



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appeal 257 of 2001**

**PETER WAWERU WAITITU ..... APPELLANT**

**AND**

**CYRUS J. KARANJA ..... RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya*

*at Nairobi (Hon. Gacheche, Commissioner of Assize) dated 24<sup>th</sup> May, 2001*

**In H. C. C. C. No. 340 of 1995 (O.S)**

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of the High Court of Kenya at Nairobi (Hon. Gacheche, Commissioner of Assize, as she then was) given on 24<sup>th</sup> May, 2001 whereby the appellant was ordered to refund to the respondent a sum of Khs.75,000/- together with interest at the rate of 20% per annum payable from 20<sup>th</sup> May, 1985 until payment in full following a void land transaction.

The facts giving rise to the dispute, the subject matter of the appeal now before us, are largely incontestable and briefly may be stated thus. The appellant is the registered proprietor of all that piece or parcel of land known as Land Reference No. 10029/28, the suit land, comprising by measurement approximately 85 acres or thereabouts. On 20<sup>th</sup> May, 1985 the appellant agreed to sell a portion of 15 acres of the suit land to the respondent in exchange for the respondent’s motor vehicle registration number KMP 865 whose value was agreed at Kshs.75,000/-.

It was an agreed term of the Agreement for Sale that on the execution of the Agreement the respondent would hand over the motor vehicle plus the logbook and a duly signed transfer form from him to the respondent who would then be shown by the appellant his 15 acres. Thereafter, both would cause the land to be subdivided so that the respondent gets a title for the said portion “*as soon as possible.*”

It is common knowledge that the respondent performed his part of the Agreement by delivering the motor vehicle to the appellant. However, the appellant refused to honour his part of the Agreement and did indeed evince an intention of disposing of the suit land to other parties. The respondent, quite appropriately so we think in the circumstances, lodged a caveat over the suit land. This was on 7<sup>th</sup> December, 1992.

On 27<sup>th</sup> January, 1995, the appellant moved the superior court by way of an Originating Summons for the removal of the caveat on the ground that the respondent had no right or registrable interest over the suit land recognizable under the Registration of Titles Act.

After a short trial, the learned Hon. Commissioner of Assize held:-

*“The subject land described in the Grant shall be used for agricultural purposes and the residence of the grantee. It is thus land to which the Land Control Act would readily apply.*

*I am therefore guided by Section 6 of the said Act which makes it a mandatory requirement that parties to a transaction such as the one envisaged here which is referred to as a controlled transaction do obtain the consent of the Land Control Board otherwise the transaction is void.”*

The Hon. Commissioner of Assize further held:-

*“Having handed paid valuable consideration, for a transaction I find is null and void, the respondent was only entitled to recover the value of the said consideration, as a debt from the applicant. He had no right to have the caveat registered against the property. Indeed the applicant’s counsel submits that the respondent’s claim if any has a recovery (sic) of the consideration.”*

The superior court then ordered the appellant to refund to the respondent the sum of Kshs.75,000/- being the agreed value for the motor vehicle together with interest.

The appellant being dissatisfied with that decision has preferred this appeal the main ground being that the learned Commissioner of Assize erred in ordering the refund of the sum of Kshs.75,000/- when there was no claim or prayer before her for such an order.

The records of the appeal show that on more than three occasions when the appeal was called to hearing the parties asked us to stand over the hearing in order to enable them arrive at a settlement out of Court. This stalled the hearing of the appeal for more than two years but it became apparent to us that no agreement out of Court could be reached and we directed the parties to proceed with and conclude their submissions..

We agree with the superior court that it is plain that the Agreement of Sale related to agricultural land and that such agreement is void unless the Land Control Board for the land control area where the suit land is situated had given the necessary statutory consent. The parties agree that no application for consent was ever made or consent obtained and it followed that the respondent had no legal right or interest in the suit property capable of being protected by a caveat.

Section 7 of the Land Control Act provides:-

*“7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void ...that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid ...”*

Mr. Otieno for the appellant informed us from the bar that the appellant was not after all against refunding to the respondent his money but that his only complaint was against the payment of interest.

As the transaction became void the appellant was bound to pay back the consideration to the respondent. Likewise, the respondent had no reason to maintain the caveat over the suit land. Further, section 7 of the Act does not forbid payment of interest on money that has been paid in the course of a void transaction and the superior court was perfectly entitled to order the appellant to refund the consideration plus interest thereon.

At the conclusions of his submissions, Mr. Otieno did not persuade us that there were any valid grounds to differ with the Hon. Commissioner of Assize.

In the result, this appeal fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 16<sup>th</sup> day of March, 2007.

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR.