



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA AT ELDORET**

**CIVIL APPEAL 84 OF 2004**

**BETWEEN**

**1. FRED C. FEDHA**

**2. PETER W. FEDHA**

(Being the personal legal representatives of  
the estate of **NATHAN WASHIKO FEDHA**) ..... **APPELLANTS**

*Control Act* the agreement was null and void and cannot be specifically performed. The deceased counter-claimed for eviction.

By the reply to the Amended Defence and counter-claim the respondent admitted that the transaction was subject to the control of the Land Control Board but contended that the parties had made an agreement for consent to the Land Control Board in the prescribed time which had never been determined. By an application dated 4<sup>th</sup> January, 1996, made by the deceased under **Section 3A Civil Procedure Act** and **Order XII Rule 6 Civil Procedure Rules** the deceased sought judgment on admission for Kshs.1,250,000/= in favour of the respondent and against him being the refund for purchase price on the ground that the agreement for sale had become void as the Land Control Board had not approved the application for consent. The interlocutory application was dismissed and the parties subsequently framed three issues for determination at the trial namely, firstly, whether or not the agreement dated 1<sup>st</sup> July, 1989 was valid and enforceable or void; secondly, whether or not the respondent was entitled to an order for specific performance and thirdly, whether the respondent was alternatively entitled to a refund of the purchase price with interest at commercial rates from 1st July, 1989 till payment in full. At the trial the respondent gave evidence and called three witnesses namely **Beatrice Nakhumicha Khaoya** (PW1) (Beatrice) who was working as secretary to Land Control Board at the material time; **Wilfred J. E. Mulira** (PW3) (Mulira) also a secretary to Land Control Board and **Olwanya Jackson Andubate** (PW4) who signed the application for consent of the Land Control Board as agent of the respondent.

The deceased also gave evidence and called one witness **Shem Mutali Mutsami** (DW2) (Shem).

The following brief facts emerge from the entire evidence.

By an agreement dated 1<sup>st</sup> July, 1989 the deceased agreed to sell a portion of 50 acres to be excised from the deceased's land LR. No. 7060/1 comprising of approximately 1020 acres at a price of Kshs.1,250,000. The deceased acknowledged the payment of the full purchase price in the agreement by four specified instalments.

It was agreed that the land would be free from encumbrances; that the deceased would obtain the consent of Land Control Board for sub-division and subsequent transfer; that the deceased would pay all expenses related to survey, and, lastly, that the transfer should be completed within five (5) months from date of the agreement.

Subsequently on 15<sup>th</sup> November, 1989 the parties made an application to Saboti/Kwanza Land Control Board (*Board*) indicating the nature of the transaction for which consent was sought as:

**“SUB-DIVISION INTO FOUR PORTIONS OF 228.0, 50.0; 25 AND 10.0 ACRES RESPECTIVELY AND TRANSFER OF 50.0 ACRES.”**

The application fee of Kshs.50 was paid and the application was minuted in the meetings of the Board on two occasions in 1989, but was not considered for various reasons. On 31<sup>st</sup> December, 1989 the parties having failed to obtain the consent of the Board mutually by written agreement extended the completion date to 30<sup>th</sup> June, 1990. Thereafter the application for consent was again minuted on several occasions but it was never considered.

It transpired that the application for consent of the Board sought consent for two separate transactions – sub-division and transfer in breach of a *practice instruction* Ref. No. GEN./F/9/38 dated 7<sup>th</sup> January, 1983 from Chief Land Registrar directing that:

- “(i) A land owner who wishes to transfer a portion of his land should first make an application to the Land Control Board for consent to the sub-division.**
- (ii) Once the consent is given the land should be surveyed, mutation registered and new registers opened in the name of the proprietor.**

**(iii) Thereafter an application for consent to transfer giving the specific parcel intended to be transferred can be dealt with.**

**(iv) Any application which requests both sub-division and transfer or other dealing should not be accepted and if such an application is presented 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”.**

Sometime in July 1990 the parties were advised by the Chairman of Board to make a fresh application for sub-division only to conform with the *practice instruction* and as a consequence the deceased made a new application dated 1<sup>st</sup> July, 1991 for sub-division of the land into two portions of 157 acres and 50 acres which application was allowed by special Board and consent given on 22<sup>nd</sup> February, 1992. According to the evidence of the deceased the original letter of consent was collected by the respondent.

The deceased subsequently caused the land to be surveyed, the 50 acres to be excised, Deed Plan and beacon certificate to be prepared. However mutation was not completed because according to the deceased, the surveyor requested the original letter of consent which the respondent failed to surrender to him. At the time of filing the suit not only was mutation incomplete but also the Board had not given consent for the transfer of suit land. Nevertheless, the respondent filed the suit to forestall his claim being time-bared as the six years limitation period was about to expire.

On the issue whether or not the agreement of sale was null and void for lack of consent of the Board Mr. Keyonzo, learned counsel for the respondent submitted at the trial in essence that the agreement had not become void since the second part of the application for consent of the Board dated 15<sup>th</sup> November, 1989 seeking consent for transfer was still pending for determination by the Board.

On the other hand, Mr. Wafula, learned counsel for the appellants contended at the trial that the agreement was null and void as the application dated 15<sup>th</sup> November, 1989 was dealt with when the Board required separate application for sub-division to be made and subsequently granted the consent for sub-division without granting the consent for transfer.

The trial Judge considered the submissions made and held, *inter alia*, that before the practice instruction of 7<sup>th</sup> November, 1983, an application for consent of dual transaction (*sub-division and transfer*) was allowed; that the practice had been scrapped by November 1989 when the application for consent for sub-division and transfer was made; that had the application been dealt with by the Board, it would only have granted consent to sub-division and struck out the part seeking consent for transfer; that literally the application was still pending before the Board as it had not been dealt with; that although the application for consent to sub-division was paid for the Board could consider that application as it was overtaken by events when separate application for consent to sub-division was made and consent granted; that the application for consent to transfer would not be considered by the Board as it was not paid for and as it would have to be made separately in accordance with *practice instructions* and that the transaction only received consent for sub-division and not for transfer.

The trial Judge thereafter considered whether on facts and law specific performance could issue to compel the deceased to *process the transfer* and said in part:

**“As stated earlier the plaintiff performed his part of contract and the remaining part was to be completed by defendant. The plaintiff has been in occupation of the land and the defendant had use of the consideration and so there is no problem in completing the transaction if the defendant is willing to do so. I note that the completion period stipulated in the contract is long past but that alone is not a bar to the parties completing the deal. This finding is cemented on the fact that the parties extended the completion date to 30<sup>th</sup> June, 1990 which date passed before consent had been given. Despite this the parties made an application to the Board on 28.2.92 for sub-division and the same was**

approved. Following the same trend the parties can extend the completion date initially agreed and make an application for approval of **transfer if the defendant is willing**. This is so because the reasons the defendant is giving for not completing the deal as noted earlier on were not part of the condition set out in the contract namely harassment and filing the matter in court.” (emphasis added).

The court after considering other claims relating to alternative relief of refund of purchase price and the issue of interest concluded:

**“In the premise I find that the plaintiff has proved his case on a balance of probabilities in both alternative limbs by which specific performance will be ordered and if not complied with then the defendant will be required to refund the purchase price with interest at court rates from the date of judgment.”**

The court granted two main reliefs thus:

- “1. An order be and is hereby issued that the defendant herein Nathan Washiko Fedha to specifically perform the contract by processing the transfer in favour of the plaintiff of the suit and within 90 - (ninety) days from the date of reading of the judgment. (emphasis added)**
- 2. In default of the above he (defendant) be and is hereby ordered to refund the purchase price together with interest at court rates from the date of judgment until payment in full.”**

There were important developments after the judgment was delivered. By 20<sup>th</sup> March, 2000 the deceased through his advocates deposited the purchase price plus interest of Kshs.63,152/95 as at 20<sup>th</sup> March, 2000 in court in satisfaction of the second order of refund of purchase price in the decree and demanded that the respondent vacates the land within 60 days. On 7<sup>th</sup> September, 2000 the Deputy Registrar of the High Court Eldoret issued a cheque for Kshs.1,313,152/90 payable to the respondent which was forwarded to the respondent's advocates. The respondent's advocates returned the cheque to the deceased's advocates who again returned it to the respondent's advocates. The cheque which is now stale is currently in possession of the respondent's advocates.

Sometime in 2001 the deceased filed a suit for enforcement of the decree, to wit, *H.C.C.C. No. 57 of 2001 Bungoma* and sought an interlocutory mandatory injunction evicting the respondent from the suit land on the ground that pursuant to the judgment, the deceased was entitled to evict the respondent if he failed to vacate the suit land within 60 days upon refund of purchase price and interest. The application was allowed on 10<sup>th</sup> May, 2002 and the respondent was evicted from the suit land sometime in late 2002.

On his part the respondent by a letter dated 14<sup>th</sup> January, 2000 addressed to the Commissioner for Lands Ardh House Nairobi requested the Commissioner to approve the sub-division plans sent to him pursuant to the consent of the Board given on 28<sup>th</sup> February, 1992. Thereafter on 28<sup>th</sup> January, 2000 the respondent filed a notice of motion mainly under **section 34** of the *Civil Procedure Act* and **section 8 (1)** of the *Land Control Act* in the concluded Eldoret suit seeking various orders including extension by 90 days of time within which the deceased should specifically perform the contract by processing the transfer pursuant to the judgment delivered on 13<sup>th</sup> October, 1999; an order that the deceased be ordered to execute an application for consent of the Land Control Board and in default the Deputy Registrar be appointed to execute the application, and, an order that, the time within which an application to the Board for consent to transfer the suit land be extended by 90 days. The application was allowed in its entirety by Etyang, J. on 26<sup>th</sup> September, 2003.

Sometime in November 2005, the respondent and the Deputy Registrar of the Court made an application for consent for transfer of the suit land. The consent was granted by Kiminini Land Control Board on 30<sup>th</sup> November, 2005. Sometime in

April 2007, the Commissioner of Lands processed the Deed Plan and a new register for suit land LR No. 7060/9 (original 7060/1/5) was opened. On 28<sup>th</sup> June, 2007 the Deputy Registrar, Kitale transferred the suit land to the respondent and a Certificate of Title was issued to the respondent on 27<sup>th</sup> November, 2007.

However the respondent is not in possession of the land although he is now the registered proprietor. The respective counsel state from the bar that the deceased sold the portions of land to ten different people who are not in possession.

The appellants are relying on seven grounds of appeal. The first three being the main grounds which state serially that the trial Judge erred in law when she ordered specific performance of a void contract for sale of agricultural land, that the Judge misdirected herself on the law regarding specific performance of void transaction and that the Judge erred in law in holding that it was possible to specifically perform the land sale contract depending on the willingness of the appellant (deceased).

There is a notice of cross-appeal whereby the respondent essentially seeks the reversal of the finding of the superior court that the application dated 15<sup>th</sup> November, 1989 for consent to sub-division and transfer is invalid or spent. The respondent instead seeks an order that the application is still pending.

The facts relating to the contract and the subsequent events leading to the filing of the suit were not in dispute. Indeed the facts that we have already summarized above are not in dispute. It was also a common ground that the suit land was agricultural land and that the sale was subject to the consent of the Land Control Board.

By **section 6 (1) (a), 6 (1) (b)** of the *Land Control Act* (Cap. 302) the sale, transfer, partition, sub-division, among other dealings with agricultural land, 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.”**

**Section 8 (1)** Provides that the application for consent should be made in the prescribed form within six months of the making of the agreement by any party to the controlled agreement.

**“Provided that the High Court, 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 condition if any as it may think fit.”**

By **section 9 (2)** the agreement for a controlled transaction becomes void where, among other things, the application has been refused.

In this case the application for consent for sub-division and transfer dated 15<sup>th</sup> November, 1989 was made within the prescribed time of six months of the date of the agreement which was 1<sup>st</sup> July, 1989.

It was a common ground at the trial and the trial Judge so held that the Board gave consent to the sub-division of the deceased's land but had not at the date of filing the suit or at the date of judgment granted consent for the transfer of the suit land. However the respondent's case was that since the application for consent for sub-division and transfer had not been determined by the Board, the agreement of sale had not become void. The contention of the respondent was considered and rejected by the trial Judge. The respondent by the notice of cross-appeal faults the findings of the superior court. It is clear from the *Practice Instruction* of 1983, Land Control Board registries used to accept a single application seeking consent for dual transactions. However there was evidence from Beatrice who had been a secretary to the relevant Board for ten years from 1987 to 1997, a fact verified by the minutes of the Board produced at the trial, that, after receiving the 1983 circular (*practice instruction*) stopping double transaction they advised the parties to make fresh application for sub-division alone. Beatrice further testified that when an application has been before the Board for six times it is withdrawn for the applicant to renew the

application. There was also the evidence of Shem who produced the *instruction* as exhibit that the practice in *practice instruction* was operative in every Lands Office in the country and that only KShs.50/- was paid for the dual application. There was the evidence of Mulira that he filled the particular application for consent on behalf of the parties but he conceded in his evidence that he was not aware of 1983 circular and had not seen it.

The respondent admitted in his evidence that the application for consent for dual transactions which was signed by deceased and the respondent's agent was irregular. He testified in his evidence in cross-examination by Mr. Wafula in part:

**“I have not made application for transfer. There is no payment for application for transfer. You first of all go for sub-division and after that you then go for transfer and then you pay fees.**

**The register showed sub-division and transfer. They jumped the gun. They should have made an application for transfer after sub-division.”**

According to the evidence of the deceased, when he went to see the Chairman of the Board in the company of the respondent the chairman advised them to make another application for sub-division only to replace the first application of 15<sup>th</sup> November, 1989. The deceased stated further in his evidence in cross-examination by Mr. Keyonzo;

**“We went to see the chairman in his office. We were informed that it had been withdrawn because it had been wrongly filed.**

**Because it usually lapses after 6 sittings.**

**They had received communication that they should not combine transactions into one form.”**

There was thus ample evidence that the first application was considered to be in breach of the *practice instruction* which predated the application and that parties on advice from the chairman of the Board filed a fresh application in 1991 to replace the first application and obtained a consent for sub-division. However the parties did not as admitted by the respondent make an application for consent to transfer the suit land. There was evidence that according to the prevailing practice of the Board an application for consent lapses and the applicant is required to renew it if it is not determined within six sittings of the Board. The suit was filed almost six years after the first application in 1989 was made. It is an academic exercise in our view to argue that the application was still pending at the date of filing the suit or and even to-date – over twenty years after. It is evident that the first application of 1989 was superseded by the second application of July 1991 for consent and by the granting of the consent for sub-division. Even if we were to find in favour of the respondent that the first application of 1989 was still pending for determination by the Board on 29<sup>th</sup> June, 1995 when the suit was instituted that fact alone would not justify the granting of a decree for specific performance. Before the court could grant a decree of specific performance it had to be satisfied, among other things, that the consent to transfer the suit land had in fact been given by the Board.

In this case, it is incontestable and we find that, in the absence of the consent of the Board to transfer the suit land, the agreement of sale dated 1<sup>st</sup> July, 1989 being a controlled transaction was void for all purposes and equity would not compel specific performance of a contract which was illegal.

The trial Judge apparently appreciated that a decree of specific performance of a void contract could not be granted for the learned Judge did not grant an order for specific performance in terms sought in the suit. Indeed, the court did not order the deceased to execute the transfer of the suit land in favour of the respondent within a specified time, or, as invariably the case, order the Deputy Registrar of the court to execute the transfer in case of default. The superior court instead ordered the deceased to specifically perform the contract by processing the transfer in favour of the respondent. The excerpt of the judgment of the superior court granted above shows what the court meant by the phrase *to process the transfer*.

It is clear that the court envisaged that the deceased would be willing to have the transaction completed and would agree to the extension of time for completion of the agreement as he had done before and also to the making of an application for consent of the Board. In essence, the court anticipated that the parties would mutually alter the terms of the agreement or make a fresh agreement that would facilitate the transfer of the suit land to the respondent. The successful completion of the transaction was therefore dependent on the willingness of the deceased.

There was a default clause as quoted above. That is the construction that we give to the two main orders granted by the superior court.

The first order required the deceased to specifically perform the contract by *processing the transfer* had no force of law as it was dependent on the will of the deceased. The deceased had early in the suit filed an application for judgment in favour of the respondent for refund of the purchase price. The deceased had also in his evidence in the suit stated categorically that he was not willing to transfer the suit land. The order for specific performance by its character was incapable of execution and the court erred in making an order in vain.

We now turn to the post judgment application dated 28<sup>th</sup> February, 1992 the Ruling thereof of Etyang, J. and the subsequent events culminating in registration of title in the name of the respondent. Mr. Wafula submitted that any subsequent orders based on the judgment should be set aside and the title cancelled.

Mr. Keyonzo on his part submitted that the respondent has obtained a valid title as there was no order staying the execution of the decree.

The application dated 28<sup>th</sup> February, 1992 was filed in the concluded suit and not as a distinct miscellaneous application. It was brought partly under **section 34 (1)** of the *Civil Procedure Act* which provides:

**“All questions arising between parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”**

The application was also based on **section 8 (1)** of Land Control Act which in the proviso gives High Court power to extend the period of six months within which an application for consent of Land Control Board should be made.

We have already indicated the orders which respondent sought in the application dated 28<sup>th</sup> February, 1992.

The application was based on the grounds on the body of the application and ground C in particular states:

**“The court directed the defendant to specifically perform the contract of sale between himself and the plaintiff and in that regard to process the transfer necessary to realize such specific performance.”**

The application was supported by the affidavit of the respondent who deposes in paragraph 3 that justice requires that the court do settle the question of how the order on specific performance was to be executed, satisfied and discharged.

It is apparent that the application was brought on the basis that the superior court had ordered specific performance of the agreement of sale and that the purpose of the application was to settle the questions of how the order for specific performance was to be executed, satisfied or discharged.

As we have already observed above the superior court did not order the deceased to specifically perform the agreement of sale.

In our respectful view, the application and the ruling thereof were based on gross misapprehension of the judgment. Furthermore the Ruling in effect altered the character of the judgment and gave the respondent additional reliefs

which were not granted by the trial court. In addition, the court erred in finding that the judgment did not authorize the deceased to refund the purchase price before the expiry of 90 days and that he was in disobedience of the court order by refunding the money before the expiry of 90 days.

On true interpretation of the judgment the deceased had the option either to agree to process the transfer or to refund the purchase price and that option could be exercised at any time after the judgment. By depositing the purchase price in court before the expiry of 90 days, the deceased acted in conformity with the judgment.

It follows that the Ruling and the subsequent transfer of the suit land by the Deputy Registrar of the court were a nullity and not in disobedience of the court order.

The ruling and subsequent transfer were treated as proceeding in execution of the decree. The orders made were in effect consequential orders. In furtherance of the overriding objective of the Appellate Jurisdiction Act and the Rules spelt out as **section 3A (1)** thereof, the court has a duty under **section 3B (1)**, among other things, to ensure the just determination of the proceedings. In addition **Article 159 (2) (d)** of the *Constitution* requires the court to administer justice without undue regard to procedural technicalities. Thus, we have jurisdiction in this appeal to set aside the consequential orders which are nullity and to restore the title of suit land to the appellants.

Having regard to the conduct of the deceased in the whole transaction, and the fact that the appeal has succeeded partially it is just that the respondent should not be overburdened with costs of the suit and the appeal.

For the foregoing reasons we allow the appeal to the extent that the judgment for specific performance of the contract by *processing the transfer* is set aside. The Ruling and consequential orders given by *Etyang, J.* on 26<sup>th</sup> September, 2003 are also set aside. The transfer dated 28<sup>th</sup> June, 2007 and the certificate of title for LR. No. 7060/9 (*original number 7060/1/5*) are cancelled. The Register in respect of LR. No. 7060/9 (*original 7060/1/5*) shall be rectified by deleting the name of **Edwin Edward Asava Majani** and registering **Fred C. Fedha** and **Peter W. Fedha** in substitution as legal representatives of the estate of **Nathan Washiko Fedha**. The respondent shall surrender the cancelled certificate of title to the Land Registrar Trans Nzoia for cancellation within 60 days from the date hereof.

There shall be no orders as to costs of the appeal and the suit in the superior court.

Orders accordingly.

**Dated and delivered at Eldoret this 12<sup>th</sup> day of November, 2010.**

**R. S. C. OMOLO**

.....  
**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR