



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELC CASE NO. 56 OF 2014**

VERONICA CHEPWAMBOK TOO.....PLAINTIFF

-VERSUS-

ELIZABETH CHEBET ORCHARSON.....DEFENDANT

**RULING**

1. The present application is brought under Order 2 Rule 15 (b), (c) and (d) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The application seeks the following orders ;

1. The defendant's statement of defence be struck out
2. Judgement be entered as prayed in the plaint
3. Cost of the suit be awarded to the plaintiff

2. The application is based on the grounds on the face of the application to wit; that the defence is scandalous, frivolous and vexatious. Secondly that the defence does not raise any triable issues and is merely intended to delay the expeditious and just conclusion of this suit. The application is also supported by the affidavits of Veronica C. Too sworn on 29<sup>th</sup> September 2014 and 13<sup>th</sup> June 2015.

3. In the affidavits, the Applicant deposes that she purchased the property L. R No MN/111/1076 in 1988 and built a house on it. She later subdivided this land and in 2008 sold part of this property to the defendant at Kshs 1,500,000 which she said was duly paid. She deposed that she realised as a trustee of the suit property she could not sell the land without consent of the beneficiaries. Further she could not have sold the land if the Respondent had not misrepresented to her about the building of a charitable home.

4. The Applicant deposes that the consent of the Land Control Board for the area was not obtained therefore the transfer to the Respondent was a nullity. She annexed minutes of the Bahari Land Control Board meeting held on 6<sup>th</sup> March 2008 to show no consent was obtained. It is her case that the defence filed and on record is a sham and should be struck out.

5. The application is opposed by the Respondent vide a replying affidavit and grounds of opposition filed. The Respondent deposed that the Applicant had previously filed case No Msa HCC 195 of 2011 in regard to the same subject matter which case was dismissed with costs to her. She also mentioned the existence of HCC No 287 of 2009 which is pending and that she is vexed in terms of costs by the many cases the Applicant has filed.

6. The Respondent deposes further that on 7.3.2008 she sent copies of her ID, PIN, coloured photos and 10% of the purchase price and later paid on 14.3.2008 monies assessed for stamp duty and balance of the purchase price. Later on 7.4.2008, the Applicant called her and presented to her a title deed after the lawyers had applied for and obtained transfer in her favour. She deposes that the title was legally transferred to her.

7. The Respondent avers that it was the responsibility of the Applicant to obtain all the necessary consents. That as an adult of sound mind the plaintiff cannot claim that she was unaware she could not sell the land and that there was no agreement to make the Applicant a trustee of a charitable organization. She also stated that there are several holiday homes, schools, trading centres neighbouring the land hence such land is not normally subject to the Land Control Board. She urged the Court to dismiss the motion.

8. The parties thereafter filed written submissions which I have read and considered while writing this decision. The core reason why the Applicant seeks to strike out the defence is due to lack of consent of the Land Control Board to the transaction. It is also stated that the defence does not raise any triable issues and is a sham.

9. From the pleadings, it is agreed that there was a sale agreement drawn between the parties herein. The Applicant annexed the sale agreement dated 14<sup>th</sup> March 2008 as "VCT 2". The agreement set the terms and obligations between the parties. In clause 7(v) of the agreement it provided thus ;

***"Completion shall take place at the offices of Omondi Waweru & Co Advocates on the completion date or earlier where upon the vendors advocate shall deliver to the purchasers' advocate inter alia ; (v) Land Control Board consent or such other consents and documents as may be necessary to procure registration of the transfer in favour of the purchaser".***

10. It follows that it was incumbent upon the Applicant or her advocate to provide the Land Control Board consent. She annexed minutes of the board of 6.3.2008 to support the averment that such consent was not obtained. I wish to point out that the minutes refer to a date before the parties entered into a sale agreement. The Applicant did not explain in her affidavit why she chose the date of 6<sup>th</sup> March 2008.

11. In essence the minutes annexed do not land any credence to the application. The Respondent deposed that given the nature of development activities in the area, there may be no need to obtain the Land Control Board consent. The Applicant did not controvert this fact in her supplementary affidavit. In my opinion and I so hold, the twin questions on who was to obtain the Land Control Board consent and whether the same was obtained is a triable issue.

12. Further the question whether Land Control Board consent was required to be obtained is an important question. The agreement clearly stated that the consent to be obtained was Land Control Board consent or any other consent. The suit title is registered under the Registration of Titles Act (repealed). It is therefore not obvious that this is agricultural land as anticipated under the Land Control Act. It will be interest of justice that this question of which consent was applicable be determined during a full trial and not by way of an interlocutory application.

13. Lastly, the plaintiff raised the issues on her capacity to sell in paragraphs 8, 9, 10, 11 and 17 of the plaintiff which facts the defendant vehemently denied. In paragraphs 6, 7 and 8 of the defence, the defendant pleaded that she conducted a postal search and was unaware of the agreement between the Applicant and her family governing the use and control of the suit property. These again are triable issues that require this matter to proceed to full trial.

14. The Applicant in her submissions referred to sections 107 and 108 on the burden of proof. Such proof can only be ascertained if parties are given an opportunity to present evidence and not through interlocutory applications. I have considered case law presented by the Applicant as regards the provisions of the Land Control Act. However having found that it requires evidence to determine whether the suit land falls under the controlled transactions, I find the said cases of no relevance at this stage.

15. The upshot is that I find this application to be without merit and hereby dismiss it with costs to the Respondent.

**Ruling dated and delivered at Mombasa this 22<sup>nd</sup> day of April 2016.**

**A. OMOLLO**

**JUDGE**