



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 205 OF 2016**

**STEPHEN THUKU KABEBE.....PLAINTIFF**

**VERSUS**

**SAID ATHMAN MZEE.....DEFENDANT**

**RULING**

1. The Defendant has filed an Application dated 1<sup>st</sup> September, 2016 together with a Preliminary Objection of the same date.
2. In the Preliminary Objection, the Defendant has averred that the contract of 2<sup>nd</sup> July, 2011, which is the basis of the suit, does not adhere to the provisions of Section 3(3) of the Law of Contract Act; that the contract is unenforceable for want of the consent of the Land Control Board; that any dispute was to be settled by way of arbitration and that this court does not have jurisdiction to hear and determine the suit.
3. In the Notice of Motion dated 1<sup>st</sup> September, 2011, the Defendant is seeking for an order that the suit should be struck out with costs.
4. The Application is premised on the grounds that there is no privity of contract between the Plaintiff and the Defendant; that the alleged agent of the Plaintiff had no legal contractual capacity to enable him execute the agreement of 2<sup>nd</sup> July, 2011 on behalf of the Plaintiff and that the alleged contract is unenforceable.
5. The advocates for the parties filed their respective submissions which I have considered.
6. The Defendant is seeking for an order striking out the suit because the contract that the parties entered into is unenforceable for want of the consent of the Board; that there is no privity of contract between the Plaintiff and the Defendant; that the alleged agent of the Plaintiff did not have the legal capacity to enter into the impugned agreement with the Defendant and that there is no valid agreement.
7. The Plaintiff has averred in the Plaint that he purchased land known as Lamu/Lake Kenyatta II/538 from the Defendant at an agreed price of Kshs. 950,000; that the Defendant was to follow up on the issue of the consent of the Land Control Board and that the Defendant entered into another agreement with a third party over the same parcel of land.
8. In his prayers, the Plaintiff is seeking for an order of specific performance. In the alternative, the Plaintiff wants to be refunded his money together with interest at the rate of 25% with effect from 2<sup>nd</sup>

July, 2011 until payment.

9. I have perused the record and noted that there is no Defence. In the absence of a Defence, it is presumed that the Plaintiff's assertions have not been controverted.

10. It is therefore rather odd that even before filing a Defence, the Defendant has sought to strike out the suit. How is that possible when the issues raised in the Plaintiff have not been controverted?

11. In any event, all the issues that have been raised in the Defendant's Preliminary Objection can only be raised at trial.

12. Even if there was no privity of contract between the Plaintiff and the Defendant, or the consent of the Board was never obtained, the Defendant will still have to refund the amount received from the Plaintiff, which is the alternative prayer in the Plaintiff.

13. In the circumstances, I find that the Defendant's Preliminary Objection and Notice of Motion dated 1<sup>st</sup> September, 2016 are incompetent and the same are dismissed with costs.

**DATED AND SIGNED AT MACHAKOS THIS .....2<sup>nd</sup> ..DAY OF MAY, 2017.**

**O.A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT MALINDI THIS ..12<sup>th</sup>... DAY OF MAY, 2017.**

**J.O. OLOLA**

**JUDGE**