REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appeal 32 of 2005

BETWEEN

JOSEPH BORO NGERA ……..…APPELLANT
(ORIGINAL DEFENDANT)

AND

1. WANJIRU KAMAU KAIME
2. KARUNGARI KAMAU KAIME ….....……RESPONDENTS
(ORIGINAL PLAINTIFFS)

(Appeal from the judgment of the High Court of Kenya at Nakuru (Ondeyo, J.) dated 21st January, 2003

in

H.C.C.C. NO. 224 OF 1987)
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JUDGMENT OF THE COURT

The facts giving rise to High Court Civil Suit No. 224 of 1987 from which this appeal arises, are brief and straight forward, more so, because most of the facts have not been controverted. The first respondent, ***Wanjiru Kamau Kaime*** and the second respondent ***Karungari Kamau Kaime***, were both wives of one Kamau Kaime who was the original owner of land parcel LR No. 5282 situate in Njoro measuring about 1,060 acres. He was advanced some money by Agricultural Finance Corporation. The exact amount is not clear, but whatever amount was originally advanced, the same was secured by a charge over the Land parcel No. 5282. Kamau Kaime died in April 1969. The respondents were appointed the administrators of his estate. It would appear from the record before us, that the respondents did not service that loan and did not care to know how much was due to be paid to Agricultural Finance Corporation (AFC) although they had caused their names to replace that of their husband at the AFC offices and thus were treated as the debtors in AFC records. Be that as it may, in April 1985, AFC moved to sell the land to recover the debt due to it. It moved its security personnel to the land in preparation to sell it. The respondents got wind of the intention of AFC to sell the land. They approached the appellant Joseph Boro Ngera who was their close relative, for help. Their version was that they wanted the appellant to bail them out by paying off the debt on the understanding that whatever was paid to AFC would be treated as a friendly loan to be refunded to the appellant later. The appellant's evidence however, was that they offered to sell to him 300 acres out of the entire land at an agreed price of Ksh.650,000/- which would be paid directly to AFC and if that represented under-payment of the debt, then the extra debt would be cleared by the appellant nonetheless. If however, the debt was less than that amount then the difference would be paid to the respondents. Whatever was the truth (and here we pause to state that we are in complete agreement with the learned Judge of the superior court, that the appellant's version of sale of 300 acres to him sounded more credible) the appellant gave instructions to Mr. Maraga (now Hon. Justice Maraga) who was an advocate practicing in Nakuru to quickly prepare some sort of sale agreement for the parties to sign. As time was of essence, because sale of the entire land was imminent, Mr. Maraga prepared a short agreement dated 2nd April, 1985 which the parties signed, although the respondents maintained they did not know the contents of that agreement as they alleged it was never read and explained to them, though Mr. Maraga who appeared as DW4 at the hearing maintained he explained the agreement to the parties. Again we agree with the learned Judge of the superior court that the respondents must have known what they were signing as they knew what they wanted the appellant to do in order to help them. On the face of it, that agreement was executed on 2nd April 1985. On 3rd April 1985, armed with that agreement and a cheque for Ksh.100,000/- the appellant, Mr. Maraga and the

respondents went to AFC offices. The appellant paid that amount and AFC stopped sale. Mr. Maraga told them and their witnesses to go to his office for a proper agreement in a week's time. Mr. Maraga, did prepare a proper sale agreement. This was dated 9th April 1985. However, on that date, the respondents did not show up at Mr. Maraga's office and both appellant and Mr. Maraga had to search for them at various places so as to cause them to sign the agreement. They signed the agreement at various times and at various places. Witnesses Bernard Ndungu Kamau also signed the agreement while Wallace Kamau Kaime thumb-printed his part. That done, the appellant continued to repay the loan by installments but there is no evidence that any consent of the Land Control Board was obtained pursuant to the provisions of ***section 6*** of the Land Control Act Chapter 302 Laws of Kenya. The appellant blames the respondents for that omission but there is no evidence that indeed an attempt was made even by himself by filling and forwarding to the respondents the requisite application forms for the same. It was however, agreed by both sides that the subject land was subject to Land Control Act as it was in a land Control Area and was an agricultural land. As the appellant continued paying the outstanding debt to AFC, he also caused the land to be surveyed and although the survey instruments were not duly presented for consent of the Land Control Board to subdivide, he excised about 300 acres of the land, fenced it off and started farming it, by among other things growing grass which he would mow and bale into hay and sell. The respondents were appalled by appellants' action of allocating to himself their land. They had in the meantime applied for and obtained confirmation of the grant. They offered to refund to the appellant whatsoever money he had paid to AFC and they at first offered Ksh.314,880/- in refund which the appellant rejected as by then he had paid to AFC an amount in excess of Ksh.600,000/-. The respondents then proceeded and filed a case against the appellant in Elders Tribunal. The elders ruled in favour of the appellant. The respondents thereafter filed Civil Suit No. 224 of 1987 in the superior court at Nakuru. In the suit, the respondents sought:-

"(a) Vacant possession

(b) General damages for trespass

(c) Mesne profits

(d) Costs of suit

(e) Interest on (a) (b) and (c) at Court rates

(f) Any further or alternative relief this Honourable Court deems fit to grant."

In seeking judgment for the above, the respondents alleged that the appellant committed fraud in causing them to sign agreements without reading or causing the agreement to be read to them; in causing agreement to be drawn falsely purporting that plaintiffs had agreed to sell to him 300 acres out of LR 5282 for Ksh.650,000/-; that he caused the respondents to sign agreements at odd places and at odd times without disclosing to them the contents of the agreements; that he caused the two witnesses to the agreement to sign or append their thumb points to documents not signed in their presence and that in any event the agreements were void for lack of the consent of the Land Control Board.

The appellant, in response to the plaint filed defence and counterclaim. In his defence he denied the allegations of fraud and other allegations. In his counterclaim he sought:-

(i) A declaration that the plaintiff is the lawful owner of portion of land LR 5282 comprising 300 acres.
(ii) Specific performance as stated in paragraphs 15 and 16 of the counterclaim.
(iii) An order for the extension of time for filing the land Control Board Applications.
(iv) A permanent injunction against the plaintiffs restraining the plaintiff and/or their agents from selling, transferring, possessing and/or otherwise disposing the said portion of land.
(v) Judgment for Ksh.1,028,969/80 with interest at court rates from the filing of the counterclaim until payment in full.
(vi) Special damages of Ksh.1,076,000/- plus further special damages for loss of usage of money on the amount of Ksh.1,028,969/80 as stated in paragraph 19 of the counterclaim.

After these pleadings were filed, the record shows that an application by way of chamber summons was filed pursuant to ***Order V1 rule 13 (1) (a) (b) (c)*** and ***(d)*** of the Civil Procedure Rules seeking the dismissal (or should it have been striking out?) of the defence and counterclaim. That application was opposed but there is no evidence on record of the fate of that application. Suffice it to state that after all the procedural aspects such as exchanging issues, seeking particulars to be produced were completed, the hearing of the case started before Tunoi, J. (now Judge of Appeal), but the learned Judge did not finalise that hearing and after hearing the second respondent who appeared

before him as the first witness, Tanui J. (as he then was) took over the hearing of the case and started it *de novo*. No reasons are availed in the file as to why Tunoi, J. could not proceed with the hearing. However, even Tanui J. also did not complete it. He also heard only one witness, the same Margaret Karungari, the second respondent. Thereafter Ondeyo J. (as she then was) took over the hearing of the case and she also started it *de novo*. This time however, she commenced the hearing by setting out the matters which were not in dispute between the parties and the issues which were to be investigated by the court. She recorded the following orders which were by consent.

> ***"ORDER***
>
> ***By consent the following is (sic) not in dispute:-***
>
> 1. ***The parties to this suit are relatives***
> 2. ***The defendant paid a sum of Ksh.650,000 to AFC on behalf of the plaintiffs' (sic) and with their consent.***
> 3. ***There was no consent of the L.C. Board to the alleged transactions.***
> 4. ***The agreements of sale which the plaintiffs have disputed are void for want of the L.C.B consent of the relevant area where the suit land is situated.***
>
> ***The following issues, arise for determination, by consent of the parties:-***
>
> 1. ***Should the court extend the time within which the consent of the L.C.B should be applied for?***
> 2. ***Did the defendant make any further payments to AFC apart from the agreed Ksh.650,000/-***
> 3. ***Are the plaintiffs entitled to general damages and mesne profits.***
> 4. ***Is the defendant entitled to special damages."***

