IN THE COURT OF APPEAL

AT KISUMU

(CORAM:PLATT, GACHUHI & APALOO JJA)

CIVIL APPEAL NO. 6 OF 1986

GABRIEL MAKOKHA WAMUKOTA ……..…..……APPELLANT

VERSUS

SYLVESTER NYONGESA DONATI ……RESPONDENT

(Appeal from the High Court at Kakamega, Aganyanya J)

JUDGMENT

Platt JA Once again the trumpet of Equity has called into question the operation of the Land Control Act (Cap 302) by a party who has sold land and having not helped the purchaser to get consent to that sale, has resold later to another person, to which sale consent has been given, and the land transferred by registration to the new purchaser. It is sought by a finding of fraud to set aside the registration, and to induce the authorities to assist the first purchaser.

As the learned judge found them, the facts were that in January 1976, the respondent/defendant purchased land from Ismael Machio, and paid the full price of Kshs 12,742. The respondent Sylvester Nyongesa Donati, attempted to get Ismael to transfer the land to him. Unfortunately Ismael spent some years in jail, and his complaint was that the respondent had not paid the full purchase price.

In November 1982, the appellant/plaintiff Gabriel Makokha Wamukota, purchased the land from Ismael Machio, at a price about three times greater than that paid by the respondent. On November 16, 1982 the Land Control Board gave consent to the sale to the appellant and very shortly afterwards, the appellant was registered as the owner of the land in place of Ismael.

The appellant then approached the respondent and asked him to vacate. The appellant had superior title but the respondent has steadfastly refused to budge. The learned judge agreed with the respondent. He held that the sale to the appellant had been concluded in a great hurry. It had been agreed that the appellant had visited the land before sale, and must have seen that the respondent was living on the land with his three wives and many children. The judge found that the appellant knew that the land had already been sold to the respondent. It was therefore a fraud upon the respondent to sell the land to the appellant behind the respondent's back. The appellant and Ismael should have brought the new sale to the notice of the respondent and allowed him to add more money. Instead the appellant and Ismael set out "to swindle" the respondent. Consequently sec 145 (1) of the Registered Land Act (Cap 300) could be operated, by directing the registration in the appellant's name to be cancelled. The sense of outrage felt by the learned judge was set out in the following passage:

"I have found that Ismael and the plaintiff entered into the transaction for the sale and/or purchase of the disputed land with full knowledge that the defendant had already purchased and was living thereon. This being so, both were out to swindle him, the defendant – by Ismael swindling of Kshs 12,742 which was not refunded and the plaintiff use (of) provisions of the law

to get defendant – then correct occupier of the land – out of it. This cannot be allowed otherwise people will manipulate the law to the detriment of innocent *wananchi*. In view of the above observation, I dismiss the suit, and order that the register will be rectified by cancelling the registration of the plaintiff as proprietor of the disputed land – and subject to the defendant making the necessary application to the Land Control Board – relevant papers whereof should be signed by the deputy registrar of this court in event that Ismael refuses to do so – the defendant should eventually be registered as proprietor of the same. Costs to defendant".

It was now the turn of the appellant to be outraged by the judgment. He commences his reply by pointing out that on July 12, 1983 the respondent convened a meeting of the elders under the chairmanship of the district Officer Kanduyi division. The respondent was found to be without title to the land and had been asked to move. The respondent retorted that the District Officer had not acted in accordance with instructions from his superior. It seems however that the elders were arbitrating and not the commissioners. Perhaps it may be that there were conflicting local opinions, and therefore it is right that this court should return to the legislation which bound the parties, and happily that is what the appellant has sought in his memorandum of appeal.

The appellant has referred to the fundamental question in this case, where in ground 2 he alleged that the learned judge had erred in law in holding that East Bukusu / North Kanduyi/414 belonged to the respondent when there was no evidence to support that finding. The learned judge had held that the respondent had bought the land and paid for it in 1976, and was correctly in occupation of it. What the learned judge has omitted to mention, is that the contract of sale was not in writing as required by section 3 of the Contract Act (Cap 23) and although that might be originally cured by possession and payment of the price, it was not consented to by the Land Control Board, so that possession became unlawful and payment became refundable.

