



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

Civil Case 1159 of 2005

INSHWIL BUILDERS ENGINEERS LTD.....PLAINTIFF/RESPONDENT

VERSUS

MUGUMOINI FARMERS CO LTD.....1ST DEFENDANT/RESPONDENT

ERUSTUS G. NDUHIU

T/A EMAC ENTERPRISES.....2ND DEFENDANT/RESPONDENT

RULING

This Ruling is delivered in the 2nd Defendants preliminary objection filed under a Notice of Preliminary objection dated 27th February 2006, in which he challenges the Plaintiff/Applicants' Chamber Summons dated 7th December 2005 and the suit filed on 23rd September 2005. The Preliminary objection raises the following points.

1. THAT the sale agreement (forming the basis of the suit herein) is null and void and of no effect for non compliance with
 - (a) the Stamp Duty Act
 - (b) the Land Control Act
2. THAT the Plaintiff has been restrained from interfering with the suit land by this honourable court in H.C.C.C. No 1171 of 2005.
3. THAT the application and suit are bad in law misconceived, frivolous and vexatious.

The Plaintiffs claim against the Defendants is mainly for specific performance of a sale agreement in respect of a 200 acres Parcel of land forming part of L.R No. KAKUZI/KIRIMIRI BLOCK 7/37, a permanent injunction restraining the Defendants from interference with the Plaintiff/Applicants use, development occupation and enjoyment of the same and transfer of ownership from the Defendants to the Plaintiffs of the said parcel of land. The Chamber Summons dated 7th December 2005 seeks temporary restraining orders pending the hearing of the suit and the granting of the main orders sought therein.

The Preliminary Objection was argued vigorously during two court sessions. Counsel for the 2nd Respondent cited three authorities in support of the preliminary objection namely

1. E.K. Shamalla vs Gerry J.B. Chibeu Civil Appeal No. 169 of 1986
2. Onyango & Anor vs Luwayi 1986 KLR 513 and
3. Githu vs Kalibi 1990 KLR 634.

The said authorities do support the 2nd Respondent's position (which has been adopted by the 1st Respondent) that an agreement for the Sale of Agricultural Land is, in law, void for all purposes if the consent of the Land control Board is lacking. This notwithstanding, and with due respect to counsel for the 2nd Respondent I find that the preliminary objection as presented and argued does not pass the legal test laid down in the leading authority of Mukisa Biscuit Company vs Westend Distributors [1969] E.A. 696 in that it does not raise pure points of law but contains matters of fact which require to be ascertained and which are clearly disputed. The applicants have in their lengthy Supporting Affidavit alluded, inter alia, to a pending application for Land Control Board's consent which they claim the Respondents are blocking. This being the case, no presumption or assumption can be inferred that all facts pleaded by the applicants are correct as stipulated in the Mukisa Biscuit CO's case (supra). The said authority clearly provides, as regards a preliminary objection, that

"It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Clearly the issue of whether or not there is a pending application for land board consent and whether the Plaintiff / Applicant has been restrained from interfering with the suit premises as stated in the notice of preliminary objection are matters for inquiry.

As regards the third preliminary point counsel has submitted that the suit lacks foundation and therefore the plaint ought to be struck out for being not only bad in law and misconceived but also frivolous and vexatious. These are matters requiring the exercise of judicial discretion and which are properly addressed in an application brought under Order VI Rule 13. Whether the injunction sought can or cannot issue as submitted by Counsel is a matter requiring the exercise of Judicial discretion which ought to be addressed in the interlocutory application itself.

For the above reasons I am not inclined to allow the preliminary objection which, as I have already stated, raises points which ought to have been raised and properly argued at the inter partes hearing of the Chamber Summons itself. The preliminary objection is hereby overruled with costs in the cause.

Dated and Delivered at Nairobi this 8th day of December 2006

M.G. MUGO

JUDGE

Delivered in the presence of:

For the Plaintiff/Applicant

Mr. Chacha for the Defendant/Respondent

Mr. Chacha holding brief for Kamere for 2nd Defendant/Respondent