



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

**AT NAIROBI**

**ELC NO. 1442 OF 2014**

**CHRISANTUS BARASA BIFWOLI..... PLAINTIFF**

**VERSUS**

**1. NOAH KIPROTICH BUSIENEI**

**2. RITA JEPTOO BUSIENEI.....DEFENDANTS**

**JUDGMENT**

The plaintiff and the defendants entered into an agreement for sale dated 16<sup>th</sup> December 2012 under which the plaintiff agreed to buy and the defendants agreed to sell to the plaintiff all that parcel of land known as L.R No. Ngong/Ngong/3098 at a consideration of Kshs.11,000,000/- on the terms and conditions which were set out in the said agreement. It was a term of the agreement that the plaintiff would to pay a deposit of Kshs. 3,500,000/- on the execution of the agreement, a further deposit of Kshs. 1,000,000/-at the end of January 2013 and the balance amounting to Kshs. 6,500,000.00 in installments of Kshs. 500,000.00 between March 2013 and December 2013. The completion date of the agreement was agreed on to be 90 days from the date of the execution of the agreement or 14 days from the date of registration of the transfer of the suit property in favour of the plaintiff whichever came earlier. It was a further term of the agreement that on or before the completion date and upon payment by the plaintiff to the defendants of the purchase price in full, the defendants would deliver to the plaintiff the following documents;

- i. Original title deed for the suit property.
- ii. Instrument of transfer duly signed by the defendants.
- iii. Land Control Board Consent.
- vi. Three coloured passport size photographs.
- v. PIN certificates.
- vi. Executed Stamp Duty Valuation Form

The plaintiff brought this suit against the defendants seeking, a declaration that the plaintiff has acquired proprietary rights over the suit property, an order for specific performance of the said agreement for sale and an order for the extension of time within which an application for Land Control Consent is to be made. The plaintiff averred that despite having paid substantial portion of the purchase price to the

defendants and possession of the suit property having been handed over to him, the defendants refused to complete the agreement. The plaintiff averred that the defendants failed to have the Charge registered against the title of the suit property in favour of Standard Chartered Bank discharged so that the original title deed for the suit property which is in the custody of the said bank can be released to the plaintiff and also to obtain consent of the Land Control Board within the prescribed time. The plaintiff averred that the defendants refused and/or failed to deliver the completion documents under the said agreement for sale even after a demand and notice of intention to sue was served upon them.

The defendants were served with summons to enter appearance but failed to do so. Upon request by the plaintiff, interlocutory judgment in default of appearance was entered against the defendants on 26<sup>th</sup> February 2015 after which the suit was listed for formal proof on 16<sup>th</sup> January 2017. At the trial, the plaintiff gave evidence and did not call a witness. In his testimony, the plaintiff adopted his witness statement dated 11<sup>th</sup> November 2014 that was filed in court on 13<sup>th</sup> November 2014. In the said statement, the plaintiff reiterated the contents of the plaint which I have highlighted earlier in this judgment. The plaintiff also produced as exhibits the documents attached to his list of documents dated 11<sup>th</sup> November 2014 which was filed in court on 13<sup>th</sup> November 2014.

I have considered the plaintiff's case as pleaded and the evidence which was placed before the court in proof thereof. It is admitted that the agreement for sale between the plaintiff and the defendants was a controlled transaction within the meaning of the Land Control Act Chapter 302 Laws of Kenya. Section 6 of the Land Control Act provides that where no consent is granted by the Land Control Board for a controlled transaction, the transaction becomes void for all intents and purposes. Section 8 of the Land Control Act provides that an application for consent of the Land Control Board should be made within six months of the date of the transaction for which the consent is sought. It is admitted that no consent was sought and obtained in relation to the agreement for sale dated 16<sup>th</sup> December 2012 between the plaintiff and the defendants. It follows therefore that the agreement became void on 17<sup>th</sup> June 2013 at the expiry of six months from the date of the agreement. The proviso to section 8 of the Land Control Act gives this court power to extend time within which an application for consent is to be made even after the expiry of the six months period prescribed for making the application. In these proceedings, the plaintiff has sought specific performance of the agreement dated 16<sup>th</sup> December 2012 and extension of time within which to apply for the consent of the Land Control Board. As the saying goes, I am of the view that the plaintiff has put the cart before the horse. As I have stated above, the agreement between the plaintiff and the defendants became void on 17<sup>th</sup> June 2013. Until the time is extended for making the application for consent of the Land Control Board and the application is made and consent granted, the agreement remains void. It follows therefore that the proper procedure which should have been followed by the plaintiff was to file an application under section 8 of the Land Control Act for extension of time within which to apply for consent of the Land Control Board. For such application, the court is normally moved by way of a miscellaneous application. If the plaintiff's application succeeds, the plaintiff would then make an application for consent to the Land Control Board. The Land Control Board has the discretion to allow or reject the plaintiff's application. If the application is allowed and consent is issued then the plaintiff can move the court for specific performance of the agreement if the defendants refuse to complete the same.

As things stand now, the court has been called upon to order specific performance of a void agreement. Whereas, the court has power to extend time for the plaintiff to apply for consent of the Land Control Board, such extension cannot amount to consent of the said board so as to clothe the agreement in contention with legality.

In the final analysis and for the reasons I have given above, I find the plaintiff's suit incompetent. The order that commends itself to me to make in the circumstances is to strike out the suit so that the plaintiff can have opportunity to bring appropriate proceedings if he is so advised.

This suit is accordingly struck with no order as to costs.

**Delivered and Signed at Nairobi this 26<sup>th</sup> day of July, 2017**

**S. OKONG'O**

**JUDGE**

**Judgment delivered in open court in the presence of:**

**Mr. Kiprono for the Plaintiff**

**N/A for the Defendants**

**Catherine Court Assistant**