



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 33 OF 2015**

**ZACHARY WARWIMBO RIHANGI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**CLEMENT MUTURI KIGANO.....DEFENDANT/APPLICANT**

**RULING**

The defendant has moved this Court by his Notice of Motion dated 15<sup>th</sup> April 2015 and filed herein on 17<sup>th</sup> April 2015 seeking the following orders:-

1. *The plaint herein be struck out with costs on the ground that it discloses no reasonable cause of action.*
2. *Judgment be entered for the defendant as prayed for in the counter-claim.*
3. *Costs of and incidental to this application be paid by the plaintiff.*

The application which is premised on **Order 2 Rule 15 (1) (a) of the Civil Procedure Rules** is based on the main ground that the contract giving rise to the cause of action herein related to a controlled transaction under the purview of the **Land Control Act** for which no consent was obtained and therefore the said contract is void in law and unenforceable.

In opposing this application, Mr. N.M. Kiriba advocate for the plaintiff has filed a replying affidavit in which he has deponed, inter alia, that the same is vexatious, incompetent and a blatant abuse of the Court process and that the defendant has not come to Court with clean hands since he received Ksh. 400,000/= from the plaintiff being the purchase price of land parcel No. LOC 12 SUB/LOC 1/GAKIRA/T.48 (herein the suit property) and therefore it is only fair that the plaintiff be given his day in Court.

The genesis of this application is the plaintiff's suit filed herein on 27<sup>th</sup> March 2015 seeking the following orders:-

1. *An order do issue directing the District officer Kangema to issue a consent for land parcel No. LOC 12 SUB/LOC 1/GAKIRA/T.48 to effect transfer to the plaintiff.*
2. *The Executive officer of this Honourable Court be authorized to execute all necessary documents on behalf of the defendant herein.*
3. *The Land Registrar be ordered to dispense with production of PIN Certificate, National Identity Card, Passport size photographs of the defendant and effect transfer of LOC 12 SUB/LOC 1/GAKIRA/T.48 to the plaintiff.*
4. *Interest*
5. *Costs of the suit.*

The claim was based on pleadings that on 6<sup>th</sup> December 2006 the plaintiff and defendant entered into a written sale agreement in respect of the suit property for a consideration of Ksh. 400,000/= of which Ksh. 380,000/= was paid vide cheque and Ksh. 20,000/= in cash. However, the defendant has refused to attend the Land Control Board for the transfer and instead wants to evict the plaintiff from the same.

The defendant filed a defence stating that the transaction offends the provisions of both the **Land Control Act (CAP 302) Laws of Kenya** and the **Law of Contract Act (CAP 23) Laws of Kenya** and is therefore un-enforceable. The defendant in turn counter-claimed for an order of permanent injunction restraining the plaintiff, his agents, servants or anybody claiming through him from entering, remaining or in any other manner howsoever interfering with the defendant's possession and use of the suit property adding that he had refunded the purchase price to the plaintiff by a bankers cheque which the plaintiff had refused to accept.

The plaintiff filed a reply to the defence and defence to the counter claim in which he pleaded, inter alia, that the sale agreement did not materialize because the defendant breached the same yet it was valid.

The above Notice of Motion is the subject of this ruling and I have considered it together with the affidavits by both parties, their pleadings and the submissions by their counsels.

The first issue herein is whether an agreement for sale of agricultural land for which no consent has been obtained as required under **Section 6 of Land Control Act** can be enforceable. It is clear from the plaint filed herein that what the plaintiff seeks is to have the agreement entered into between himself and the defendant for purchase of the suit property on 6<sup>th</sup> December 2006 be executed. It is not disputed that the suit property is indeed agricultural land for which any sale, transfer lease etc would require the consent of the Land Control Board of the area. **Section 6 (1) of the Land Control Act** which sets out the requirements of such consent reads as follows:-

***6 (1) "Each of the following transactions:-***

- a. ***the sale, transfer, lease mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a Land Control area;***
- b. ***the divisions of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply***
- c. ***the issue, sale transfer mortgage, or any other disposal of or dealing with any share in a private Company or Co-operative Society which for the time being owns agricultural land situated within a Land Control area, is void for all purposes unless the Land Control Board for the Land Control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act"***

The issues arising in this suit have, fortunately, been the subject of two recent but dissimilar decisions of the Court of Appeal.

In the case of **MACHARIA MWANGI MAINA & 87 OTHERS VS DAVIDSON MWANGI KAGIRI C.A CIVIL APPEAL NO. 6 OF 2011 (NYERI)**, the Court took the view that when a purchaser is in possession of the land subject of a sale agreement for which no consent was obtained as required, then the seller will be held to have created a constructive trust in favour of the purchaser who has paid the purchase price. Citing the overriding objectives of the Court and the needs to dispense substantive justice not based on technical issues, the Court was of the view that a constructive trust relating to land subject to the **Land Control Act** would therefore be enforceable. That decision was rendered on 22<sup>nd</sup> January 2014.

However, on 18<sup>th</sup> December 2014 in the case of **DAVID SIRONGA OLE TUKAI VS FRANCIS ARAP MUGE AND 3 OTHERS C.A CIVIL APPEAL NO. 76 OF 2014 (NAIROBI)**, the same Court though

differently constituted, took the view that granted the express provisions of the ***Land Control Act*** with regard to obtaining the consent of the Land Control Board for a transaction relating to agricultural land, there can be no room for the Courts to import the doctrines of equity, constructive trust or estoppels to override the express, unequivocal and comprehensive provisions of the ***Land Control Act***. The Court, after citing other previous judgments of the Court of Appeal and High Court, came to conclusions that unless the consent of the relevant Land Control Board is obtained, a transaction involving agricultural land is void and unenforceable. That Court said:-

***“The Land Control Act requires consent to be obtained from the relevant Land Control Board if the transaction involves agricultural land and failure to do so renders the transaction void for all purposes and in addition any occupation of the land pursuant to such void transaction is declared to be a criminal offence. We are firmly of the opinion that no estoppels can arise under the Land Control Act to render valid and lawful conduct which is otherwise declared by the Act to be void for all purposes and also a criminal offence”***

Lastly the Court held that the decision in the case of ***MACHARIA MWANGI MAINA*** (supra), in so far as it found that a declaration of trust can be founded where there is no consent of the Land Control Board, that decision was ***“clearly per incurium”***.

Both those decisions are binding on this Court by virtue of the doctrine of stare decisis which demands that a Court must strictly follow the decisions handed down by superior Courts within the same jurisdiction. The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are:-

1. ***Where there are conflicting previous decisions of the Court, or***
2. ***Where the previous decision is inconsistent with a decision of another Court binding on the Court, or***
3. ***Where the previous decision was given per incurium - see JASBIR SINGH RAI & OTHERS VS TARLOCHAN SINGH RAY,***

#### ***SUPREME COURT OF KENYA PETITION NO. 4 OF 2012.***

It follows therefore that the decision of ***MACHARIA MWANGI MAINA*** (supra) having been declared to have been arrived at per-incurium, this Court is only bound by the latter decision in the case of ***DAVID SIRONGA OLE TUKAI*** (supra) and in the circumstances, I hold that this sale agreement between the parties herein dated 6<sup>th</sup> December 2006 with respect to the suit property herein is void and therefore un-enforceable as the requisite Land Control Board’s consent was not obtained as required by ***Section 6 (1) of the Land Control Act.***

Secondly, the agreement with respect to the sale of the suit property would also not be enforceable because it was not signed by the parties herein. ***Section 3 (3) of the Law of Control Act*** provides as follows:-

***“No suit shall be brought upon a contract for the disposition of an interest in land unless:-***

- a. ***the contract upon which the suit is founded –***
  1. ***is in writing***
  2. ***is signed by all the parties thereto; and***
- b. ***the signatory of each party signing has been attested by a witness who is present when the contract was signed by such party....”***

The contract entered into by the parties in respect to this suit is among the documents attached to the plaintiff’s plaint. I have looked at it and it only bears the signatures of two witnesses namely PETER NJUKI NJOROGE and JAMES MICHUKI MACHARIA. Strangely, that agreement was not signed by

the parties herein and therefore, there is no contract between the plaintiff and the defendant that this Court can purport to enforce. That can only mean that agreement is unenforceable.

That then leads me to the consideration of whether or not to strike out this suit.

The leading authority in our jurisprudence on the law as regards striking out of pleadings is the case of **D.T. DOBIE (KENYA)**

**LTD VS JOSEPH MBARIA MUCHINA AND ANOTHER C.A CIVIL APPEAL NO. 37 OF 1978, (1980) e K.L.R 1982 K.L.R 1** where Madan J.A (as he then was) stated as follows:-

***“No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it”***

emphasis added.

I have already made a finding that the sale agreement on which the suit is premised is void and unenforceable as it contravenes both the **Law of Contract Act** and the **Land Control Act**. Clearly therefore, this suit is ***“so hopeless that it plainly and obviously disclose no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment”***.

This suit is therefore a candidate for striking out and I must declare it so. It must be recognized that there is no application before me for extension of time within which to apply for the consent of the Land Control Board as provided under **Section 8 (1) of the Land Control Act**. The plaintiff pleads that he has been in occupation of the suit property since 2006 pursuant to that agreement but it is clear from the Court of Appeal’s decision in the case of **JOSEPH BORO NGERA VS WANJIRU KAMAU KAIME & ANOTHER C.A CIVIL APPEAL NO. 32 OF 2005 (NAKURU)** that even if such an application was made, the plaintiff would not be entitled to such extension of time because his occupation of the suit property constitutes a criminal offences under **Section 22 of the Land Control Act**. **Section 7 of the Land Control Act** provides that any consideration paid pursuant to such a transaction is recoverable. The defendant has expressed willingness to refund the Ksh. 400,000/= and even made a cheque which should be handed over to the plaintiff or his advocate. The plaintiff’s claim is however struck out with costs.

The defendant filed a counter-claim seeking a permanent injunction restraining the plaintiff, his agents, servants or anybody claiming through him from entering, remaining on or in any other manner howsoever interfering with the defendant’s possession and use of the suit property. That is not a liquidated claim for which I can enter summary judgment in his favour. I direct that the defendant lists this case so he can formally prosecute that claim.

Ultimately therefore, and with considerable sympathy for the plaintiff, this Court makes the following orders with regard to the defendant’s Notice of Motion dated 15<sup>th</sup> April 2015 and filed herein on 17<sup>th</sup> April 2015:-

1. ***The plaint herein is struck out as it discloses no reasonable cause of action.***
2. ***The defendant to refund to the plaintiff or his advocate the purchase price of Ksh. 400,000/=***
3. ***The defendant to take a hearing date in the registry on which to prosecute his counter-claim.***
4. ***In the circumstances of this case, I direct that each party bears his own costs.***

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**

COURT: Ruling delivered, dated and signed this 4<sup>th</sup> day of December, 2015 in open Court.

Mr. Mureithi for Mr. Amuga for Defendant/Applicant present

Plaintiff/Respondent also present in person.

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**