



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: OMOLO, O'KUBASU & WAKI, J.J.A.)  
CIVIL APPEAL NO. 81 OF 2002  
BETWEEN**

**ELLY ODHIAMBO ONYUKA ..... APPELLANT**

**AND**

**AYUB ODHIAMBO MIGWALLA ..... RESPONDENT**

**(An appeal from the decision of the High Court of Kenya at  
Kisumu (Wambilyanga J.) dated 25 th January, 2002  
in  
H.C. C. C. NO. 196 OF 1996)**

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of Wambilyangah J. which judgment was delivered by Tanui J. on **25th January, 2002** at Kisumu. In that judgment, the learned Judge entered judgment in favour of the respondent herein, one, **Ayub Odhiambo Migwalla** who was the plaintiff in the superior court.

The dispute herein relates to a piece of land known as No. Tamu/108 measuring about 10 acres. This piece of land (the suit land) had been registered in the name of Ezekiel Onyuka who was the father of one, **John Aloo Onyuka**. When Mzee Ezekiel Onyuka died the family members appointed John Aloo Onyuka to take care of the interest of the family. It must be pointed out that John Aloo Onyuka had not been issued with a grant of letters of administration but all the same the members of the family authorized him (as the eldest son) to enter into a sale agreement for the suit land. A sale agreement between John Aloo Onyuka (as the vendor) and Ayub Odhiambo Migwalla (as the purchaser) was entered into. The purchase price was stated as shs.250,000/=. For some strange reason, this sale agreement had no date although completion date was stated as 31st March 1991. The purchaser paid the full purchase price and took possession of the suit land.

As this transaction related to agricultural land it was imperative that the consent of the relevant Land Control Board be obtained. The respondent herein produced "**An Application for Land Control Board Form**" as Exhibit 3 in his evidence. This document merely stated the names of John Aloo Onyuka and Ayub Odhiambo Migwalla as the parties to the transaction, the parcel of land known as No. KSM/TAMU/108 and the purchase price of shs.250,000/-. There was no date on the application form. But in a letter of consent there is a date of 24th January, 1996 which refers to a "scheduled" meeting of the same date as having given consent to the transfer of the land from John Aloo Onyuka to Ayub Odhiambo Migwalla at a consideration of shs.250,000/-.

While this suit was still pending John Aloo Onyuka died and hence his step brother Elly Odhiambo Onyuka, the appellant herein, stepped in. When the family of the late Mzee Ezekiel Onyuka refused to

transfer the suit land the respondent herein as the purchaser sued John Aloo Onyuka seeking the following orders:-

**“(a) A permanent order of injunction restraining the defendant from entering into dealing with, trespassing upon, or in any other manner dealing with the suit premises.**

**(b) Specific performance of the agreement by the surrender of the Title Deed of the suit premises.**

**(c) Damages for Breach of contract in lieu of or in addition to specific performance.**

**(d) The costs of this suit and interest on (c) and (d) at court rates.”**

In entering judgment in favour of (Ayub Odhiambo Migwalla) the learned Judge concluded his judgment thus:-

*“It should be remembe red in any case that in the present case there has never been a suitable application seeking the revocation of the Grant to John Aloo. It means the Grant is still valid and effectual. Moreover, the entire big family except for DW1 and DW2 (who are only d riven by malice towards the plaintiff) still want the sale transaction of the land to be completed. There is a valid consent of the relevant Divisional Land Control Board. So the transaction is valid and binding. It should be completed by the defendant’s personal representative. Accordingly I reject the defence and enter judgment for the plaintiff for specific performance of the said sale agreement and for an injunction against the defendant as sought in (a) of the plaint.”*

Being aggrieved by the judgment of the superior court the appellant Elly Odhiambo Onyuka lodged this appeal citing the following grounds of appeal:-

***“1. The learned Judge erred in law and fact by holding that the sale transaction was valid on the basis that there was a valid grant w hile in actual fact nobody had applied for and obtained letters of administration in respect of the estate of the deceased at the time of the alleged sale agreement.***

***2. The learned Judge erred in law and in fact by failing to appreciate the fact that the suit land was an agricultural land and was therefore governed by the provisions of the Land Control Act Cap 302 Laws of Kenya.***

***3. The Learned Judge erred in law and in fact by holding that there was a valid consent from the relevant Land Control Board.***

***4. The Learned Judge erred in law and fact by allowing himself to be guided by irrelevant matters which irrelevancies did influence him to arrive at a wrong decision.***

***5. The Learned Judge erred in Law and fact by holding that the consent of the widows of the deceased overrides the beneficial interest of other non consenting beneficiaries.”***

As regards the first ground of appeal we must go back to the genesis of the sale transaction. As already stated the suit land was registered in the name of the deceased Ezekiel Onyuka. It would appear that the family of the deceased Ezekiel Onyuka was anxious to sell the suit land so as to raise money for medical expenses of one of his sons. To achieve this objective the members of the family entered into what was described as “consent”. That document read as follows:-

***“CONSENT” We the undersigned being the beneficiaries and/or being the persons interested in the estate of the late EZEKIEL ONYUKA who is the registered proprietor of the plot known as No. 108 TAMU in the MUHORONI SETTLEMENT SCHEME, KISUMU DISTRICT do hereby consent FIRST to the appointment of JOHN ALOO ONYUKA to be the lawful administrator of the estate of the said deceased and SECONDLY do hereby consent to the sale of the said plot to one AYUB***