Thereafter, the learned Judge of the superior court heard the entire case and after hearing the two respondents together with their three witnesses, the appellant and his three witnesses, the submissions by the learned counsel on both side, she delivered a judgment dated 21st January 2003, in which she found as a matter of fact that the appellant indeed paid Ksh.1,011,537/40 to AFC on behalf of the respondents and with the knowledge, consent and authority of the respondents with their understanding that the same would constitute sale price for 300 acres of land comprised in Land Parcel LR 5282, but that the agreements in respect of the same sale were void for lack of consent of the Land Control Board as is required by the provisions of ***section 6*** of the Land Control Act Chapter 302 Laws of Kenya. The learned Judge also found that a case for extension of time to apply for that consent had been made out by the appellant as the reasons for delay to apply for and obtain the consent were reasonable, but as the appellant breached the provisions of ***section 22*** of the Land Control Act as he entered the suit land and remained therein developing the land and further continued paying money to AFC even after the six months had expired and no consent obtained i.e. after the transaction, which was a controlled transaction had been avoided, the court could not grant the order for extension as the appellants hands were soiled and he thus did not deserve equitable remedy. The learned Judge having considered the entire case and the law, concluded thus:-

> ***"The remedy of the defendant lies in a refund of the purchase price paid to AFC i.e. Kshs.1,011,537/40. The plaintiffs suit succeeds only to the extent that the defendant shall vacate the suit land. The issue of payment of damages does not arise. The plaintiffs took advantage of their relationship with the defendant and used the defendant to solve their problems, after which they refused to honour the sale agreement. They would not be entitled to costs of their suit. The defendant has been using the land since 1985 to date. He too would not be entitled to damages and under section 7 of Cap 302, no damages are payable. The plaintiffs suit is allowed and it is ordered that the defendant do vacate the suit land within 90 days (ninety) from the date hereof. Each party shall bear its own costs of the plaintiffs suit. The prayers sought in the counter-claim cannot be allowed. However, the plaintiffs shall refund to the defendant Kshs. 1,011,537/40 which is the purchase price paid by him to them. Each party to bear its own costs of the counter-claim."***

That is the decision that prompted this appeal before us. The appellant felt aggrieved as has come before us on five grounds of appeal which are that:-

> ***"1. The learned trial Judge errored (sic) in law by not allowing extension of time within which to apply for consent of the Land Control Board having already found that a case for extension of time had been made and that there were reasonable reasons for the delay in seeking and obtaining the relevant consent.***
>
> ***2. The learned trial Judge misdirected himself in considering the continued occupation of the land by the appellant after the sale agreement had become void and yet she authorized the appellant to continue such occupation for a further 90 days of the date of judgment.***
>
> ***3. The learned trial Judge failed to consider the fact that a seller who continues to receive part of the purchase price under the provisions of the Land Control Act, Cap 302, is as guilty as a purchaser who continues to remain on the land and consequently the parties to the suit in***

question would be equally guilty.

4. ***The learned trial Judge having discredited the plaintiffs case as set out at the beginning of her judgment and came to the conclusion that the plaintiffs took advantage of their relationship with the defendant should not have showed any sympathy towards them so as to allow them to enjoy the fruits of such unjust conduct.***
5. ***The learned trial Judge's final decision was unjust in the circumstances of the case as disclosed by the evidence and as found by her."***

Mr. Mindo, the learned counsel for the appellant, in his submissions before us argued the first ground only, but in his argument, he also touched on the second ground as that became necessary in the course of his addressing us on the first ground. In his view, once the learned Judge had made a specific finding as she did, that the appellant had made out a case for extension of time to apply for consent and having found that the respondents took undue advantage of their relationship with the appellant and got help from him but thereafter refused to honour their part of the deal, the learned Judge had no option but to allow the appellant's prayer for extension of time to apply for consent of the Land Control Board pursuant to proviso to ***section 8*** (1) of the Land Control Act Chapter 302. Mr. Mindo argued further that the reason the learned Judge gave for refusal to extend time was not valid as indeed if the appellant was on the land in violation of ***section 22*** of the Land Control Act, and that is what militated against granting extension then the learned Judge, in granting the applicant Ninety (90) days to vacate the land, contradicted that reasoning as in doing so, she in effect endorsed the offending act of the appellant. Thus in Mr. Mindo's view, the alleged violation of ***section 22*** of the Land Control Act was not proper reason for refusing extension when the court had accepted that grounds for extension were demonstrated and were valid. He thus, prayed for the appeal to be allowed on that score.

