



**Kemei & another v Kirui (Environment & Land Case  
51 of 2016) [2018] KEELC 4910 (KLR) (6 April 2018) (Ruling)**

*Philip Kibet Kemei & another v Josiah Kipkoske Kirui [2018] eKLR*

Neutral citation: [2018] KEELC 4910 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 51 OF 2016**

**JM ONYANGO, J**

**APRIL 6, 2018**

**BETWEEN**

**PHILIP KIBET KEMEI ..... 1<sup>ST</sup> PLAINTIFF**

**JOEL KIPTOO TUEI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSIAH KIPKOSKE KIRUI ..... DEFENDANT**

**RULING**

1. By a Notice of Motion dated 21<sup>st</sup> February, 2018 brought pursuant to Order 2 Rule 25 of the Civil Procedure Rules the defendant seeks the following prayers:
  - a) That the suit against the defendant be struck out with costs to the defendant.
2. The application is predicated on the grounds inter alia that the suit property herein relates to Agricultural land yet the transactions did not get the consent of the Land Control Board within the prescribed period of 6 months. Furthermore, the defendant has already refunded the purchase price pursuant to an agreement reached between the plaintiff and defendant in Molo CM Criminal Case No. 2102 of 2016.
3. The application is supported by the defendant's affidavit sworn on the 19<sup>th</sup> February 2018. In the said affidavit he depones that he entered into an agreement with the plaintiff for the sale of a portion land parcel number Kericho/Sorget/Kalyet/1/160. He further depones that no consent of the Land Control Board was secured to validate the said agreement and therefore the agreement became null and void after the expiry of six months.
4. He depones that he subsequently refunded the purchase price after the plaintiff instituted criminal proceedings against him vide Molo CM Criminal case no. 2102 of 2016. He therefore maintains that



the plaintiff's suit has been settled and he has no further claim against the defendant. He has annexed copies of bank transaction slips showing that that he transferred the purchase price to the plaintiff's account.

5. In opposing the application, the plaintiff has filed a Replying affidavit dated 21st February 2018 in which he depones that the defendant does not deny that he sold him the suit property. He further depones that the defendant put the plaintiffs in possession of the suit property and kept promising to transfer the property to the plaintiffs to no avail. He depones that while the plaintiffs were waiting for the transfer to be effected, the defendant sold the suit property to a third party and violently chased the plaintiffs away.
6. He depones that him and the 2<sup>nd</sup> plaintiff initiated criminal proceedings against the defendant subsequent to which the defendant agreed to refund the purchase price together with costs and interest to be taxed in this suit. He therefore maintains that the plaintiffs have an arguable cause of action against the defendant.

### **Issues for Determination**

7. From the foregoing, the following issues emerge for determination:
  - a) Whether the transaction between the plaintiffs and the defendant is void for failure to obtain consent of the Land Control Board.
  - b) Whether the plaintiffs are entitled to damages for breach of contract together with costs and interest.
  - c) Whether the plaintiff's suit should be struck out.

### **Analysis and Determination**

8. It is common ground that the defendant sold land to the plaintiffs in 2005. The said sale was pursuant to an agreement dated 3<sup>rd</sup> June, 2005. It is also common ground that even though the defendant put the plaintiffs in possession of the suit property soon after the sale, he did not obtain consent of the Land Control Board within the requisite period of 6 months with the result that the sale became null and void in terms of section 6(1) of the [Land Control Act](#). The said section provides as follows:
9. 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 controlled area;
  - b) The division 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 area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;
  - c) The use, sale, transfer lease, mortgage exchange, partition or 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



10. In the case of David Sirona Ole Tukai V Francis Arap Muge and 2 Others (2014) eKLR the Court of Appeal held as follows:

“The Land Control Act remains one of the most litigated statutes in Kenya, as a consequence, a consistent line of case law has emerged, both from this court and the High Court on the interpretation and application of various provisions of that statute. Those authorities cover a span of 47 years from the date of enactment of the Act in 1967 to this day. From the outset it is clear to us from the decision of the High Court that precipitated this appeal together with the recent decision of the court in Macharia Mwangi Maina & 87 Others V Davidson Mwangi CA No 26 & 27 of 2011 (Nyeri) are a departure from the previous decisions of the courts as we shall shortly demonstrate. The real question is whether that departure is based on sound legal foundation.....In our opinion, the learned judge did not give any serious reasons for departing from such consistent decisions, many of which were binding on him. All that we see is the taking of refuge in unclearly articulated notions of inequality, injustice, equity and natural justice.

To begin with it is difficult to comprehend the legal basis of the view that the court has power to ignore clear and express provisions of a statute under the guise of equity. We have already pointed out that in Karuri V Gitura, Simiyu V Watambamala (1985) KLR 852 and Wamukota V Donati (1987) KLR 280 this court held that the provisions of the Land Control Act were clear enough to leave no room for application of the principles of equity”

11. Similarly, in the instant suit the transaction is void for all purposes and cannot form the basis for a claim for general damages. Section 7 of the land Control Act provides that:

“If any money or other valuable consideration has been paid in the course of the controlled transaction, that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid but without prejudice to section 22.”

13. Section 22 states as follows:

“Where a controlled transaction or an agreement to a party to a controlled transaction is avoided by section 6, and any person

- a. Pays or receives any money or;
- b. Enters into or remains in possession of any land in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or imprisonment for a term not exceeding three months or to both such fine and imprisonment.”

14. From the foregoing it is clear that the only remedy available to the plaintiffs is the recovery of the purchase price which they have already been paid. Any other payments would be in breach of the provisions of section 22 of the Land Control Act.

15. For the above reasons I find that the defendant’s application has merit and I strike out the suit with costs to the defendant.



DATED SIGNED AND DELIVERED AT KERICHO THIS 6<sup>TH</sup> DAY OF APRIL, 2018.

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**J.M ONYANGO**

**JUDGE**

In the presence of:

1. Mr. Momanyi for the Defendant
2. Miss Ngetich for Mr. Koske for the Plaintiff
3. Court Assistant: Rotich

Amended and signed at Kericho this 16<sup>th</sup> day of April, 2018

**J.M ONYANGO**

**JUDGE**