From the exhibits presented to the court, the registration of the land was opened on May 22, 1973. The sale in 1976 was subject to the Land Control Act (Cap 302) then in existence. By virtue of section 6 of that Act the sale of agricultural land is void for all purposes, unless the Land Control Board for that area in which the land is situated has given its consent to the sale. The agreement to be a party to a controlled transaction becomes void for all purposes at the expiration of 3 months after the making of the agreement, if the application for consent has not been made within that time. Once consent is given, the decision of the Land Control Board would be final and conclusive and could not be questioned by any court. If, on the other hand, consent is refused there is a right of appeal. In this case no consent was applied for, and as a result the agreement became void at the expiration of three months after the date of it was made. Section 22 of the Act provides that if a person enters into or remains in possession of any land after an agreement to be a party to a controlled transaction is avoided by section 6 of the Act, he would be guilty of an offence and liable to a fine not exceeding shillings three thousand or to a term of imprisonment not exceeding three months, or to both such fine and such imprisonment. This offence would depend upon the reasonable presumption being drawn that the party remained in possession in furtherance of an avoided three months after it was made for lack of consent, he was in fact in breach of section 22 of the Land Control Act and subject to a penalty. As far as his agreement to purchase the land was concerned it was void for all purposes, whether of legal or equitable nature, his only redress being that he could recover the money or valuable consideration paid in the course of the controlled transaction by virtue of section 7 of the Land Control Act. He would not be able to pursuade the registrar to transfer the land to him after the agreement became void, because section 20 of the Land Control Act provides that the registrar shall refuse to register an instrument effecting a controlled transaction, unless he has satisfied himself that any consent required by the Act had been given or that no consent was required.

There was one final hope for the respondent and that was that if he could remain in adverse possession for 12 years he would be able to acquire a title by virtue of the Limitation of Actions Act (Cap 22). If the sale

in this case was void in 1976, the period would end in 1988, but the suit was brought in 1984 and therefore the period had not expired. The situation then is that even though the Land Control Act was amended to provide a longer period within which to obtain consent in 1980, and established the power given to the High Court to extend the period, those provisions did not apply in 1976. The result therefore is that the respondent did not purchase this land; he was not correctly in possession of it; his adverse possession had not been made into a right to the title of the land; and that the title of Ismael Machio was not affected, so that the latter was fully entitled to resell the land to the appellant in 1982.

It must however, be observed that the Land Control Board gave consent to the sale of the land to the appellant, and that is the sale which was registered by the Registrar. It follows that even if the Registrar were to consider cancelling the registration of the appellant as owner of the land in question, the authorities could do nothing to help the respondent, because a valid consent to the sale of the land to the appellant had been consented to by the Land Control Board.

Once the Board has given its consent it is *functus officio* and cannot unilaterally withdraw its consent. Of course, neither Ismael nor the appellant could ask the Board to do so.

The learned judge considered that Ismael and the appellant had conspired to defraud the respondent in two ways. The first was that Ismael had deprived the respondent of his money. That does not appear to be true. On the record there is a letter of December 7, 1982 written by Ismael's Advocate, Mr Onyinkwa informing him that Kshs 12,742 had been deposited with the Advocate and was waiting for collection. Therefore the respondent has not been deprived of his money. The second point taken was that the Land Control Board and the Registration of Land Act were used as instruments of fraud. This problem has agitated the courts in the past and there are a number of judgments in which similar views were expressed to those of the learned judge. They are recorded by Chesoni J (as he then was) in *Hirani Ngaithe Githire v Wanjiku Munge*, [1979] KLR 50 at page 51. He observed that one of the courts had ordered specific performance and ruled that lack of consent by a Land Control Board was not fatal to the agreement, and that equity as requiring substantial justice supported specific performance. In particular the learned judge referred to Sachdeva J's view that an Act of Parliament should not be used to perpetuate fraud. These were views rejected by Chesoni J on the authority of *Rioki Estate Co [1970] Ltd v Kinuthia Njoroge* [1977] KLR 146. There is no doubt that the Kenya Court of Appeal has rejected the sentiments expressed by the learned judge in this case, and it was not open to the learned judge to revert back to the notions rejected by it. This court has not been asking to depart from its earlier decisions.

But on looking at the matter in a broad way, there is no ground for a finding of fraud. The respondent had been in the police force and had thus been connected with the process of Government. The latter had declared his contract void. He had therefore two options: the first was to leave the premises and recover his money under section 7 of the Land Control Act. If he took the risk of remaining in possession despite section 22 of the Act he might in course of time claim title by adverse possession under the Limitation of Actions Act (Cap 22) (*supra*). It was for the respondent to decide as a responsible person how he should comply with the law. If he took the risk of waiting for 12 years but that before that time the seller and a new purchaser evicted him, then the risk he took would not have paid-off. But if he had not title to the land and he was there in adverse possession, it cannot be fraud, there was no ground upon which the learned judge could seek to rectify the register under section 145 of the Registered Land Act (Cap 300).

It will be seen from the defence that all the defendant asked for was that the plaintiff's suit for eviction and costs should be dismissed. There was no counter-claim asking for the register to be rectified by cancelling the registration of the plaintiff as the proprietor of the disputed land. In so far as the learned judge granted the rectification and made suggestions that the respondent should apply to the Land Control Board with the help of the Deputy Registrar if necessary, those orders were not called for. Indeed, if the Registrar was to be ordered to rectify the register, it would have been proper to have given him notice of the suit, so that he could make representations to the court, in view of the fact that he had a valid Land

Control Board consent served on him. If the learned judge wished to widen the scope of the case and include allegations of fraud and claims for the rectification of the register, he should have seen to it that the defence was amended to include these matters, in order that the plaintiff and if necessary the Registrar

could answer the claims. Moreover it is awkward that Ismael Machio was found to have conspired to defraud the respondent when Ismael Machio was not a party to the case. The findings against him in his absence might well be a source of danger to him in future. In a word the learned judge embarked on a risky adventure well beyond the scope of the proceedings.

For these reasons, I would set aside the judgment of the High Court and I would substitute thereof judgment for the plaintiff/appellant. Having no title to the land, I would order the respondent to vacate the land within six months of the date of the order being read in open court. I would grant the appellant the costs of this appeal and the costs of the suit in the High Court.

As Gachuhi and Apaloo JJA agree in the result, the appeal is allowed, judgment of the High Court is set aside and judgement for the plaintiff / appellant substituted as prayed in the plaint except that as Gachuhi and Apaloo JJA feel that the respondent should have more time within which to vacate the premises in 12 calender months' time from the date of this order being read to the parties on open court. The appellant will have the costs both here and below.

Gachuhi JA The main question in this appeal is whether equity would apply in contrast to the express provisions of the law. The law as it stands, is that there is no way by which equity can be applied to assist a litigant who failed to obtain Land Control Board consent to a transaction dealing with agricultural land.

There is no apparent evidence of fraud on the part of the appellant. If the appellant and the owner colluded to deprive the respondent of what, at one time, appeared to be a dealing in land which he wished to buy and the appellant and the owner acted within the law in their dealing, there is nothing the court can do for the respondent. If the Act was applied by the appellant and the owner as a means of fraud as the learned trial judge put it, so long as the procedure that was followed is what is laid down in the law, however sympathetic the respondent's case is, there is no way, as the matter stands, the court can interfere. It is only the parliament that can amend any part of the Act that is applicable in this case which is causing injustice or which is causing in-convenience or hardship to the parties relating to a controlled transaction. Ignorance of the procedure is no defence.

The appellant entered into a verbal agreement for the purchase of the land. The receipt of the money has been acknowledged. The respondent was put in possession. Initially that was a valid contract as it was subject to the proviso to section 3(3) (i) and (ii) of the Law of Contract Act (Cap 23). The validity of the said contract was subject to obtaining the Land Control Board consent within three months from the date of the agreement as provided by section 6(1) of the Land Control Act (Cap 302). Immediately the respondent entered into the sale agreement he ought to have registered a caution against the title to the land to protect his interest. He ought to have pressed the owner to sign the necessary documents for the Land Control Board consent. Even if the vendor was in prison, still the respondent could have been assisted by the prison authorities to obtain his signature.

Under the law, the respondent could not have filed suit for specific performance of the contract of the sale of the land until he obtained the Land Control Board's consent. It is the law of this country that unless the transaction is consented to by Land Control Board, the would-be purchaser will have no claim of title to the land after 3 months from the date of the agreement. He will be regarded as a trespasser.

What the trial judge found, which is an undisputed fact is that the vendor entered into a verbal sale agreement with the respondent and received full purchase price. The vendor started dogging about, thus, avoiding going to the Land Control Board. The statutory period of 3 months expired. He was imprisoned. In the meantime the respondent developed the land. When the vendor came out of prison, sold the same land occupied by the respondent to the appellant. Within a matter of a day, consent of the Land Board was obtained and the transfer completed the following day. No doubt this process was swiftly finalised as remarked by the learned judge. The respondent inspite of his development of the land was required to vacate.

When the vendor sold the land to the appellant at a price much higher than was paid by the respondent, one can see that the respondent was disheartened and felt that the Act has been used as a means of fraud

because he had not obtained the consent required by the law. The law provides that in the absence of the Land Board consent that agreement became null and void for all purposes on expiry of 3 months from the date of the agreement. *John Onyango and another v Samson Luwayi* CA No 93 of 1985 (unreported). Section 7 of the Land Control Act (Cap 302) provided for the refund of the purchase price. No consideration for the development is provided for in the Act.

It is the operation of section 6 of the Land Control Act (Cap 302) that deprives the respondent of his development over the year because it rendered the agreement null and void *ab initio*.

It is expected that any purchaser should not enter the land and start developing it without obtaining the Land Control Board consent. The respondent must have been misled by the vendor. Now the vendor has sold the land for much higher price and he uses the Act as a shield for his mischievous deed and character. Unfortunately the respondent cannot obtain the redress from the court apart from ordering the vendor to refund to the respondent the full purchase price of Kshs 12,742 without any deductions.

I would allow this appeal. The vendor was not made a party. If he had been made a party, I would have ordered costs of this suit and in the appeal to be borne by him. I would order that the respondent should vacate the land within 12 months from the date of reading this judgment.

Apaloo JA. I have read and considered the very full judgment of Platt, JA and from it, I do not now wish to dissent although it has not been easy for me to accept the conclusion finally reached by the Court.

That conclusion is founded on the avoidance of the contract of sale concluded between Machio, the appellant's vendor and the respondent by the peremptory provisions of section 6(2) of the Land Control Act. Although the appellant was represented before us by an advocate, he did not seek to found any argument on the provisions of that Act. The respondent who appeared in person, was not invited to address any argument to us on the effect of that Act and I have felt some unease that a judgment in his favour should be upset solely on reliance on the provisions of the Land Control Act. But a court is bound by an Act of parliament and should take cognisance of it even if the parties choose to ignore it.

I have for long thought that the rule of Equity which precludes a person from relying on an Act of parliament where it would be unconscionable for him to do so, could be invoked to prevent both Machio and the appellant from relying on the Land Control Act to escape the effect of the contract of sale between Machio and the respondent about which, on the judge's holding, the appellant well knew.

The learned trial judge felt the facts of this case justified the application of that equitable rule. What are these facts? They should be stated briefly. In January, 1976, the respondent was dispossessed of his land by government. One Ishmael Machio offered to sell him the land in dispute. The respondent accepted and paid the full purchase price. Machio thereafter put him in possession and he and his family remained in undisturbed possession of that land until 1982. The respondent tried to get Machio to give him a document of that land. He could not be found because he had committed a crime and was sent to prison. When he was released, he dodged the respondent under the pretext, as the judge found, that the whole purchase price had not been paid. Machio's true object, as was plain, was to make more money from the land. Although the respondent was in possession, Machio again resold the land to the appellant in circumstances which showed that both Machio and the appellant were in collusion to deprive the respondent of the land. Within one day of lodging his application, the appellant obtained the consent of the Land Control Board, and shortly afterwards, secured the registration of his title.

In a contest of title, between Machio and the respondent, if the latter sought to rely on the Land Control Act to defeat the sale he himself made, it would seem to me perfectly legitimate to reply that it would be contrary to good conscience for him to be permitted to do that. He ought not to be allowed to use an Act of parliament as a vehicle for fraud. If that argument could properly be made against Machio, it can, in like manner be made against the appellant, who as the judge found colluded with Machio to purchase the land.

The learned trial judge thought that such equitable rule should be involved. And it seems another

experienced judge, Sachdeva, J, also felt that the ends of Justice would be met by an application of that equity principle. But this did not find favour with the East African Court of Appeal. In *Rioki Estate Co (1970) Ltd v K Njoroge* [1977] KLR 146, the court held that as the consent of the Land Control Board was not obtained within the prescribed time, the lease of a land subject to the Land Control Act was void and the occupation of the demised land by the lessee after demand for its surrender, was wrongful. That decision seems to have been consistently followed and I do not presume to question its authority.

In view of the *Rioki Estate* decision, the position seems to be this:

"A" sold agricultural land to "B". The former was uncooperative in getting

"B" to obtain the consent of the Land Control Board. "A" however obtained full payment of the purchase price and duly put "B" into possession. On the faith of this sale, "B" spent a large sum of money in developing and improving the land. Ten years afterwards, "A", motivated by the prospect of obtaining higher price for the land, sells the self-same land to "C", then with A's active co-operation, hurriedly obtained the consent of the Land Control Board, (it is possible to obtain this in one day) and thereafter registered his title. "C" then proceeds to seek B's eviction from the land. Without the aid of section 6(2) of the Act, "C" cannot obtain title to the land superior to "B"s". Yet as the law stands at present, "C" will be held entitled to evict "B".

Indeed "A" would be entitled to say to "B" "yes, I accept that I sold the land to you, obtained full payment of the consideration money and put you in possession for 10 years and you may well have developed the land. But I say that an Act of parliament entitled me to resell to "C" and you must be content with the return of the purchase price you paid me ten years ago." To think such a thing could be possible offends against one's idea of propriety and fairness.

I believe that sound reasons of public policy motivated the parliament of Kenya to seek to prevent the alienation of agricultural land to non-Kenyans or to Kenyans without the interposition of the judgment of an independent board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be "void for all purposes". Strong words indeed! But one may be permitted to doubt whether the Act as judicially construed and applied, meets the ends of justice or is a true reflection of the legislative will.

I have, I hope, given full expression to the difficulty I feel about the conclusion to which we have come and draw some comfort from the fact that my brother Gachuhi JA like me, feels that this is a matter at which parliament could, with profit, have a second look. I concur in the result which the court has reached with no relish and with far less confidence than my brothers.

Dated and Delivered at Kisumu this 6th day of May, 1987

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL