



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELC CASE NO. 12 OF 2013**  
**(FORMERLY 2133 OF 2000 NAIROBI)**  
**(FORMERLY ELC NO. 186 OF 2014)**

**ELIUD TIMOTHY MWAMUNGA.....PLAINTIFF/APPLICANT**

**V**

**BAMBURI PORTLAND CEMENT.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant moved the Court under Order 51 rule 1 and Order 2 rule 15 asking the Court to strike out the amended defence and counter-claim dated 20<sup>th</sup> June 2008 and judgement be entered for the Plaintiff as prayed in the plaint.
2. The application is based on the grounds enumerated on the face of it and the affidavit in support sworn by Mr Kibe Mungai advocate for the applicant. The applicant contends that the defendant has no legal or beneficial interest on the suit property to warrant his occupation, use and enjoyment of it. Secondly that the purported sale agreement dated 7<sup>th</sup> December 1989 is void for want of the Presidential exemption under section 24 of the Land Control Act.
3. In the affidavit in support, Mr Mungai deposes that the applicant is the registered owner of plot No L.R MN/111/2388 and L. R No. MN/111/2392. He deposed that the plaintiff offered to sell these parcels of land at Kshs 11 Million which price the defendant failed to pay in full. Consequently the Defendant has no justification to impeach the Plaintiff's titles. Further that the sale transaction is void for absence of the Presidential exemption.
4. Further to what is contained in the application, the applicant submitted that the relevant Land Control Board consents were not obtained and the Defendant did not apply to Court under section 8 for extension of time to get consent. That there is nothing in the pleadings before Court challenging the legal effects of section 8 and 24 of the Land Control Act. Therefore the orders sought should be granted and the plaintiff's suit be set down for hearing on formal proof. The applicant cited cases of **Hirani Githire vs Wanjiku Munge (1976 – 80) 1KLR**, **Kahia vs Nganga (2004) 1EA 75** and **BTB Insurance Agencies vs Nitin Shah & 2 Others (2006) eKLR** to support his application.
5. Mr Wanyoike in opposing the motion relied on the grounds of opposition filed. He submitted that when seeking an order "*where there is no reasonable defence*", no affidavit should be attached therefore this application is defective. Secondly that the supporting affidavit should be struck out because it is sworn by an advocate on the most contentious issues at paragraph 4 and 6. Mr

Wanyoike submits that the defendant does not admit consent was not obtained and that the application was filed after six years which is undue delay.

6. He continued that the defence raises several triable issues inter alia that the suit is time barred. He cited two case laws of **Moi University vs Vishwa Builders (2010) eKLR** and **Francis K. Bii vs Kaisugu (Kenya) Ltd (2016) eKLR** in support of his submissions. The defendant urged the Court to dismiss the application.
7. The orders sought herein are premised on non-compliance with section 6 (1) of the Land Control Act. The plaintiff pleaded in the plaint that the suit properties were agricultural land therefore fell under the confines of the Land Control Act. In paragraph 6 of the plaint, the applicant pleads that the transaction did not receive the envisaged Presidential exemption under section 24 of the Act. From the pleadings, the applicant gave the defendant, *“exclusive permission/licence and full liberty to enter upon the said property to search, dig work and obtain by escalation and quarrying open to the daylight all the strata seams and beds of limestones and other minerals from that part of the said property edged red on the map ...”*
8. In paragraph 4 of amended plaint, it is pleaded that the defendant expressed wish to purchase the land under licence agreement plus additional land for purposes of quarrying for limestone and other minerals it required for manufacture for cement. The pleadings sets out the purpose for which the licence agreement and the subsequent sale that was drawn. In the annexed certificate of title it begs the question whether the nature of the registration of this title (regime of Law) and the activities undertaken therein can be classified as “agricultural activities or agricultural land for which the provisions of section 6 (1) of the Act would apply.
9. For that question to be answered, it would be imperative for evidence to be adduced. In paragraph 17 of the amended plaint, the Plaintiff pleaded that the only transactions exempted were in respect to certain acreages of unsurveyed L. R No 2389 and not the suit property. The defendant denied the contents of paragraph 17 and 18 of the amended plaint. He pleaded that they were never made aware of the gazette notice therefore the plaintiff is estopped from relying on it.

10. In the affidavit in support of this application, the gazette notice referred to in paragraph 17 of the amended Plaint and ground (e) of the application was not annexed. This Court can not authenticate for a fact whether such gazette notice was published and if it excluded the suit properties. Again this is an issue that can be determined by adduction of evidence and not through summary procedure in an application such as this.

11. The defendant have also submitted that they raised the defence of limitation actions. In a nutshell, there are several issues that should be determined in a just and fair manner if the matter proceeds to trial. This case is not as clear as the cases referred to in support of the motion. In the result, I find no merit in the motion dated 10<sup>th</sup> July 2014 and hereby dismiss it with costs to the defendant.

**Ruling and delivered at Mombasa this 13<sup>th</sup> day of May 2016**

**A. OMOLLO**

**JUDGE**