



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

HCCC NO. 663 OF 2005

MOHAMED SIAKA ALI (through

Mohamed Shaibu Shosi – personal legal Representative).....PLAINTIFF

VERSUS

SUNPALM LIMITED1ST DEFENDANT

ISSA TIMAMY T/A TIMAMY

& CO. ADVOCATES..... 2ND DEFENDANT

STEWART MADZAYO T/A MADZAYO

& CO. ADOVATES.....3RD DEFENDANT

CHIEF LAND REGISTRAR4TH DEFENDANT

JUDGMENT

Background Facts and Pleadings

The Plaintiff vide a plaint dated 2nd June 2005 which was subsequently amended on 21st June 2005 filed the present suit and prays for the following orders:-

1. The registration of the suit premises Land Parcel Number **Kilifi/Jimba/669** in favour of the 1st defendant be declared null and void and be cancelled under the provisions of the Land Control Act and also on the grounds that the said registration in favour of the first defendant was obtained fraudulently.
2. The suit premises Land Parcel Number **Kilifi/Jimba/669** purportedly registered in favour of the 1st defendant be restored to the plaintiff under the provisions of the Land Control Act and the register be rectified under the Registered Land Act.
3. The 1st Defendant its agents employees and/or its servants be ordered to vacate the suit premises forthwith.
4. Costs of the suit.
5. Such other or further relief be granted as this Honourable court may deem fit and just to grant in the unique circumstances of this case.

The Plaintiff claims that by an agreement of sale dated 22nd November 1996 (though the annexed copy of agreement is dated 22nd October 1996) he agreed to sell to the 1st Defendant his parcel of land number **Kilifi/Jimba/669** measuring 8.1 acres at Kshs.1,000,000/- per acre. The plaintiff states the 1st, 2nd and 3rd defendants deliberately caused a vague agreement of sale to be prepared with the intention of defrauding the plaintiff of his parcel of land. The plaintiff denies that he ever executed any transfer instrument in regard to his parcel of land in favour of the 1st Defendant and asserts that the signature that appears on the instrument of transfer was not his signature.

The plaintiff avers that he and his family after signing the agreement together with the 1st Defendant's managing Director and her Advocate on 24th October 1996 appeared before the Malindi Land Control Board for the Board to consider the application by the plaintiff to sell the parcel of land number **Kilifi/Jimba/669** to the 1st Defendant but the application was deferred because the plaintiff had not been fully paid the purchase price.

The plaintiff further contends that the application for the Land Control Board which was deferred on 24th October 1996 was never reconsidered by any other subsequent monthly Land Control Board or by a special Land Control Board and thus no consent was ever given by the Malindi Land Control Board for the sale and transfer of the plaintiff's said parcel of land. The plaintiff thus contends the Land Board consent used to effect the transfer of the plaintiff's parcel of land to the 1st Defendant was not genuine and/or valid. It is the plaintiff's contention that the 1st, 2nd and 3rd Defendants acted in collusion to fraudulently cause the plaintiff's parcel of land **Kilifi/Jimba/669** to be transferred illegally and unlawfully to the 1st Defendant by using forged and/or fraudulently obtained documents of transfer and letter of consent from the Land Control Board.

The 1st Defendant filed a defence dated 4th July 2005 on 5th July 2005 and denies the plaintiff's allegations of fraud set out in the plaint. The 1st Defendant maintained the agreement of sale between the 1st Defendant and the plaintiff was lawful and that the 1st defendant was paid the full purchase price. The 1st defendant avers that the plaintiff's suit is an abuse of the process of the court and should be dismissed.

The 2nd Defendant filed his defence dated 13th March 2007 on 14th March 2007. The 2nd Defendant denies all the allegations of fraud attributed to him in the plaint and further denies he was professionally negligent as alleged in the plaint. The 2nd Defendant denies that he had any knowledge in regard to how the execution of the transfer was procured from the plaintiff and/or how the Land Board Consent was obtained. The 2nd Defendant denies that he fraudulently and/or corruptly presented or caused the registration of any forged instrument of transfer and contends that the plaintiff's suit raises no cause of action against the 2nd Defendant and that the same is bad and should be struck out with costs.

The suit against the 3rd Defendant was withdrawn by the plaintiff while the 4th Defendant, the Chief Land Registrar, never appeared and did not file any defence. The contest therefore in this suit is between the plaintiff on one part and the 1st and 2nd Defendants on the other part.

The original plaintiff in this case died on 5th August 2005. An application to have one **Mohamed Shaibu Shosi** appointed as legal representative of the plaintiff was on 30th October, 2007 dismissed by **Hon. Lady Justice Rawal** (as she then was) on a technicality but she granted leave for a fresh application to be filed within seven days of her ruling. The plaintiff filed a fresh application dated 31st October 2007 seeking leave to substitute the deceased plaintiff with the legal representative one **Mohamed Shaibu Shosi**. This application was heard and was granted by **Hon. Lady Justice M.A. Ang'awa** on 4th March 2008. That although the 2nd defendant had given and served notice to appeal the ruling by **Hon. Lady Justice Rawal** to the Court of Appeal, this notice and/or the appeal was not pursued.

The court on the 28th June 2013 dismissed the plaintiff's application dated 13th October 2012 where the

plaintiff sought to have the defence filed by the 1st Defendant struck out under the provisions of Order 2 Rule 15 of the Civil Procedure Rules. The court vide the same ruling directed the parties to comply with the provisions of Order 11 of the Civil Procedure Rules within 30 days from the date of the ruling whereupon the court would issue directions for the hearing of the suit on a priority basis. Following several court attendances the plaintiff and the 1st and 2nd Defendants were certified to have complied with Order 11 of the Civil Procedure Rules while the suit against the 3rd Defendant was withdrawn. The 4th Defendant despite being afforded the opportunity to do so did not comply with Order 11 of the Civil Procedure Rules and did not take any active part in the proceedings.

The matter was eventually fixed for hearing before me on 18th November 2014 when the plaintiff, the 1st defendant and the 2nd defendant were represented by their respective Advocates. **Mr. D. P. Mugambi Advocate** for the plaintiff stated that he did not wish to call any witness and indicated he would entirely rely on the documents tendered in evidence by the plaintiff and the defendants. He stated that the legal representative who substituted the original plaintiff was a minor when the transaction giving rise to the present suit took place and he could therefore not testify on the matters relating to the transaction. **Mr. Mugambi Advocate** stated the plaintiff's case related to documents which the plaintiff contended were either illegal and/or forgeries and were invalid having been procured unprocedurally.

Mr. Kakhule Advocate for the 1st Defendant sought an adjournment to enable his witness who was not in court to attend and further sought leave to file a witness statement. **Mr. Mugambi Advocate** for the plaintiff opposed the application for adjournment but the court granted the adjournment sought by the 1st Defendant and granted leave to the 1st Defendant to file a witness statement on terms that the plaintiff will have leave to reopen his case and file any further documents as he may deem necessary upon being served with the 1st Defendants set of documents. The court fixed the suit for further hearing on 23rd March 2015.

On 23rd March 2015 **Mr. Mugambi Advocate** reiterated that he would not call any witness and he would rely on the filed documents. Ms **Rakama Advocate** for the 1st Defendant elected not to offer any witness and closed the 1st Defendant's case. **Mr. Odero Advocate** for the 2nd Defendant equally elected to offer no witness to testify on behalf of the 2nd Defendant and closed the 2nd Defendant's case. The case therefore became one that fell to be determined on the basis of the filed witness statements and bundles of documents.

The court in the premises invited the parties to file their closing written submissions. The plaintiff filed his submissions dated 25th March 2015 on 26th March 2015. The 1st Defendant's submissions dated 15th April 2015 and the 2nd Defendant's submissions also dated 15th April 2015 were filed on 20th April 2015.

Issues for determination

No statement of agreed issues were filed by the parties for determination by the time the suit was set down for hearing and the court therefore under the provisions of Order 15 rule 2 will frame the issues for determination. Having considered the parties pleadings, the documents filed by the parties and the submissions by the parties the court frames the issues for determination as follows:-

- i. Whether there was a lawful agreement for sale between the plaintiff and the 1st Defendant of Land Parcel **Kilifi/Jimba/669** and if so whether the terms thereof were honoured by the defendants.
- ii. Whether any valid consent for the transfer of land parcel **Kilifi/Jimba/669** was obtained from the Malindi Land Control Board under the provisions of the Land Control Act Cap 302 Laws of Kenya.
- iii. Whether the transfer of land parcel **Kilifi/Jimba/669** to the 1st Defendant was fraudulent, irregular and/or illegal and therefore null and void and should be cancelled.
- iv. By whom the costs of the suit are payable?.

Evidence by the Parties

As stated above no party called any oral evidence in this matter and all the parties elected to rely on their filed documents in support of their respective cases. Although the 1st and 2nd Defendants filed witness statements they did not opt to give evidence and therefore be cross examined. Their evidence as per their witness statements was untested in cross-examination and their evidential value hence is diminished. It is significant however to note that the 1st Defendant through its director **Eleonora Cozzi** under paragraph 5 of her witness statement dated 2nd December 2014 adopts and reiterates the statement of the 2nd Defendant, **Issa Timamy** and the documents filed by the 2nd Defendant as the documents of the 1st Defendant. Thus in determining the issues in this case the court will have to rely on the documents filed by the plaintiff and the 2nd Defendant. No party objected to the production of any of the documents on record and hence the court will be entitled to look at and consider all the documents in making any determination of the issues.

The plaintiff submitted the following documents to support his case:-

- i. Certificate of official search of title number **Kilifi/Jimba/669** dated 17th June 2013 which shows **Sunpalm Limited** was registered as proprietor on 10/1/1997.
- ii. Sale agreement between **Mohamed Siaka Ali** and **Sunpalm Limited** dated 22/10/1996.
- iii. Transfer of **Kilifi/Jimba/669** dated 22/10/1996 from Mohamed **Siaka Ali** to **Sunpalm Limited**.
- iv. Copy of Minutes of Malindi Divisional Land Control Board dated 24/10/1996.
- v. Application for registration of Transfer of title number **Kilifi/Jimba/669** submitted by **Timamy & Company Advocates**.
- vi. Letter dated 9/1/1997 by **Timamy & Company Advocates** to the Land Registrar, Kilifi forwarding the Transfer and the supporting documents for registration.
- vii. Copy of certified register of title number **Kilifi/Jimba/669** as on 15/7/2004.