Mr. Muhia, the learned counsel for the respondents on the other hand, urged as to dismiss the appeal contending that the learned trial Judge proceeded on the right principles in her judgment as she considered all aspects that were before her and came to the right decision. In his further submissions, Mr. Muhia stated that the learned Judge, in considering whether or not to extend time to apply for consent, was exercising her discretion and she did so properly as she exercised that judicial discretion upon reasons, as she found rightly, in Mr. Muhia's view, that the appellant had committed an offence under the provisions of the Land Control Act. He however, conceded that the money paid to AFC by the appellant pursuant to the void agreements, was refundable. He also informed us from the bar that the appellant had since the judgment of the superior court, moved out of the suit land and it has so been out of his possession for about five (5) years, but he contended that before the trial courts decision, the appellant acted with a lot of impunity in proceeding to occupy the suit land illegally and continuing to repay to the AFC the debt even when it was clear the respondents had repudiated the alleged agreements. Finally he accepted that as the respondents were bound in law to refund the amount paid to AFC, they were ready to do so. Mr. Mindo referred us to one decision by Ole Keiwua, J. (as he then was – now JA) – Muigai Gakibi vs. Andrew Kimani Ngureka – H.C.C. No. 1850 of 1993. That decision though persuasive, is not binding on this Court. Mr. Muhia referred us to three reported cases, in support of his submissions.

We have considered the grounds of appeal, the record of appeal together with the facts and judgment therein. We have also considered the submissions by the learned counsel, all the past cases to which we were referred both persuasive and binding ones and the law. As the parties had by consent, recorded by the superior court, agreed that the appellant paid sum of Ksh.650,000/- to AFC on behalf of the respondents and with their consent; on account of the suit property but that as there was no consent of the Land Control Board, the agreement of sale in respect of which such payment was made was void for all purposes, the main issues that remained to the superior court to consider were four and these were whether the time within which to apply for the consent of the Land Control Board should be extended; whether the defendant made any further payments to AFC over and above the original Ksh.650,000/-, whether the respondents were entitled to general damages and mesne profits and lastly whether the appellant was entitled to special damages.

The learned Judge of the superior court found that the appellant indeed paid to AFC Ksh.1,011,537/40 representing extra payment of Ksh.361,537/40. She ordered the respondents to refund to the appellant the entire amount of Ksh.1,011,537/40. That decision was not challenged by either party before us and rightly too because it was in the evidence of Adet Norbetus Kachi (DW4) which was not challenged in anyway as Mr. Muhia, though given opportunity to cross examine Mr. Kachi, did not do so, as he had no questions to put to the witness. Thus the agreed issue as to whether any further payment was made to AFC by the appellant on behalf of the respondents over and above Ksh.650,000/- was found in favour of the appellant and is not in dispute before us in this appeal. The other issue as to whether the respondents were entitled to general damages and mesne profits was also dealt with by the learned Judge who in her judgment decreed that:-

> ***"The payment of damages does not arise. The plaintiffs took advantage of their relationship with the defendant and used the defendant to solve their problems, after which they refused to honour the sale agreement."***

There was no cross appeal challenging that decision and it was not raised before us. We must leave it at that. Equally the last issue

which was whether the appellant was entitled to special damages was also solved by the learned Judge when she decided that prayers sought in the counter-claim could not be allowed except that of refund of the amount paid to AFC by the appellant. That issue is also not before us.

What we have stated above, shows that only one issue is before us. Mr. Mindo, in our view, properly confined his arguments to the first ground in his memorandum of appeal, only touching the second ground on passing. The main issue is whether, the learned Judge, having found that the appellant had reasons to warrant granting extension of time to apply for consent of the Land Control Board under the proviso to ***section 8 (1)*** of the Land Control Act Chapter 302 Laws of Kenya, should have refused to grant that prayer on reason of the appellant's alleged perpetration of an offence under ***section 22***of the same Act while at the same time she, in effect endorsed further perpetration of the same offence by granting the appellant ninety (90) more days to stay on the land notwithstanding that such prolonged stay amounted to further perpetration of the same offence. That is the issue raised by Mr. Mindo, if we understand him.

