



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 560 of 2001

BTB INSURANCE AGENCIES LIMITED.....PLAINTIFF

VERSUS

NITIN SHAH and NUJ DESAI, the Executors of the Estate of

KIRTI KUMAR LAXMICHAND BID.....1ST DEFENDANT

KUSINI INVESTMENTS LIMITED.....2ND DEFENDANT

R U L I N G

This is an application by the defendant, who wishes to have the Plaintiff struck out. The application has been made pursuant to the provisions of Order 6 Rule 13(1) (a) (b) and (d); as well as Order 6 Rule 16 of the Civil Procedure Rules; and Section 6 (1) and 22 of the Land Control Act.

At the commencement of the hearing of this application the plaintiff raised a preliminary objection on the grounds that insofar as the application was brought under O. 6 rule 13 (a), amongst others, the applicant had to make an election whether to forego reliance on the supporting affidavit if it went ahead with the application under all the three heads, or alternatively choose to drop reliance on rule 13(a), and then use the affidavit.

In a ruling delivered on 26th January 2006, I overruled the objection. I also overruled an objection to the supporting affidavit which had been sworn by Mr. Z. Alibhai. Consequently, the application was prosecuted as it had been filed.

Basically, as I understand it, the application centred on the provisions of Section 6 (1) of the Land Control Act.

It is the defendant's case that the entire claim is based on the Agreement for sale of shares dated 10th February 2000. The said sale of shares would have given to the plaintiff rights over some agricultural property, so says the defendant. Therefore, it was contended that the transaction ought to have been consented to by the Land Control Board, pursuant to S 6(1) of the Land Control Act.

However, insofar as there was no Land Control Board consent, the defendant contends that the entire transaction was void ab initio. And as the Agreement, which is the basis of the suit was void for lack of Land Control Board consent, the defendants submitted that there was no cause of action against them.

In the case of **WAMBUA V WATHOME [1968] E.A. 40**, the Hon. FARREL J. held that there was no valid cause of action due to the absence of lawful consent from the Land Control Board.

In that case the Board had made an initial decision on an application for consent. The said initial decision postponed the application for further consideration. Ultimately, the Board made a decision in which it granted consent. However, the said final decision was made long after the expiry of the 3 months from the date of the application.

In arriving at the decision to strike out the plaint, the court took into account the plaintiff's concession to the fact that the land which was the subject of the proceedings was subject to the then "**Kenya (Land Control) (Transitional Provisions) Regulations 1963**". That being so, the plaintiff had to plead consent before he could establish his cause of action. He therefore sought leave to amend the Plaint so as to insert the new paragraph within which he was to set out the particulars of the consent.

Having given due consideration to the contents of the intended amendment, the court came to the conclusion that even if leave to amend was granted, the proposed amendment would not be capable of curing the defect in the plaint, as the consent which was sought to be pleaded was not lawful in any event.

For those reasons, the court declined leave to amend the plaint, and then proceeded to strike out the said plaint.

As far as the law is concerned, there can be no doubt at all that;

"The position is simple and clear. Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The courts cannot do that; for it is not for us to legislate but to interpret what parliament has legislated. So in this case that agreement between the parties having been entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and, since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary land control board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the land control board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes."

- per the Hon. CHESONI J. (as he then was) in the case of **HIRANI NGAITHE GITHIRE V WANJIKU MUNGE [1979] KLR 50 at page 52**.

That legal position is constant even in situations in which the plaintiff, in a case involving agricultural land in a land control area, had made payments for the purchase thereof.

In **SIMIYU V. WATAMBAMALA [1985] KLR 852 at page 856**, the Hon. NYARANGI Ag. J.A (as he then was) said:

"Here, the appellants had to obtain consent for the controlled transaction. They did not and so the agreement was void for all purposes including attempting to set up estoppel."

Thus, the mere fact that the plaintiff herein had already paid a total of Kshs. 1,641,608/50 would be of no consequence, in creating an estoppel, if the transaction in question involved the purchase of agricultural land which was subject to land control board consent. In effect, the defendants could not be compelled to deliver land to the plaintiff just because the plaintiff had made part-payment, and was also ready to pay the balance of the purchase price, if land control board consent was a prerequisite to the transaction in question.

According to the plaintiff herein, the trial court would need to determine the question as to whether or not there had been inducement by the defendants, for the plaintiff to enter into the Agreement in issue.

I think that the all important question is whether or not the transaction was subject to the provisions of S. 6 (1) of the Land Control Act. If the answer to that question is in the affirmative, then it would matter not that the plaintiff might have been induced to enter into the Agreement, as the said Agreement would be void in any event.

In **KARIUKI V KARIUKI [1983] KLR 225 at 227**, the Hon. LAW J.A. held as follows:

“When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked.”

In the light of the law as set out in the above-cited legal authorities should the plaint now be struck out, as disclosing no cause of action; or as being frivolous or vexatious; or on the grounds that it was otherwise an abuse of the process of the court?

I have given careful consideration to the Plaint, the Amended Defence and the Reply to Amended Defence. I did also give consideration to the original Defence.

First, it is noteworthy that at paragraph 6 of the Plaint, there is reference to the Agreement dated 10th February 2000, which was as between the plaintiff and the 1st defendant. By that Agreement, the 1st defendant was supposed to sell to the plaintiff some 200 shares which had been issued by the 2nd defendant.

In the prayers sought in the Plaint, the plaintiff seeks an order to compel the 1st defendant to execute the Transfer of the 200 shares to the plaintiff.

Now, when it is borne in mind that the 2nd defendant was the owner of the suit property, Title No. KWALE/GALU/KINONDO/682, evidence would have to be led to prove the nexus between the shares and the said suit property.

Of course, the Plaintiff itself has stated that the suit property was the only known asset of the 2nd defendant. That would imply that if one was buying shares of the 2nd defendant, the intention would be to own part of the said suit property. Indeed, that appears to be the plaintiff’s intention as is expressed through its action of lodging a caution against the title to the suit property.

However, on 27th August 2003, the plaintiff had already drafted and filed a **“statement of Issues”**, in which the very first issues were set out in the following terms:

“1. (a) Is the suit property known as KWALE/GALU/KINONDO/682 relevant to the suit herein?

(b) Does the plaintiff have a cause of action in relation to the suit property?”

Those issues were drawn up about 15 months before the defendants filed their Amended Defence.

And whereas the Amended Defence did raise the issue concerning the need for any dealings or agreement for dealings in the shares, to have the relevant land control board consent, it also asserts that the suit property had nothing to do with the suit herein. At paragraph 2 of the Amended Defence it is stated that;

“The Defendants admit that the 2nd Defendant, a private company owns the freehold property known as title No. Kwale/Galu/Kinondo/682 (“the property”) but avers that the said Property has

nothing to do with the suit herein and the Plaintiff has no cause of action in relation to the said property or at all.”

However, the Defendants concede that they did sign “**points of agreement to purchase shares**”, even though they insist that they were surprised and induced to do so.

To my mind, the said pleading clearly gives rise to the possibility that the plaintiff may prove that it has an Agreement for the purchase of shares. Whether such purchase, if proved, would have any bearing on the suit property would then need to be determined, in the light of the defendants’ contention that the shares and the suit property were not inter-linked.

In the circumstances I hold that there is yet to be provided any evidence to prove or disprove the nexus between the sale of shares and the suit property. There is thus a possibility that the trial court may come to the conclusion that the shares were not linked to the suit property, as asserted by the defendants. If that were to happen, there would be no need for the transaction in the shares, being sanctioned by the Land Control Board.

Furthermore, even if the transaction should be found to be subject to the consent of the Land Control Board, it is arguable whether or not the plaint could be amended so as to enable the plaintiff recover the consideration it may have paid to the 1st defendant. The right to recover consideration which was paid in a dealing which becomes void was recognised both in **NJAMUNYU V NYAGA [1983] KLR 282 and in SIMIYU V WATAMBAMALA [1985] KLR 852.**

In effect, I have come to the conclusion that there at least two issues which arise from the Plaint and the Defence on record. For that reason, the plaintiff is entitled to have the suit proceed to trial. Accordingly, the application dated 27th April 2005 is hereby dismissed with costs.

Dated and Delivered at Nairobi, this 6th day of October 2006.

FRED A. OCHIENG

JUDGE