***ODHIAMBO MIGWALLA for the price or sum of Kenya shillings Two Hundred and fifty thousand (Kshs.250,000/-). We hereby authorize the proposed administrator the said JOHN ALOO ONYUKA to enter into an appropriate agreement for the sale with the proposed purchaser and to receive a deposit of the purchase price notwithstanding that the Letters of Administration have not been granted to him .***

***DATED at ..... this ..... Day of ..... 1991.”***

It is as a result of the above that the late John Aloo Onyuka entered into the sale agreement as the vendor and the appellant as the purchaser. The question here is whether the late John Aloo Onyuka had the capacity to enter into a sale agreement with the Ayub Odhiambo Migwalla (the respondent herein) while the said John Aloo Onyuka had not yet obtained the grant of letters of administration. According to the evidence the grant of letters of administration was issued to John Aloo Onyuka on 29th September 1993, while the consent by the family, although not dated, has at the back the date of 5th January, 1991. That means the late John Aloo Onyuka had no capacity to enter into a sale agreement in respect of the suit land which was still registered in the name of his late father Ezekiel Onyuka. Indeed the property of the deceased Ezekiel Onyuka was protected by **section 45(1)** of the **Law of Succession Act (Cap 160** Laws of Kenya) which provides:-

***“Except so far as expressly authorized by this Act or by any other written law or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with any free property of the deceased.”***

The second and third grounds of appeal relate to the provisions of the Land Control Act (Cap 302 Laws of Kenya) and the consent of the relevant Land Control Board. This transaction related to agricultural land and the parties were well aware of this fact. Hence the transaction required consent of the relevant Land Control Board. Section (6(1)(a) of the Land Control **Act Provides:-**

***“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) (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; Provided that the High Court may, 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 conditions, if any, as it may think fit.”***

The sale transaction between the parties herein required the consent of the relevant **Land Control Board** . We must go back to the sale agreement between John Aloo Onyuka and the respondent Ayub Odhiambo Migwalla. That sale agreement as we have already observed was not dated. This is rather perplexing as the sale agreement shows that the purchaser had engaged the firm of advocates then known as Oraro & Rachier Advocates of P.O. Box 51236 Nairobi. It was however stated that the completion date was to be 31st March 1991 . For lack of any clear evidence, we shall assume that the agreement was entered into at the beginning of March 1991 . An application for consent ought to have been made within six months. Where do we go from here? We go to this application for consent of Land Control Board (Exhibit 3 at p.53 of the record of appeal). That application form bears no date! But that is not the end of the matter. A letter of consent dated 24th January, 1996 was produced in the superior court as exhibit 4 (see p. 54 of the record of appeal). In that letter of consent it is stated:-

**“With reference to your application dated the ..... 19 ..... the Board gave its consent to the following controlled transaction of its SCHEDULED meeting held on the 24th January 1996.”**

In that letter of consent the application which was said to have been considered by the Board had no date. It is to be observed that the “consent” by the members of the family of Ezekiel Onyuka bears a date of *5th January, 1991* on the reverse of the document. The other date that we can refer to is completion date of the sale agreement which is stated as *31st March, 1991* . In retrospect it would appear that the agreement for sale was entered into at the beginning of 1991. Hence by August, 1991 the parties to the transaction ought to have made the application for the necessary consent from the relevant Land Control Board as per *section 8((1))* of the Land Control Act.

Since there was no evidence that any of the parties applied to the High Court for extension of time in which to apply for consent of the *Land Control Board* , the transaction became null and void after the expiry of six months after the making of the agreement which was stated as *31st March, 1991* . From that date six months expired by 30th September, 1991 and without extension of time by the High Court for application for consent that transaction became null and void long before that date (*30th September, 1991*). Hence the question of a letter of consent being issued on 24th January, 1996 pursuant to an +undated application was of no legal effect.

We think that the first three grounds of appeal are sufficient to dispose of this appeal. We are of the view that the family of Ezekiel Onyuka had a very noble idea of using the late Onyuka’s land to raise some money to assist in paying for medical expenses in the family. The family decided to sell the suit land to the respondent who readily agreed to pay Shs.250,000/= as the purchase price. All this happened in good faith without any ill intention. Unfortunately, the law was not on Onyuka’s side. John Aloo Onyuka who was put forward to sell the land on behalf of the deceased Ezekiel had no capacity to do so as he had not obtained the grant of the letters of administration. But even if John Aloo Onyuka had the capacity to enter into the said sale transaction this being agricultural land the consent of the relevant Land Control Board was essential.

An application for consent of the said sale transaction ought to have been made within six months of the making of the sale agreement. This was not done and hence rendered the transaction void for all purposes.

In view of the foregoing, while we sympathise with the respondent who willingly came to the rescue of the Onyuka family by paying them the agreed purchase price of Shs. 250,000/= for the suit land, we are constrained to allow the appeal in view of the provisions of the Law of Succession Act and the Land Control Act. We therefore allow this appeal and set aside the judgment of the superior court. As regards costs we are of the view that bearing in mind the background of this dispute it would be in the interest of justice if each party was ordered to bear his own costs. We so order.

*Dated and delivered at NAIROBI this 14 th day of January 2005.*

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**