



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 236 OF 2009**

**JOSVIR TRADERS & AGENCIES LTD. ....PLAINTIFF**

**VERSUS**

**GEOFFREY CHEGE KIRUNDI.....1<sup>ST</sup> DEFENDANT**

**LUCY WAMAITHA CHEGE.....2<sup>ND</sup> DEFENDANT**

**EVERTON COAL ENTERPRISES LTD. ....3<sup>RD</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 5<sup>th</sup> October 2012 brought by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants seeking for the following orders:

1. That the Plaintiff's claim as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be struck out with costs.
2. That the Plaintiff be ordered to receive Kshs. 22.5 million from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without interest and in its default that the same be deposited with this Honourable Court for the Plaintiff's collection.
3. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be awarded the cost of this Application and suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1<sup>st</sup> Defendant, Geoffrey Chege Kirundi, sworn on 5<sup>th</sup> October 2012 in which he averred that the subject matter of this suit is a land parcel known as L.R. No. 10090/23 situate in South West of Thika Municipality (hereinafter referred to as the "suit property") upon which he and the 2<sup>nd</sup> Defendant as vendors entered into a Sale Agreement dated 30<sup>th</sup> December 2008 with the Plaintiff. He further averred that being an agricultural land, the suit property fell within the ambit of the provisions of the Land Control Act, Cap 302 Laws of Kenya which required the consent of the Land Control Board before any transaction could be effected. He further averred that no such consent was ever obtained by the Plaintiff/Respondent and as such the transaction between himself and the Plaintiff became void for all purposes and therefore the terms of the Sale Agreement cannot be enforced by a court of law. He further stated that the Plaintiff fundamentally breached the terms of the said Sale Agreement by undertaking the sub-division of the suit property and started selling the sub plots to third parties without his consent and that of the Municipal Council. He further stated that he proceeded to rescind the said Sale Agreement and offered to refund the Plaintiff the deposit he had paid. He further stated that the Plaintiff's claim for

damages are speculative and cannot be supported in law and the prayers for equitable remedies are similarly unenforceable. He further stated that in the absence of a valid contract capable of being enforced, the Plaintiff's suit herein remains technically incompetent, frivolous and an abuse of the legal process and the Plaintiff ought to be struck out. He further added that the suit property has since been legally transferred to the 3<sup>rd</sup> Defendant for value and who title is protected under **Section 23** of the **Registration of Titles Act** and under **Section 26** of the **Land Act**, which facts were expressly admitted in the Plaint. He further stated that the Land Control Act provides for the refund of the deposit paid by a purchaser in a transaction that becomes void for want of Land Control Board consent without interest and he urged this court to order this.

The Application is contested. The Plaintiff filed his Grounds of Opposition dated 5<sup>th</sup> November 2013 in which he stated that the Application is misconceived and wrong in law for the following reasons:

1. It seeks a summary remedy based on a contested issue of fact.
2. There is no proof that the consent of the Land Control Board was necessary and the same would have to be proved at the trial.
3. If the transaction was controlled, the period for application of the consent at the Land Control Board had not expired prior to the filing of the suit.
4. This is not a fit case for exercise of the court's jurisdiction to strike out pleadings.
5. The Applicant is implicitly asking the court to reverse a finding made by its predecessor at an interlocutory stage.

Both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as well as the Plaintiff filed their written submissions.

It is the submission of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants that the Plaintiff's claim is premised on a sale agreement that has been rescinded for want of Land Control Board Consent and that the same ought therefore to be struck out to avoid unnecessary litigation. They further submit that owing to fundamental breaches by the Plaintiff, they in any event proceeded to rescind the said sale agreement and offered to refund the deposit paid which they still intent to do but the Plaintiff has refused to receive the same. In brief, the Applicants contend that the Plaintiff has no cause of action enforceable at law warranting the hearing of this suit to its natural conclusion.

On his part, the Plaintiff disagrees with that position. In the first place, the Plaintiff submits that this Application was filed in violation of an explicit order given by Justice Mwilu on 30<sup>th</sup> May 2012 as follows:

**“It is my further finding that parties are yet to comply with Order 11 of the Civil Procedure Rules and they are hereby urged to do the same without more dilatory ventures so that the suit herein may be determined on merit.”**

He further submitted that the allegation that the sale transaction is null and void for want of the Land Control Board consent featured in this suit in the ruling of Justice Nambuye on 24<sup>th</sup> March 2010 as follows:

**“Assertion by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant that the Sale Agreement between them and the plaintiff is null and void due to failure of the parties to seek and obtain Area Land Control Board Consent by reasons of the land being agricultural land of itself does not operate to deny the Plaintiff/Applicant an interim injunctive relief because it is subject to proof at the trial”**

He further submitted that there are issues that arise for determination in this suit one of which is the question whether or not the suit property is agricultural land and further the legal effect of the absence of land control board consent in respect of a sale transaction. In a nutshell, he contended that this suit raises triable issues on which basis the suit should be allowed to proceed for full hearing.

The main issue for determination which emanates from this Application is whether I should order that the Plaintiff filed in this suit by the Plaintiff be struck out. The applicable law is to be found in **Order 2 Rule 15(1)** of the **Civil Procedure Rules, 2010** which states as follows:

**“At any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that –**

- a. It discloses no reasonable cause of action or defence in law; or**
- b. It is scandalous, frivolous or vexatious; or**
- c. It may prejudice, embarrass or delay the fair trial of the action;**
- d. It is otherwise an abuse of the process of the court,**

**And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”**

After due consideration of this matter, I am convinced that this suit has triable issues that require to be subjected to a full hearing before a just conclusion can be arrived at. I do agree with the Plaintiff that the issue whether or not the suit property is agricultural land is a triable issue. In addition, there is the issue of what effect the lack of land control board consent has to a sale of land transaction. There is the issue of whether the sale agreement was properly rescinded. There is the issue of whether the Plaintiff is entitled to an order of specific performance. I find that all these are issues that cannot be properly determined through an interlocutory application such as this one.

Further, I do agree with the Plaintiff that the issue on the legal impact of lack of land control board consent was stated by Justice Okwengu in her ruling as fit to be determined at the main trial and not at the interlocutory stage. Further, I also agree with the Plaintiff that Justice Mwilu categorically directed the parties herein to proceed to comply with Order 11 in order to pave way to the main trial without filing any more applications.

In light of the foregoing, I find that the Application is unmerited and proceed to dismiss it. Costs shall be in the cause. The Plaintiff is now directed to set the suit down for hearing with no further delay.

**DELIVERED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY 2014**

**MARY M. GITUMBI**

**JUDGE**