



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT MOMBASA**  
**CIVIL SUIT NO.515 OF 2011**

**BAKARI KALAMU SULEIMAN.....PLAINTIFF**

**VERSUS**

**JOSEPH MUTUA MAKAU.....DEFENDANT**

**JUDGMENT**

1. The plaintiff sued the defendant vide his plaint dated 16<sup>th</sup> September 2011 and filed in court on 20<sup>th</sup> September 2011. The plaintiff pleaded that he is the registered owner of all the land known as **KWALE/UKUNDA/4083measuring 0.02HA**. That he leased a portion of this parcel to the defendant on 25<sup>th</sup> July 2003 on condition that he builds a permanent house for the plaintiff and pay a rent of Kshs.700 per month. The lease terms were later revised on 11<sup>th</sup> October 2004. Subsequently the parties entered into a sale agreement of the plot on 6<sup>th</sup> July 2007 for the sum of Kshs.400,000.00. It is the plaintiff's case that the contract was not concluded and he therefore moved the court seeking the following prayers:

**(a) The Defendant be ordered to return to the Plaintiff his Title Deed for the parcel of land known as Ukunda/Kwale/4083.**

**(b) That an order of injunction do issue against the Defendants or their agent or servants from trespassing or remaining on or entering or developing the whole or part of the parcel of land known as Ukunda/Kwale/4083 until this suit is heard and determined.**

2. The suit is defended vide a defence and counterclaim filed on 14<sup>th</sup> October 2011. The defendant denied that he never paid the consideration as pleaded by the plaintiff. The defendant pleaded in paragraph 4, 5 and 6 on how he made payments for the consideration giving a total of Kshs.389,000.00 paid towards the purchase of the suit property. It is the defendant's case that despite request, the plaintiff ignored, neglected and or refused to obtain the necessary statutory consent to transfer the property. That the plaintiff by his declaration, act or omission intentionally caused or permitted the defendant to believe that the sale would be effected and acting on this belief, he expended money for this purpose and caused erection of improvements on the suit property valued at Kshs.2,330,000

3. The defendant counter claimed that whilst he exercised due diligence and performed his obligations as per the agreement, the plaintiff blatantly failed to obtain the necessary consent. The defendant pleaded that he relies on the doctrine of estoppel, doctrine of legitimate expectation as a bona fide purchaser for value without notice as well as the doctrine of natural justice. The defendant is apprehensive the plaintiff will evict his tenants thus deprive the defendant of quite possession. He therefore asked the court to grant him the prayers sought in the counter-claim's as follows:

**i) A permanent injunction restraining the Plaintiff, his employees, servants, and/or agents from allowing the transfer, disposal, alienation of and/or further restraining the Plaintiff from selling the suit property to 3<sup>rd</sup> parties and/or interfering with/disrupting the Defendant's quiet enjoyment of and/or in any manner dealing with Plot No.Ukunda/Kwale/4083**

**ii) An order of declaration recognizing the Defendant herein as the rightful owner of Plot No.Ukunda/Kwale/204 after subdivision and as per the sale agreement between the Plaintiff and the Defendant.**

**iii) A mandatory order compelling the Plaintiff to co-operate in the necessary process of execution of the transfer documents in respect to Plot No.Ukunda/Kwale/4083 in favour of the Defendant and a consequent order to have the register of lands reflect the same once the Certificates are issued.**

4. After the close of pleadings and conclusion of all interlocutory applications, the parties' advocates agreed to proceed by way of written submissions. They orally agreed on the following facts. First that the defendant paid a sum of Kshs.389,000.00 leaving a balance of Kshs.11,000.00. That the land was subject to the land control board and no consent was obtained. Thirdly that the defendant developed the property with legitimate expectation the land would be transferred to him.

5. The parties also agreed that the following are the issues to be determined:

**1. Whether the sale agreement is null and void for lack of consent of land control board.**

**2. The defendant relies on the doctrine of estoppel.**

**3. The court to look at the prayers made by each of the parties.**

6. The plaintiff filed his written submissions on 21<sup>st</sup> November 2016. The defendant did not file theirs up to 23<sup>rd</sup> May 2017 when this matter was listed for judgment or subsequently thereafter. The plaintiff submitted on the provisions of section 6 and 7 of the Land Control Board Act Cap 302. The plaintiff continued that Section 22 of Cap 302 provided "**where a controlled transaction is voided by section 6 any person;**

*a. Pays or receive any money or*

*b. Enters into or remains in possession of any land in such circumstances as to give rise a reasonable presumption that the person pays or receive the money or enters or remains in possession in furtherance of the voided transaction or agreement; that person shall be guilty of an offence and is liable to a fine or imprisonment."*

The plaintiff submits that the defendant has ignored the above provision of the law. That the defendant cannot get the land but can only recover the monies paid. It is the contention of the plaintiff that the principle of legitimate expectation enunciated in the case of **INWARD VS BAKER (1966)1 ALLER 488** does not apply in Kenya as we have specific provisions through an Act of Parliament.

7. On the applicability of the principles of equity, the plaintiff relied on the decision of the Court of Appeal in the case of **HARAMBEE CO-OPERATIVE SACCO VS MAKIMIP ENTERPRISES LTD (1983) KLR 611** at page 612 where the Court of Appeal held that "**the Land Control Board Act was framed with recognition of equitable as well as legal doctrines. Therefore where the legislature states that transaction is void for all purposes unless consent of relevant Land Control Board is sought, the court cannot say consent is required as a matter of equity.**" Further that the defendant did not pray for refund of the sum of Kshs.389,000.00. The court cannot therefore make an order for the said sum to be paid/refunded. He therefore urged the court to enter judgment against the defendant as prayed in the plaint.

8. It is trite law under the provision of Section 107 and 108 of the Evidence Act that he who alleges must prove. The plaintiff has endeavored to prove the facts pleaded in the plaint through his submissions by citing the relevant sections of the statute and case law. The defendant on his part has failed to demonstrate by submitting on the issues raised on his defence and counter-claim as he did not file any submissions as agreed between the parties. Consequently, it is this court's finding that the issues raised by the plaintiff have not been contested. Since it was agreed between the parties that the sale was subject to the provision of the Land Control Board Act. Further that no consent was obtained within the timelines provided by the Act and the defendant did not apply for extension of that time. Accordingly, the transaction became void within the meaning of the provisions of Section 6 of the Land Control Act Cap 302. In the absence of contrary evidence presented, there is no reason why I should not enter judgment in favour of the plaintiff.

9. The prayer in the counter-claim seeking specific performance fails for lack of the necessary consent and is hereby dismissed. This court is guided by the decision of the Court of Appeal in **David Sironga Ole Tukai vs Francis ArapMuge & 2 Others (2014) eKLR** which discussed in detail the effects of section 6 of Cap 302 to controlled transactions. In this decision, the Court of appeal **THE LAW OF CONTRACT; Butterworths Common Law series, 3<sup>rd</sup> ed. 2007p.1000** which states as follows:

**“Where contracts of a specific type are expressly declared to be illegal by a particular statute, the contract is rendered void and unenforceable from its very inception or formation. There is no need to embark on any inquiry into the legislative intent as such for the simple reason that the legislative intent is evident from the express language of the statute itself.”**

The Court went further to cite the decision of Nyarangi J (as he then was) in **Simiyu v. Watambamala (1985) KLR 852 at p. 856** thus, **“ here the appellants had to obtain consent for the controlled transaction. They did not and so the agreement was void for all purposes including attempt to set up estoppel.”**The summary of this court of appeal decision is that they would be no basis to justify a void transaction as provided in the statute.

10. Since it is admitted that the sale transaction over the suit parcel was subject to land controlled board and none was obtained; it follows then that it became void. Consequently the defendant cannot maintain a counterclaim based on equitable remedy and or legitimate expectation to use and occupy the land. The plaintiff has submitted that the defendant did not pray for refund of the sums already therefore none should be awarded. However to avoid multiplicity of suits, this court makes an order under the provisions of Section 7 of Cap 302 that the sum of Kshs.389,000.00 agreed between the parties as having been received by the plaintiff be refunded to the defendant. Accordingly I make the following orders;

**i) The Defendant be and is hereby ordered to return to the Plaintiff his Title Deed for the parcel of land known as Ukunda/Kwale/4083.**

**ii) That an order of permanent injunction is hereby issued against the Defendants or their agent or servants from trespassing or remaining on or entering or developing the whole or part of the parcel of land known as Ukunda/Kwale/4083.**

**iii) The defendant to comply with prayer (ii) above as soon as he receives his refund and or within thirty days of the money being deposited in court.**

**iv) I also order each party to bear their respective costs of the suit.**

**Dated and signed this 12<sup>th</sup> day of June 2017**

**A. OMOLLO**

**JUDGE**

**Delivered at Mombasa on the 14<sup>th</sup> day of June 2017 by**

**C. YANO**

**JUDGE**