Section 8 (1) of the Land Control Act states:-

> ***"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 controlled transaction by any party thereto:-***
>
> ***Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considered that there is sufficient reasons so to do upon such conditions, if any, as it may think fit."***

It was not in doubt that the transaction which was contemplated by the parties as the learned Judge found in her judgment was sale of the subject land which was agricultural land in a controlled area and was therefore a transaction for which consent was, under ***section 8 (1)*** to be obtained within six months. It was also not in dispute that such consent was not so obtained and that was the reason why the appellant pleaded for more time to apply for it. The proviso to ***section 8 (1)*** we have reproduced above allows the High Court to grant extension beyond six months, but it is clear to us that the High Court in doing so exercises its discretionary powers. This, in our view, is the reason why the word *"may"* is used by legislation in granting such powers. In this appeal, the learned Judge of the High Court considered reasons advanced for the grant of such a plea and was convinced that there were reasons to support the extension, but her discretionary powers were still to be used in granting the same. In exercising discretionary powers, she considered the conduct of the appellant which was mainly that the appellant, having known that the transaction was subject to prior consent of the Land Control Board being obtained, excised a portion of the land, took possession of it and continued to utilize it contrary to the requirements of the provisions of ***section 22*** of the Land Control Act. That section states as follows:-

> ***"Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6, any person***
>
> ***(a)pays or receives any money; or***
> ***(b)enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such five and imprisonment."***

Thus, Mr. Mindo is asking us to interfere with that discretionary exercise of power by the learned Judge. In law, we have that power but it must be exercised with extreme caution and we must be satisfied that the learned Judge, in the exercise of her discretion failed to consider matters that should have been considered or considered matters that should not have been considered and consequently came to a wrong decision or that looking at the entire case that was before her, the decision she arrived at was plainly wrong. In the case of ***Mbogo and Another vs. Shah (1968) EA 93,*** Sir Chales Newbold, P. stated:-

> ***"We now come to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial Judge where his discretion, as in this case was completely unfettered…….. A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as result there has been misjustice."***

We have, on our own analysed the evidence that was before the trial court and evaluated it as we must do in law, this being a first appeal. In our view, we find no grounds upon which we can interfere with the exercise of the discretionary powers of the Judge in this appeal. The record shows, not only that the appellant breached ***section 22*** of the Act, but that he did so with abandon. Indeed what is in the record is that soon after he went with respondents to pay Ksh.100,000/- to AFC on 3rd April 1985, the respondents developed cold feet towards the transaction, such that they had to be searched for to sign the agreement of 9th April 1985. Further, the appellant moved on to the suit land in 1985 even before the surveyor Kamau M. (DW2) prepared and had the plans that were to assist in the subdivision of the suit land and in obtaining consent of the Land Control Board. Those plans were dated October 1987 apparently at the time the suit in the superior court was being filed. The plaint is dated 2nd October 1987. Further evidence on record shows that even as the respondents had sufficiently demonstrated their rejection of the transaction, and were seeking help of the Provincial Administration and Elders Tribunal, the appellant proceeded on with repayment of the AFC debt knowing well that he had no consent of Land Control Board to proceed. Mr. Mindo points out that it was a contradiction of sorts when the learned Judge on the one hand refused to exercise her discretion on grounds that the appellant had, by moving into the suit land and using it, committed an offence under ***section 22*** of the Land Control Act, yet on the other hand, she granted her (ninety) 90 days to move out, thereby compounding the offence. In our view, the ninety days granted for the appellant to move out cannot be seen as extending time to commit the offence as Mr. Mindo submits. With respect, the Court found itself with a situation where the appellant was already utilizing the land and of necessity his grass and other items were still on the land. That time granted was necessary for the appellant to remove all his properties such as fencing material, grass already cut or to be cut if ready and all that he needed to remove from the land. This period in cases of eviction is normal in our legal circles. Any person to be evicted from the land whether on trespass or not must be given time to move out. To do so is not to be construed as endorsing the breach of ***section 22*** of the Act. We reject that view.

In conclusion, we dismiss the appeal as we must do, but we also order that the appellant's money – Kshs.1,011,537/40 must be paid to him within ninety days of the date hereof failing which interest will be paid on it at court rates from the date of the judgment in the superior court until payment in full. Each party to bear its costs of the appeal.

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

M. OLE KEIWUA
……
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
…….
JUDGE OF APPEAL

J. G. NYAMU
……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR