



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 203 OF 2016**

JOSEPH KAMAU KIGUOYA.....PLAINTIFF

VERSUS

ROSE WAMBUI MUTHIKE.....DEFENDANT

**JUDGMENT**

The message that this judgment must send to the plaintiff, and I do so with a lot of sympathy for him, is that a Court of law will not enforce an illegal agreement. Parties who spend colossal sums of money purchasing land should always set aside a fraction to seek proper legal advice before entering into such transactions because in some cases, the vendors have no intention of keeping their part of the bargain sometime with un-pleasant consequences to the purchasers. his case is a clear example of such persons and it is not surprising that in his submissions, counsel for the plaintiff, **MR. MURIGI**, has referred to the defendant as “*a difficult and un-co-operative character*”.

The facts in this case are not controverted because the defendant did not enter appearance nor file any defence.

On 21<sup>st</sup> October 2014, the plaintiff agreed to purchase  $\frac{3}{4}$  of an acre out of land parcel No. NGARIAMA/MERICHI/366 from the defendant. However, the land was registered in the names of the defendant’s deceased father **GIKURU GITITIRU** whose Estate was still the subject of a Succession Cause at **GICHUGU COURT**. The consideration was Ksh. 800,000 of which Ksh. 200,000 was paid at the time of executing the agreement and the balance was to be paid upon transfer. There is evidence from acknowledgment slips that the plaintiff eventually paid the balance on 1<sup>st</sup> March 2016. However, as is common in such cases, and even though the certificate of confirmation of grant was issued in the Succession Cause by which the defendant obtained 0.30 HA out of the said land, the defendant refused to execute the transfer forms or to attend the Gichugu Land Control Board for the necessary consent and instead demanded more money. The plaintiff therefore moved to this Court by his plaint dated 24<sup>th</sup> November 2016 and seeks the main order that the Executive officer of this Court be authorized to execute the transfer forms on behalf of the defendant who has adamantly refused to do so.

The defendant, as I have already stated above, did not enter appearance or file any defence and so the matter came up before me on 26<sup>th</sup> September 2017 when the plaintiff repeated what I have already summarized and also asked me to adopt his witness statement and the filed documents as his evidence.

I have considered the plaintiff’s un-controverted evidence and the submissions of his counsel **MR. MURIGU**.

It is clear that the transaction subject of this suit required the consent of the Land Control Board. In his

statement which he asked me to adopt as part of his evidence, the plaintiff has stated as follows:

***“After the sub-division when the defendant was given her portion, she refused to transfer the land to me and started demanding more money from what we had agreed in our sale agreement. That we further made an application for transfer through the Gichugu Land Control Board but the defendant refused to attend the transfer board thus provoking me into going to Court to have the Court execute the transfer documents”.***

The sale agreement between the parties does not refer to any requirement for the consent of the Land Control Board to be obtained. It is clear from the plaintiff’s own testimony, however, that the transaction was subject to **Section 6 (1) of the Land Control Act** which provides as follows:

***“Each of the following transactions that is to say –***

***(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal or dealing with any agricultural land which is situated within a land control 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 less than twenty acres into plots in an area to which the Development and use of Land (Planning) Regulations, 1901 (L.N 5.6 (1961) for the time being apply;***

***(c) the issue, sale, transfer, mortgage or any 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”.*** Emphasis added

**BLACK’S LAW DICTIONARY 9<sup>TH</sup> EDITION** defines the term void as follows:

***“of no legal effect; null”***

And with regard to a contract, the same Dictionary states as follows:

***“A contract is void ab initio if it seriously offends law or public policy”.***

That brings me back to where I started this judgment. Since the agreement between the parties was subject to the consent of the Land Control Board being obtained in terms of the provisions of **Section 6 (1) of the Land Control Act**, and in the absence of such consent, the agreement became null and void ab initio and cannot therefore be enforced by this Court. In **MISTRY AMAR SINGH VS KULUBYA 1963 E.A 408**, the Court cited the following passage from **SCOTT VS BROWN, DOERING, MC NAB & CO. (3), (1892) 2 QB 724:**

***“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principal which is not confined to indicate offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves illegality, the Court ought not to assist him”***

See also **STANDARD CHARTERED BANK VS INTERCOM SERVICES LTD & OTHERS 2004 e K.L.R.** As the transaction between the parties was void ab initio, it follows that this Court cannot order

the Executive officer of this Court to sign any transfer documents on behalf of the defendant as sought in the plaint. To do so will amount to enforcing an illegal contract. All that the plaintiff is entitled to is a refund of the purchase price as provided under **Section 7 of the Land Control Act**. However, that is not the remedy that he seeks. He will have to file a suit for such refund subject always to the ***Law of Limitation of Actions***. His counsel has submitted that the plaintiff took possession of the land and has extensively developed it by growing coffee and other crops as well as keeping livestock. And that is why I also expressed my sympathy to the plaintiff for this unfortunate situation in which he finds himself. Unfortunately for the plaintiff, even equity cannot come to his aid in the circumstances of this case as is now clear from the case of **DAVID SIRONGA OLE TUKAI VS FRANCIS ARAP MUGE & OTHERS C.A CIVIL APPEAL No. 76 of 2014 (2014 e K.L.R)** where the Court stated that “.....***granted the express, unequivocal and comprehensive provisions of the Land Control Act, there is no room for the Courts to import doctrines of equity into the Act***”.

Under the provisions of **Section 22 of the Land Control Act**, it is clear that by remaining on the land subject of this suit, the plaintiff is in fact guilty of a criminal offence for which he can be fined or committed to jail. Those are the harsh consequences of the failure to comply with the provisions of the ***Land Control Act***. It is the responsibility of this Court to apply the law guided by judicial precedent as well.

The up-shot of the above is that the plaintiff's suit is dismissed with no order as to costs,

**B.N. OLAO**

**JUDGE**

**20<sup>TH</sup> DECEMBER, 2017**

Judgment dated, delivered and signed in open Court this 20<sup>th</sup> day of December 2017 at Kerugoya

Mr. Chomba for Mr. Murigu for the Plaintiff present

No appearance by the Defendant

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**20<sup>TH</sup> DECEMBER, 2017**