parties (in this case after consent was obtained), the option open to the concerned party is to give notice to the party in default therefore making time of the essence. Where there is no express agreement or notice making time of the essence, the court will require precise compliance with stipulations as to time whenever the circumstances of the case allow.

8. Before an agreement such as this can be rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given failure to rectify will result in rescission of the contract.

9. Where the defaulting party pays the balance within a reasonable time, equity in all probability would apply, and he would be entitled to the transfer. But where the delay is unreasonable, relief cannot be granted to such a defaulting party as to do so would destroy the other’s right in law to make time of the essence. There must be a point when the length of time must stop and reasonable time is inferred from the conduct of the parties or construction of the agreement.”

23. Mr. Kamau further submitted that the superior court ought to have considered that the relief sought was specific performance which was equitable and in this case, the court should have declined to grant it because a portion of 100 acres of the land had been sold to other persons, thus restricting the occupation of the purchasers to 200 acres only. He referred us to a treatise on specific performance by **Sir Guenter Treitel** in his book *“the Law of Contract”* 11th Edition.

24. In response to those submissions, Mr. Machio reminded us that there were express provisions in the sale agreement which were agreed on by the parties and among them was a mode of payment that required the purchasers to pay the balance of the purchase price to the advocate, which they did. The time for payment was after completion of survey and the finding of fact was that it was not completed until May 1983. The vendor was alive at the time and could have easily invoked the provisions of special condition 8 (2) to call in the balance and make time of the essence but did not. Instead he had purported to make time of the essence in December, 1980 when there was no provision in the agreement for such procedure, and the superior court correctly found the notice was premature and of no consequence. Purporting to make time of the essence outside the agreement was therefore untenable.

As for the claim that the order for specific performance was improper since a portion of 100 Acres land had been sold to other persons, Mr. Machio submitted that the sale was of no consequence because it was resisted and an injunction obtained to maintain the *status quo*.

25. We have carefully considered the evidence on record, the findings of the superior court and the

submissions of counsel and we think the superior court cannot be faulted in its conclusions on the issue of rescission.

As stated by this Court in the *Njamunyu case*, although the parties to a sale agreement upon which consent has been obtained may choose to terminate it, in the absence of an express agreement on time being of the essence, notice must be served on the defaulting party before any assertion can be made that time was of the essence. In this case there was an express provision (**clause 8(2)**) as to when time would become of the essence but the clause was never invoked by the vendor. It was not the vendor's case in the superior court, either in his pleadings or in evidence, that the refusal to accept the balance of the purchase price made time of the essence. There was no counter claim for rescission either. His case was rather that he had served notice in 1980 which was not complied with and therefore he was not obliged to accept the balance of the purchase price. As correctly held by the superior court, the notice was a nullity and therefore of no consequence to the agreement between the parties. We would for those reasons agree with Mr. Machio that there was no valid rescission of the sale agreement.

26. As for the propriety of the order for specific performance, we say with the superior court as follows:-

“DW1 pleaded that the land was sold to 3rd parties and they have nothing to give the plaintiffs since they are 4 widows with 22 children. The courts finding on this is that the late Barmalel was bound by the contract in exhibit 1. He could only sell to 3rd parties after rescinding and bringing exhibit 1 to an end. He has not done so and so he took the risk of being called upon to meet the terms of the contract. It is the fault of the late Barmalel that he sold a portion of the contracted land to 3rd parties and it is unfortunate that the remaining land is not enough for the 4 widows and 22 children of the deceased. It has to be borne in mind that a court of law is a court of justice and not sympathy. DW1 and other administrators of the Estate of the late P.T.A. Barmalel will have to satisfy the needs of the plaintiffs first and then share the remainder with the 3 parties.”

The second ground of appeal is also rejected.

27. In sum we find no merit in the appeal before us and we order that it be and is hereby dismissed with costs.

Dated and delivered at Eldoret this 12th day of November, 2010

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR