ABUALY ALIBHAI AZIZI v. BHATIA BROTHERS LTD

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Nyalali, C.J., Mfalila, Lubuva, Samatta and Lugakingira, JJ.A.)

MISC. CIVIL APPEAL No. 1 OF 1999

(In the matter of Miscellaneous Civil Appeal No. 1 of 1999, and in the matter of a conflict of decisions in the Court of Appeal in Civil Appeal No. 15 of 1988 and in Civil Appeal No. 19 of 1995, and in the matter of the full bench of the court)

Court of Appeal – Full bench – An ordinary Court referring a matter of law for decision of the same Court sitting as full bench of five justices – Basis therefore.

Contract – Sanctity of contract – English principle of sanctity of contract not excluded in the Law of Contract Ordinance Chapter 433 – Part of the law of contract of this country.

Contract law – Interpretation of expression "shall not be operative" under the Land Regulations 1948 and 1960 – Section 2(2) of the Law of Contract Ordinance Chapter 433.

Land law - Land Regulations, 1948 and 1960 – Interpretation of expression "shall not be operative" under the Land Regulations 1948 and 1960 – Section 2(2) of the Law of Contract Ordinance Chapter 433.

Statute – Interpretation of statute – Meaning of the expression "shall not be operative" – Land Regulations 1948 and 1968 and section 2(2) of the Law of Contract Ordinance Chapter 433.

A bench of three justices of the Court of Appeal of Tanzania sitting as an ordinary court under article 122(1) of the Constitution referred a matter of law for decision by the full bench of five justices of the same court under article 118(1) of the Constitution. The matter referred to the full bench related specifically to a conflict between the decision of the Court of Appeal in the case of *Nitin Coffee Estates Ltd and 4 others v. United Engineering Works Ltd and another* (2) and the decision of the same court in the case of *George Shambwe v. National Printing Co. Ltd.* (3). The full bench of the Court of Appeal considered various decisions in which the expression "shall not be operative" in Regulation 3 of the Land Regulations, 1948 was interpreted and ascertained the correct interpretation in light of the provisions of section 2(2) of the Law of Contract Ordinance, Chapter 433.

Held: (i) The Full Bench of the Court of Appeal has no greater powers than a division of the court, but if it is to be contended that there are grounds, upon which the court could act, for departing from a previous decision of the court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five judges;

(ii) In ascertaining the correct interpretation of the expression "shall not be operative" in regulation 3 of the Land Regulations, 1948 and 1960 the court should be guided by two underlying principles:

(a) that a Right of Occupancy is something in the nature of a lease and a holder of a Right of Occupancy occupies the position of a sort of lessee *vis-a-vis* the superior landlord; therefore a disposition of a right of occupancy is necessarily a tripartite transaction involving not only the holder of the right of occupancy and the purchaser or donee, but also involving the superior landlord;

(b) that the principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement.

(iii) In view of the provisions of sub-section (2) of section 2 of the Law of Contract Ordinance the expression "shall not be operative" as used under regulation 3 of the Land Regulations 1948 and 1960 does not mean "void" or another meaning to the same effect;

(iv) Decisions of cases made before the enactment of the Law of Contract Ordinance and which held to the effect that non-compliance with statutory requirements of consent or writing rendered a contract void, were correct according to law applicable then, but ceased to be precedents on the matter after 1960;

(v) Decisions which were made after enactment of the Law of Contract Ordinance and which were to the same effect as if the provisions of sub-section (2) of section 2 did not exist, were made *per incuriam*;

(vi) *Nitin's* case is bad in law since it undermines the sanctity of contract and *George Shambwe's* case is only partly sound because it does not safeguard the interests of the paramount landlord;

(vii) A contract for disposition of land which otherwise is proper but for the lack of required consent, is inoperative, that is unenforceable to the extent that such enforcement is prejudicial to the interest of the paramount landlord;

(viii) Where enforcement of a contract for disposition of land is not prejudicial to the paramount landlord a party who has performed his or her part of the bargain may be assisted by the court to enforce the contract against the defaulting party;

(ix) Where consent is sought and is refused the contract becomes wholly unenforceable, thought valid, and any expenses incurred by the parties may be recovered by legal action, if necessary;

Order accordingly.

Cases referred to:

(1) *PHR Poole v. R* [1960] EA 62

(2) *Nitin Coffee Estates Ltd and 4 others v. United Engineering Works Ltd and another* [1988] T.L.R. 203

(3) *George Shambwe v. National Printing Co. Ltd.* [1995] T.L.R 262

(4) *Mohamedbhai Khanbhai and Bros v. Mtoo Binti Tafakari bin Salum &Others* (1955) 22 E.A.C.A 84

(5) *Alexander Gray Patterson and another v. Bandrudin Mohamed Saleh Kanji and another* (1956) 23 E.A.C.A 106

(6) *Motibhai Manji v. Khurshid Begum* [1957] EA 101

(7) *TH Patel v. R. Lawrenson and another* [1957] EA 249

(8) *Fazal Kasam (Mills) Ltd. v. Abdul Nagji Kassam and Shubanu Bai Gulamhussein* [1960] EA 1042

(9) *Mlay v. Phoneas* [1968] EA 563

(10) *Syveni Mushunga v. Theonestina Rwekanika* [1974] LRT 30

(11) *Chandrakant Vinubhai Patel v. Frank Lionel Marealle and another* [1984] T.L.R 31

(12) *Methusela Paul Nyagwaswa v. Christopher Mbote Nyirabu* [1985] T.L.R 103

(13) *Wayani Longoi and Another v. Israel Solomon Kivuyo* [1988] T.L.R 263

(14) *Peter Karanti and 48 others v. Attorney-General and 3 others,* Civil Appeal Number 3 of 1988 (unreported)

(15) *J.M. Kasuka v. George Humba,* Civil Appeal Number 35 of 1990 (not yet reported)

(16) *Mohamed Hussein Alladitta v. Abdalla bin Salim and others* (1955)

(17) *Mohamedbhai Khanbhai & Bros. v. Mtoo Binti Tafakari and Mboni* [1953] T.L.R 433

(18) *Jivraj v. Devraj* [1908] EA 263

Statutory provisions referred to:

(i) Law of Contract Ordinance Chapter 433, section 2(2)

(ii) Constitution Article 118(1), article 122(1)

(iii) Land Regulations 1960, regulations 3(1) to (3) and 3(3)(c)

(iv) Land Regulations 1948, regulation 3

(v) Law of Property and Conveyancing Ordinance 1923, section 11

Mr. Mustapha Chandoo, for the Appellant

Mr. Jadeja, for the Respodnent

Professor GM Fimbo, as *Amicus Curie*

RULING

(Dated 18 June 1999)

NYALALI, C.J.: By Order dated 30 November 1998, a bench of three justices of the Court of Appeal sitting as an ordinary court under article 122(1) of the Constitution of the United Republic of Tanzania, referred a matter of law for decision by the same court sitting as a Full Bench of five justices under article 118(1) of the same Constitution. The matter arose in Civil Appeal Number 42 of 1995 between Abualy Alibhai Azizi, appellant, and Bhatia Brothers Ltd., respondent. That order stated:

> After discussions between the Bench and the representatives of the parties, it is directed that the matter of the legal effect of lack of consent to a sale of registered land be referred for decision by the Full Bench, as there are conflicting decisions by the court on the issue, and that pending such decision by the Full Bench, the case is stayed and will be fixed for continuation of hearing after such decision. *Amicus Curiae* to be appointed.

Obviously the court followed this procedure in the light of what is stated in the case of *PHR. Poole v. R* (1), that is:

> A full Court of Appeal has no greater powers than a division of the court, but if it is to be contended that there are grounds, upon which the court could act, for departing from a previous decision of the court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five judges.

The parties in the proceedings before this Full Bench are the same as the parties in Civil Appeal Number 42 of 1995. As in that appeal currently pending in the court, the appellant is represented in these proceedings by Mr Mustafa Chandoo, learned advocate. The respondent, who is not represented by counsel in the pending appeal, is represented before us by Mr Jadeja, learned advocate. Pursuant to the terms of the court order which initiated these proceedings, Professor Fimbo, learned advocate, was appointed by the court to be *Amicus Curiae*.

We must at this stage express our profound appreciation for the industrious research made by all advocates in general, and by Mr Jadeja and Professor Fimbo in particular. As it will presently be apparent, this extensive research has had a direct impact on the quality of our decision.

The matter referred to us relates specifically to a conflict between the decision of this court in the case of *Nitin Coffee Estates Ltd. and 4 others v. United Engineering Works Ltd. and another* (2) and the decision of the same Court in the most recent case of *George Shambwe v. National Printing Co. Ltd.* (3), (dissenting opinions). Basically the conflict concerns the interpretation and application of statutory provisions requiring a contract for the sale of land to be approved or consented to by a specified public authority.

Professor Fimbo's research has revealed a long history of these provisions. This history includes article 6 of the British Mandate for East Africa, Regulation 2 of the Land Regulations, 1926; Regulation 2 of the Land Regulations 1931; Regulation 3 of the Land Regulations 1948 and Regulation 3 of the Land Regulations, 1960.

As to precedents, the research by both Professor Fimbo and Mr Jadeja similarly reveals a long history of judicial decisions on the status of a contract of sale which lacks the requisite consent. These precedents include the following cases in their chronological order: *Mohamedbhai Khanbhai and Bros v. Mtoo Binti Tafakari bin Salum and others* (4); *Alexander Gray Patterson and another v. Bandrudin Mohamed Saleh Kanji and another* (5); *Motibhai Manji v. Khurshid Begum* (6); *TH Patel v. R. Lawrenson and another* (7); *Fazal Kassam (Mills) Ltd. v. Abdul Nagji Kassam and Shubanu Bai Gulamhussein* (8); *Mlay v. Phoneas* (9); *Syveni Mushunga v. Theonestina Rwekanika* (10); *Chadrankat Vinubhai Patel v. Frank Lionel Marealle and another* (11); *Methusela Paul Nyagwaswa v. Christopher Mbote Nyirabu* (12); *Nitin Coffee Estates Ltd. and 4 others v. United Engineering Works Ltd. and another* (13); *Wayai Longoi ans another v. Israel Solomon Kivuyo* (14); *Peter Karanti & 48 Others v. Attorney-*

General and 3 others, (15); *JM Kasuka v. George Humba,* (16) *and George Shambwe v. National Printing Co. Ltd.,* (3).

The relevant statutory provisions which are pertinent to Civil Appeal Number 42 of 1995 currently pending before three justices of this court, and which is the origin of these proceedings before us are contained in Regulation 3(1) to (3) of the Land Regulations 1960. These state as follows:

> 3(1) A disposition of a right of occupancy shall not be operative unless it is in writing and unless and until it is approved by the Governor.
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> (2) In this regulation "disposition" means:
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> (a) A conveyance or assignment other than by way of mortgage, or a gift, settlement, deed of partition, assent, vesting declaration, or a sale in execution of an order of Court;
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> (b) A mortgage other than:
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> (i) an equitable mortgage by deposit of title deeds; or
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> (ii) a Mortgage which by law is only effectual if registered in the Register of Documents or the Land Register;
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> (c) a deed or agreement or declaration of trust binding any party thereto to make any such disposition as aforesaid, including a deed or agreement entitling a party thereto to require any such disposition to be made;
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> (d) a decree of foreclosure of a mortgage.

The arguments for the appellant, which have been very ably put by Mr Chandoo, learned advocate, are to the effect that non-compliance with the provisions of regulation 3 of the Land Regulations 1960 does not render such contract to be void. Mr Chandoo cited the provisions of sub-section (2) of section (2) of the Law of Contract Ordinance, Chapter 433 of the Revised Laws in support of that position. That sub-section (2) states:

> (2) Notwithstanding the provisions of paragraph (g) or (j) of sub-section (1) of this section, where any written law in force in Tanganyika on the date when this Ordinance comes into operation provides that an agreement (howsoever described), of the kind specified therein, shall not be enforceable by action unless or until certain requirements specified therein are complied with, or certain consents are obtained, no such agreement shall be void by reason only that it is not enforceable by action under the provisions of that law for want of compliance with any such requirement or the obtaining of any such consent.

The provisions of paragraphs (g) and (j) referred to under sub-section (2) state as follows:

> (g) an agreement not enforceable by law is said to be void;
>
> (j) a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

It is Mr Chandoo's contention in effect that the words, "... shall not be operative" contained in sub-regulation (1) of regulation (3) cannot be construed to mean "shall be void", because such a construction would be contrary to the express provisions of sub-section (2) of section 2 of the Law of Contract Ordinance. It is part of Mr Chandoo's contention that the cases decided prior to 1960 are relevant only to that period, but not thereafter. According to him, a transaction falling within the scope of regulation 3 is valid notwithstanding the failure to comply with the requirements of sub-sections (1) to (3).

To that extent, Mr Jadeja and Professor Fimbo concur with Mr Chandoo. Mr Jadeja and Professor Fimbo however part company with Mr Chandoo in submitting to the effect that such contract, though valid, is inoperative by virtue of sub-regulation (1) of regulation 3.

We have closely examined and considered the more than ample precedents cited to us by counsel. These precedents appear to fall into three broad categories. The first category consists of cases in which the judicial decision is to the effect that a transaction, which does not fulfill the requisite conditions as void in totality. Such cases include the case of *Motibhai Manji v. Khurshid Begum* (6), wherein it was stated, "In our view, it is quite clear that the Governor's consent to the agreement has never been obtained for an each occasion

there was a substantial misdescription of its subject matter and also a failure to submit for the Governor's consideration the agreement as a whole. We think that the learned trial judge correctly held that the agreement was prohibited by law and was therefore void *ab initio*. That being so, nothing done subsequently could convert it into an enforceable contract. Similarly in the case of *Fazal Kassam (Mills) Ltd. v. Abdul Nagji Kassam and Shubanu Bal Gulamhussein* (8) wherein it was stated, "... The alleged agreement that the first defendant should not mortgage his right of occupancy to the plaintiff company was void *ab initio* for want of writing and for want of the Governor's consent, and this court has no power to order specific performances of that agreement. In my opinion it would make no difference if fraud was proved against the first defendant. The plaintiff company must be assumed to have known the law".

Undoubtedly, these cases were decided before the Law of Contract Ordinance, hence sub-section (2) of section 2 therein, had not come into being in this country. The position however was essentially reaffirmed in subsequent decisions, including the case of *Chadrakant Vinubhai Patel v. Frank Lionel Marealie and another* (11) where it was stated, "... We are of the view that the agreement is void and since the trial judge has based his decision entirely on a void agreement, his judgement is vitiated as it is based on a fundamental flaw". A similar position is to be found in the case of *Methuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu* (12), where it was stated, "... I am of the view that the sale by Patrick to the appellant of the land in Mbezi was void and ineffectual as it took place without the approval of the village council ..." These cases of course do not purport to interpret the specific expressions used in regulations 3(1) to (3) of the Land Regulations 1960. To that extent, they are not very helpful to us apart from being part of the framework within which we must make our decision.

The second category of cases are those in which it was decided to the effect that a transaction which does not comply with the requisite conditions is inoperative only as to change of title, otherwise, it is

operative. Such cases include the case of *Mlay v. Phoneas* (9) wherein it was stated, "... In my opinion a distinction must be drawn between those terms of the agreement which concern the disposition and those which are collateral to it so that while the former may be inoperative, the later remain operative and can be enforced in the event of the Commissioner failing or refusing to give consent, of course, if the Commissioner merely fails to give consent it may be that a new agreement can be drawn up and resubmitted to him". This case gives an indication of the meaning that may be attached to the word 'inoperative' used in regulation (3). By using the expression that, "the latter remain operative and can be enforced" a clear indication of the meaning of the opposite, that is the meaning of "inoperative" may be surmised as being "unenforceable".

The second case in this category is the case of *Alexander Gray Patterson and another v. Bandrudin Mohamed Saleh Kanji and another* (16) wherein it was stated, "I do not think the respondent can get assistance from the variation in the wording of the 1926 and 1948 Regulations.... How far the present regulation nullifies a dealing which is not subsequently approved may be a matter of argument. Such a transaction may still be valid for some purposes e.g. if there are collateral undertakings. But at least it is clear that without approval no dealing can operate to effect a sale or mortgage or to create a charge or a sublease". This case is significant in its pronouncement to the effect that a transaction which does not comply with the requisite conditions is not totally devoid of legal effect but, "may still be valid for some purposes, e.g. if there are collateral undertakings".

The position that a transaction which does not comply with the statutory conditions is not necessarily devoid of any legal effect had of course been stated the year before in the case of *Mohamed Hussein Alladitta v. Abdalla Bin Salim and others* (16) wherein it was stated, "The question whether the agreement is wholly inoperative, or operative to the limited extent suggested, must, we think depend on, whether its terms are severable, so as to create an independent and absolute preliminary obligation to convey, which is conditional

on the Governor's consent. We are effectively made, though it seems unlikely that it would be specifically enforced and it is difficult to see what damages could be proved on its breach; but however that may be we think this is not such an agreement. There is no express undertaking to do either of the things contended for. At best a duty to do them may be implied. There is no separate or severable consideration for the promises which are said to be severable ..." The significance of the decision in this case lies of course in the pronouncement to the effect that an agreement which does not comply with the statutory conditions may be partly inoperative and partly operative depending on the nature of the agreement.

The fourth case in this second category of cases is *Mushunga v. Rwekanika* (10) wherein it was stated "I think regulation 3 of the Land Regulations 1948 may be abused by unscrupulous sellers. I think regulation 3 is applicable only to situation where the President's consent has been sought and refused. A contract of sale is not contemplated by Regulation 3. This regulation refers to dispositions which are defined ... to mean conveyances or assignments. A contract of sale is neither of these ..."

The decision in this case was of course *per incuriam* to the extent that it excluded contracts from the scope of regulation 3, as correctly pointed out by this court in the *Nitin Coffee Estate* case. However, the significance of this case in the history of judicial decisions relevant to the matter before us is the pronouncement therein that "... I think regulation 3 is applicable only to situations where the President's consent has been sought and refused ... the lack of consent is only a defence to an action for specific performance or damages, but cannot be a reason for."

The other case in this category is the recent case of *George Shambwe v. National Printing Company Ltd.*, (3) wherein it was stated *inter alia*:

> .... With respect, we are unable to accept Mr Semgalawe's argument that there was no binding agreement because the Commissioner for Lands had not sanctioned the sale transaction. We agree with Mr Semgalawe's statement that under the Land Regulations, 1948, the sale agreement was inoperative, as the correct position of the law on this point.
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> However, though that is the position of the law on this point, we wish to make it clear that Mr Semgalawe, learned counsel is not, with respect, correct in his assertion that because the approval of the Commissioner was not forthcoming there was therefore no agreement for sale between the appellant and the respondent. ... The learned trial judge correctly in our view took the view that the appellant, the vendor was in breach of the agreement even though the approval of the Commissioner had not been obtained ...
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> As found by the learned trial judge, it was at the stage when the appellant was required to execute the sale agreement that he refused to sign the document. With this refusal to sign, nothing further could be done in executing the agreement. As a result, the approval of the Commissioner could not be obtained. For that reason, we agree with the learned trial judge that the appellant was in breach of the sale agreement reached between him and the respondent, the buyer. Having breached the agreement in these circumstances, the appellant cannot validly resort to regulation 3(1) of the Lands Regulations, 1948 in defence.
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> As the relief sought at the trial was a declaratory judgement that the agreement was inoperative and as there was no counterclaim filed by the respondent for specific performance or damages the learned trial judge correctly made no further orders. The respondent having spent sums of money towards the redemption of the mortgage and other liabilities of the appellant, the matter is left open for further processing and execution of the documents in order to effect the transfer in terms of the law!

This decision was subsequently confirmed in a majority opinion in Civil Application Number 58 of 1995 between the same parties. In a dissenting opinion, Ramadhani, J.A. , stated, *inter alia*, "As I have said, I would have no difficulty to refuse this application for review if *Nitin* had been distinguished or even departed from as being bad law". Since neither was done, and in fact *Nitin* was not even mentioned

in the judgement, despite the fact that it was cited of the court, then the decision was *per incuriam*".

The significance of the decision in *George Shambwe's* case both in the appeal and in the application for review, is the statement to the effect that the contract of sale was binding between the parties, notwithstanding the lack of the requisite consent. The decision however is unclear as to its effect upon the Commissioner for Lands. If the decision meant that the binding contract between the parties obliged the Commissioner to consent to the disposition, then, for the reasons apparent hereinafter, such a decision would be wrong.

The third and last category of cases is that in which it was decided to the effect that a transaction which does not comply with the statutory conditions is inoperative and unenforceable. Such cases include the case of *Mohamedbhai Khanbhai and Bros v. Mtoo Binti Tafakari Omari and Mboni* (17) wherein it was stated, "In my judgment the plaintiff cannot succeed in the absence of the Governor's approval to the transaction ... section 11 of the Law of Property and Conveyancing Ordinance, 1923 provides that such a disposition 'shall not be operative unless it is in writing and unless and until it is approved by the Governor.' .... The plaintiffs have not fulfilled the condition precedent to their right to enforce the conveyance and in the absence of the performance of the condition, apart from any other consideration, the court is powerless to give effect to the transaction". The significance of this decision lies in the clarity in which it explains the helplessness of the court in providing relief to an aggrieved party. It is clear according to this case that an inoperative transaction is wholly unenforceable.

The second case under this category is *TH Patel v. R. Lawrenson and another* (7), wherein it was stated that "I am satisfied the whole agreement is inoperative because of a lack of approval and that being so this court is precluded from enforcing any part of the agreement. It is wrong to suppose that any position in which the appellant finds himself could be rendered by an order for specific performance up to the stage of the first respondent executing a transfer of the right

of occupancy to see whether or not approval could now be obtained. That in effect, would be for this court to defy the law by ordering dealing without approval in pursuance of an agreement which itself is inoperative. The significance of this case is that it is the strongest voice against the enforcement of any part and any stage of a transaction which does not comply with the statutory conditions.

The third case within this category is, the famous case of *Nitin Coffee Estate and 4 others v. United Engineering Works Ltd. and another* (2), wherein it was stated *inter alia*, that:

> In my view an oral agreement of the type sued on to sell land held under a right of occupancy is inoperative and of no effect. There is a long line of authority to that effect.
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> Mr Marando for the respondents submitted that there is some confusion on this matter in the High Court. He referred to a High Court decision in *Sylveni Mushunga v. Theonestina Rwekanika* (10). Mfalila, J. in that case purported to distinguish it from *Pattrerson v. Kanji* (5). Mfalila, J. stated:
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> I think that Regulation 3 of the Land Regulations 1948 may be abused by unscrupulous sellers. I think that Regulation 3 is applicable to only situations where the President's consent has been sought and refused... A contract of sale is not contemplated by Regulation 3. This Regulation refers to dispositions which are defined ... to mean conveyances or assignments. A contract of sale is neither of these.
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> Obviously Mfalila, J. had overlooked Regulation 3(3)(c) where such a contract is a disposition. With respect, that decision of Mfalila, J. was wrong.
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> Out of courtesy for Mfalila, J. and other judges of his way of thinking perhaps some subsidiary observations may be in order. A Right of Occupancy is something in the nature of a lease and a holder of a right of occupancy occupies the position of a sort of lessee *vis-à-vis* the superior landlord. A right of occupancy is for a term, and is held under certain conditions. One of the conditions is that no disposition of the said right can be made without

> the consent of the superior landlord. There is now no freehold tenure in Tanzania. All land is vested in the Republic. So land held under a right of occupancy is not a freely disposable or marketable commodity like a motor car. Its disposal is subject to the consent of the superior or paramount landlord as provided for under the relevant Land Regulations.

This case is famous not only because it was the basis of the dissenting opinion of Ramadhani, J.A. , in *George Shambwe's* case, but also because it states the principle underlying Regulation 3.

The last case in this category is the case of *Wayani Longo and another v. Israel Solomon Kivuyo* (13), wherein it was stated that, "the view that an agreement to sell a right of occupancy, which agreement has received no consent under the Regulation is inoperative, and hence unenforceable at law, was re-affirmed by this court in more recent cases of *Patel v. Marealie and another*, (11) and *Nitin Coffee Estate Ltd and Four Others v. United Engineering Works Ltd and another*, (2). It therefore follows that the judgement of the High Court based as it was wholly on an agreement which was inoperative at law, cannot be sustained and it must be set aside.

It must be clear by now that the decisions of the courts both in this country and in East Africa on the matter before us has not been consistent, contrary to what appears to be asserted in *Nitin's* case. As we have attempted to demonstrate, three positions can be discerned from the numerous precedents. If our decision is going to depart from any of these positions, it cannot be construed to be violative of the rule laid down in the case of *Jivraj v. Devraj* (18), wherein it was stated that "There is a principle of law, however, that where a Court has interpreted the law in a certain manner particularly an interpretation which affects property rights, and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to injustice".

In ascertaining what we consider to be the correct interpretation of the expression, "shall not be operative" in Regulation 3 of the

Land Regulations 1948 and 1960, we are going to be guided by two underlying principles. The first principle is explained in *Nitin's* case, that is, "a Right of Occupancy is something in the nature of a lease and a holder of a Right of Occupancy occupies the position of a sort of lessee *vis-à-vis* the superior landlord". The collorary of this principle is that a transaction for the disposition of a right of occupancy is necessarily a tripartite transaction involving not only the holder of the right of occupancy and the purchaser or donee, but also involving the superior landlord. The second principle concerns the law of contract and originates from the English Common Law. That principle is the principle of *Sanctity of Contract* as stated in **Chitty's Law of Contracts,** Volume I, (24 ed), at page 5 thus:

> A concomitant of the doctrine of freedom of contract is that of sanctity of contracts; and it is still a cardinal principle of English law because it suits the needs of a commercial community
>
> English law is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement.

It is our considered opinion that since there is nothing in the Law of Contract Ordinance, Chapter 433, which excludes this principle, there can be no doubt that it is part of the law of contract of this country, by virtue of the provisions of sub-section (2) of section 2 of the Judicature and Application of Laws Ordinance Chapter 453 of the Revised Laws.

Thus guided by these two principles and the provisions of sub-section (2) of section 2 of the Law of Contract Ordinance, we are satisfied that the expression, "shall not be operative" as used under regulation 3 of the Land Regulations 1948 and 1960, does not mean 'void' or another meaning to the same effect. We are satisfied that this must be the correct interpretation in view of the provisions of sub-section (2) of section 2 of the Law of Contract Ordinance. We note that the decisions of cases made before the enactment of the Law of Contract Ordinance and which held to the effect that non-

compliance with the statutory requirement of consent or writing rendered a contract void, were correct according to law applicable then, but ceased to be precedents on the matter after 1960. As to the decisions which were made thereafter and which were to the same effect as if the provisions of sub-section (2) above mentioned did not exist, there is no doubt in our minds that such decisions were made *per incuriam.*

We have asked ourselves if the expression "shall not be operative" does not entail invalidity, what then does it mean. Logically, it means at least that the contract in question is valid. According to Mr Chandoo, such valid contract has all the attributes of a valid contract. That submission is consistent with the doctrine or principle of sanctity of contract. We note however, and Mr Chandoo is likely to agree with us, that the principle of sanctity of contract is qualified by certain factors, including that of public policy as stated in the paragraph we have cited from **Chitty's Law of Contracts**. The factor of public policy in contracts for the disposition of a right of occupancy is consistent with the second principle guiding us, and which concerns the relationship between the holder of a right of occupancy and the paramount landlord as explained in *Nitin's* case. It is our considered opinion that a contract falling within the scope of Regulation 3 has all the attributes of a valid contract, except those, of which performance before the requisite consent is sought and obtained, is prejudicial to the interests of the paramount landlord. Such are, for example, terms of which performance has the effect of replacing the holder of a right of occupancy with another person without the consent of the paramount landlord. Such terms, though valid, are unenforceable on the grounds of public policy which protects the interests of the paramount landlord. In our considered opinion, this unenforceability of a valid contract is what is meant by the expression "shall not be inoperative" under Regulation 3.

The corollary of what we have stated is that a contract for the disposition of land, which otherwise is proper but for the lack of

required consent, is inoperative, that is, unenforceable to the extent that such enforcement is prejudicial to the interests of the paramount landlord. However, where such enforcement is not thus prejudicial, a party who has performed his or her part of the bargain may be assisted by the court to enforce the contract against the defaulting party. So a party who defaults to submit a written contract for consent or refusal by the specified authority may be compelled to do so if the other party has performed his or her part of the bargain. Of course where such consent is sought and is refused, the contract becomes wholly unenforceable, though valid, and any expenses incurred by the parties may be recovered by legal action, if necessary.

In conclusion, we are now in the position to say that of all the precedents cited to us, those falling within the second category are closer, though not completely in accord with the correct position which we have endeavoured to explain. This means *Nitin's* case is bad in law since it undermines the sanctity of contract; and *George Shambwe's* case is only partly sound because it does not safeguard the interests of the paramount landlord. We consequently direct that the ordinary bench of this court before whom Civil Appeal Number 42 of 1996 is currently pending, be informed accordingly, so that the hearing of the appeal may resume. We so order.

Since it undermines the sanctity of contract; and *George Shambwe's* case is only partly sound because it does not safeguard the interests of the paramount landlord. We consequently direct that the ordinary bench of this court before whom Civil Appeal Number 42 of 1996 is currently pending, be informed accordingly, so that the hearing of the appeal may resume. We so order.