



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 156 OF 2009**

**NYARI INVESTMENTS LTD.....PLAINTIFF**

**- VERSUS -**

**MOMBASA CASHEWNUT PROCESSORS.....1ST DEFENDANT**

**AWADH SALEH SAID.....2ND DEFENDANT**

**AND**

**DELPHIS BANK LIMITED.....THIRD PARTY**

**RULING**

[1] The applicant filed notice of motion dated 14th May 2009 seeking inter alia; cancellation of any memorial or entry in the Register of Titles CR.NO. 16310 (L.R. 12502) situated in Kwale, Coast Province registering a transfer to Mombasa Cashewnuts Processor (Kenya Implied on the 8th May 2008 or any other date whatsoever and the said transfer be declared null and void pursuant to Section 53 of the Transfer of Property Act of India 1882. Secondly whether the defendants are in contempt of early court orders.

[2] The grounds are laid out on the face of the application. The application is supported by a sworn affidavit of Harris Horn Junior who is a Director of the plaintiffs company and duly authorized to swear the same. He stated that on 13th November 2001 Ransley J (as he then was) made certain orders and gave a ruling that the transfer the suit land to the 1st defendant was illegal. And subsequently on 30th July 2007 Rawal J (as she then was) made further orders and gave a ruling holding that the transfer of the suit land to the 1st defendant was illegal as the earlier orders of 13th November 2002 having not been complied with, and that the defendants and the Third Party were In contempt of court which contempt was continuing. He alleges that the defendants have once again transferred the land to the 1st defendants without following the law. He alleges that the said transfer was illegal by virtue of non compliance to provisions of Land Control Act Cap 302 and states that the defendant obtained registration of the title of the suit property using an illegal Land Board consent and stated there was no Land Control Board meeting held as purported by the defendants are contested its validity. He further told the court that the application for consent of the Land Control Board was not in compliance with the Land Control Board Act 302, since the application withheld and suppressed material information required by the board to

arrive at a decision. It is the plaintiffs' case that the defendants have not complied with court orders either fully or at all, in that they have not furnished the plaintiff with accounts from the date of possession and the purported papers filed in court do not constitute accounts nor has the agent filed any quarterly accounts as ordered by the court and is in default of seven (7) accounting periods since August 2007 to date.

[3] The first defendants in response to this application being a duly registered limited company filed its replying affidavit through its Director Awadh Saleh Said and who is also the second defendant. He stated that following the ruling by Ransley J (as he then was) and a further order by Rawal J (as she then was) it entered into a fresh negotiation with the Third party and a new agreement for the sale of the parcel of land dated 21st March 2008. That through their advocate it filed application for consent to the Chairman Kinongo Land Control Board. In response to their application they received a letter from the District Commissioner Kinango dated 16th April 2008. In which they were informed that the land control Board Kinango had not been constituted and that all consent for land transactions are obtained in Kwale office. It then made its application for consent dated 15th April 2008 through the Kwale District Land Control Board. A special Land Control Board meeting was convened, considered and consent was subsequently approved. And that the right procedure in obtaining the Land Control Board consent for the said transaction and that it was only the Kwale Land Control Board which was legally empowered to issue the consent. And that the defendants are in compliance with the order issued on 13th November 2002 and the further order issued on 23rd July 2007. That they appointed Mr. Bobby Widna Yugi as the manager of Taru Sisal Farm on the 17th March 2003 and secondly the 1st defendant filed his audited accounts for the years 2002 to 2006 which was forwarded to court. It alleges it has never colluded with other defendants and that he complied with the laid down procedures in obtaining the land control board consent and that this application by the plaintiff is wholly unnecessary and aimed at causing delay in finalization of the suit.

[4] The third party is a duly registered company filed its replying affidavit through its manager Wilfred Kenneth Machini and whom had been authorized by the third party board to depose the affidavit dated 29th October, 2009. Gave a brief history of how this matter has transpired. And told the court they have complied with the Ruling issued on 13th November 2002 by Ransley J. (as he then was) and the further order issued on 14th May 2009 by Rawal J. (as she then was) and stated that substantive orders in the suit were recognized by the court of appeal in a stay application between the plaintiff and the defendants. That the third party made the requisite application by filing an application form to Kinango Land Control Board and they were subsequently informed that there was no board at Kinango and that officials at the Lands Ministry had directed that the application for consent be directed to Kwale District Board. They subsequently filed the same through the defendants advocate to Kwale District Board where a special meeting was convened and the consent approved. He further stated that there lies a procedure in the Land Control Act Cap. 302 for appeal. Should a party be aggrieved by the decision of the board and it is not to the High Court that one should go to. And that the Land Control board being an independent institution ought to be a party in this proceedings before a court could overturn its decision. He further disputed that it influenced any government official and that the allegations to the effect are scandalous and should be struck out. It further filed a supplementary affidavit deposed by Wilfred Kenneth Machini dated 6th March 2010. It avers that the third party as a chargee and the 2nd defendant entered into a fresh sale agreement as directed by the court order of 13th November 2002. And confirmed that the bank executed all the relevant documents necessary for the Land Control Board consent and submitted them to the advocate who processed the consent and that the consent is valid and unimpeachable. The plaintiffs filed a further affidavit through Harris Horn Junior dated 1st July 2010 and avers that the effect of the Ruling of Ransley J (as he then was) was to nullify the sale and transfer of the suit property in the absence of a valid consent from the board under the Land Control Act and therefore no fresh agreement could be entered into between the third party and the bank and the defendants without going through the process of fresh exercise of statutory power of sale (if any) which is under challenge in this suit as the Third party Bank is not registered Chargee of this suit property. The plaintiff further avers the process conducted by the defendants and the third party is a nullity and has no effect in law as the third party, not being the chargee of suit property has no capacity to realize the same by auction or private treaty whatsoever. It further avers that the defendants and 3rd party has not complied with the orders of the court issued on 13th November 2002 and the subsequent of 30th July 2007 and the purported appointment

of Tobbyas Winda Yugi as an agent of the 3rd party on 17th March 2008 six years after the ruling of Ransly J ( as she then was) for only two (2) months and his purported handling over of the suit property back to the defendants on 15th May 2008 and giving falsified accounts of the suit property for only one (1) month. And alleges this is a clear and manifest fraud committed against the plaintiffs company. It also avers that the rightful chargee of the suit property was Bank of Credit and Commerce international and there having been no proper transfer of charge/mortgage duly sanctioned and approved by the Ministry of Finance and legislated under a finance bill and later approved by the appropriated Board under the Land Control Act, the purported transfer of charge to Delphis Bank (the third party), and now Oriental Commercial Bank and are a nullity and has no effect in law and are void ab initio. it further avers that the plaintiff only had contract/agreement with bank of Credit and Commercial International and has never entered any contract of charge or mortgage with the 3rd party and therefore the plaintiff owes none of them any money as claimed.

[5] Three issues arise;

- a) Was consent validly obtained.
- b) Whether the issues of statutory power of sale was decided
- c) Whether the 1st, 2nd defendants and the interested party are in contempt of early court orders.

The issues of concern to the court is whether consent was regularly acquired under the Land Control Act Cap. 160. The question of whether or not a valid consent is required under the Land Control Act was well addressed in the ruling of Ransley J ( as he then was). The court would not belabor much on it. This court was told by the plaintiff that no valid consent was obtained and that there was no Land Control meeting Board sitting at Kwale or Kinango as purported by the 1st defendant since no such Board had been constituted or was in place at the alleged time. The plaintiff alleges he instructed Mr Moses Mwakisha an advocate who upon conducting the search on the title of the suit and at the Kwale Land Registry. And that upon search at the Land Control Board Consent process found that there was no Land Control Board consent to the said transfer as purported by the defendants and that the consent was a forgery and fraud. Mr. Moses Mwakisha Mateka in support of this application filed an affidavit dated 2nd September 2008. He narrates to court that upon instructions from Mvavi Mosko who is also an advocate he went to Kwale District Land Office with the aim of establishing the status of Kwale Land Control Board consent letter issued in respect of C.R. NO. 16310 with consent letter dated 5th May, 2008 he says he met one Mr. Randu an officer and upon inquiry he was informed that such minutes were unavailable as there had been no formal sittings of the board, for reasons that the subject property falls within the newly created Kinango District carved out of the larger Kwale district and that Land Control Board was yet to be established. And that the District Commissioner Kwale District was the one who executed, rather than the relevant Board.

[6] The 2nd defendant through its director Mr Awadh Saleh rebutted the plaintiffs claim and stated that upon the ruling by Rawal J (as she then was) it entered into a fresh negotiations with Delphis Bank Limited (3rd Party) for the sale of suit parcel which culminated to the agreement dated 21st March, 2008. He told Court that it duly executed application for consent of the Land Board dated 15th April 2008 and the 3rd party executed its part. It forwarded the same to its advocate. The advocate on record is said to have submitted the requisite papers in the Land Control Board seeking approval of the consent, but he received a letter from the District Commissioner, the Chairman of the Kinango Land Control Board dated 16th April, 2008 in which he was informed that Land Control Board for Kinango has not been gazetted or constituted and that all land transactions within the area are still dealt with by the Kwale Land Control Board. It is said the defendants advocate submitted his application dated 15th July 2008 to the Kwale District Land Control Board for consent. A special Land Control Board meeting was convened on the 5th May 2008 chaired by the District Commissioner and four other members and the Secretary. The said committee approved the application for consent. To this end the plaintiff argument must fail.

[7] The second limb of plaintiff argument is that upon the ruling of Ransley J (as he then was) that nullified the sale and transfer of the suit property in absence of a valid consent from the Land Control

Board under the Land Control Act and therefore a fresh agreement could not be entered into between the Third Party and the defendants without going through the process of fresh exercise of statutory power of sale as the Third party is not the registered Chargee of this suit. The first contention is whether or not the third party is a Chargee of the suit property.

[8] These are the competing interests in this case. On the core of this application and indeed the suit is the transfer of the suit property to the defendants and whether the Land Control consent used to transfer the suit land was legal and/or illegal, further whether the transfer of the suit property by the third party Delphis Bank Ltd to the 1st defendant Mombssa Cashewnut Process (K) Ltd was fraudulent under the provisions of Sec 53 of the Transfer of Property Act of India 1882 and /or whether it was void and whether the orders of Ransley J (as he then was) and Rawal J (as she then was) has been complied with.

These are issues that go to the root of this case. In my view, on most issues evidence will have to be lead. The same shall be tied on cross-examination. This cannot be done at this Preliminary stage. To decide these issues here will be to decide this matter at a preliminary stage. It will be to determine the issues raised in the plaint and defence without the benefit of hearing evidence from the parties themselves and their witnesses. The benefit of testing that evidence under oath and on cross-examination will be lost. It has now been five years and six months since this application was filed no doubt many issues have changed. **Nairobi High Court Civil Case No. 125 of 1999 Nyari Investment (1988) Limited vs The Dephis Bank Limited, the Delphis Finance Ltd and Nyalgunga Traders**, which case Mr. K Oyoo referred me to, in his submission was dismissed by Mabeya J on 3rd February 2012 for want of prosecution. It is therefore important that this matter do proceed to full hearing in court.

[9] I therefore order that this suit be fixed for hearing by consent of all the parties. All issues herein be canvassed at the hearing. The status quo pertaining at this ruling shall be maintained. The case being a 2009 matter shall be given a priority date in the court registry. The costs of this application shall abide in the suit.

**Dated and delivered in open court at Mombasa this 6th day of November 2014.**

**S. MUKUNYA**

**JUDGE**

**6.11.2014**

In the presence of:

Mr. Oguk Advocate for the 1st and 2nd respondents

Mr. Ogue Advocate for Mr. Koyoko for the interested party.