On the part of the 2nd Defendant the following documents were submitted:-

1. Agreement for sale dated 22/10/1996 between the plaintiff and 1st Defendant.
2. Copy of letter of consent dated 24th October 1996 to the plaintiff together with copy of presidential consent/approval of 7/1/1997.
3. Presidential consent dated 7th January, 1997.
4. Transfer dated 22nd October 1996.
5. Letter dated 29/10/1996 from **Timamy & Company Advocates** to **S.M. Madzayo Advocate** advising that as the suit property was on the beach front, presidential consent to the transfer was required.
6. Letter dated 7/11/1996 to **Mohamed Siaka** forwarding a cheque for Kshs.1,240,000/- as part payment of purchase price.
7. Letter of 11th November, 1996 from the provincial commissioner, Coast Province to **M/S S.M. Madzayo & Madzayo Advocates** advising on the requirements for obtaining Presidential consent for Transfer/Lease of beach plots.
8. Letter dated 9th January 1997 from **Timamy & Company Advocates** to the Land Registrar Kilifi, forwarding documents for registration.
9. Copy of title deed for **Kilifi/Jimba/669** dated 18th October, 1996.

(10) Application for registration of transfer dated 9th January 1997.

(11) Report dated 22nd September 2005 from the Documents Examiner.

Submissions by the Plaintiff

The Plaintiff in the filed submissions submitted that the Malindi Divisional Land Control Board did not

grant its consent to the transfer of the suit land on 24th October 1996 stating that the Board on that date deferred the application in regard to transfer of land parcel **Kilifi/Jimba/669**. The plaintiff submits the consent signed by one **LUCAS KIMUTAI KOSILBET** is not genuine since the person who chaired the Board meeting of 24th October 1996 the D.O.I was one **N.O. HIRIBAE** and the application was not approved but was deferred as per the minutes of that Board meeting which under minute 8-**Kilifi/Jimba/669- 3.25Ha** (8.00Acres) **proposed Sale Mohamed Siaka Ali to Sunpalm Ltd** Kshs.2,000,000 LCR NO. M/1852 it is noted thus:-

“The application was discussed at length the board deferred the application for court order to be heard first”.

Clearly therefore no consent was granted on 24th October 1996. There is no evidence that the application was reconsidered at a subsequent date. The deferment was tied to some court order to be heard first as to the minute and there is no indication what the court order related to. For this reason the plaintiff submits the consent allegedly signed by **LUCAS KIMUTAI KOSILBET** is fraudulent and not genuine and at any rate the said **LUCSA KIMUTAI KOSILBET** has sworn an affidavit and denies signing the same.

The Plaintiff further submits the directors of the purchaser company having been foreigners the Land Control Board could not lawfully grant any consent to the transaction and the application for consent ought to have been rejected outrightly under the provisions of section 9 of the Land Control Act Cap 302 of the Laws of Kenya.

Section 9(1) (c) of the Land Control Act provides thus:-

9. (1) In deciding whether or not to grant or refuse consent in respect of a controlled transaction, a Land Control Board shall:-

(c) refuse consent in any case in which the land or share is to be disposed by way of sale, transfer, lease, exchange or partition to a person who is not-

- i. A citizen of Kenya; or**
- ii. A private company or co-operative society all of whose members are citizens of Kenya; or**
- iii. Group representatives incorporated under the Land (Group Representatives) Act; or**
- iv. A state corporation within the meaning of the State Corporation Act.**

The plaintiff submits that the 1st and 2nd Defendant knew that the Land Board did not accord its consent to the sale transaction on 24th October 1996 but rather deferred consideration of the application. Additionally both the 2nd Defendant and the 3rd Defendant being the Advocates who represented the parties in the sale transaction new or ought to have known the 1st Defendant Company was owned by persons who were not Kenyan Citizens and accordingly could not by virtue of section 9(1) (c) of the Land Control Act be eligible to obtain consent from the land Control Board in regard to any controlled transaction on account of being foreign owned.

The plaintiff further submits the only available option for the 1st Defendant was to seek and obtain exemption from the provisions of the Land Control Act under Section 24 of the Act which was not done. The consent that was purportedly issued in regard to the transaction was null and void as the Land Board had no power or jurisdiction to issue the same. Consequently the plaintiff argues the transaction of sale was a nullity for want of compliance with the provisions of the Land Control Act and the transfer of the parcel of land to the 1st defendant on the basis of the impugned consent should be nullified and the title restored to the name of the plaintiff. The plaintiff has referred the court to various authorities notably the cases of **Simiyu –vs- Watambamala (1985) KLR 852** where the court of Appeal held that lack of land board consent renders such transaction void for all purposes. The Court of Appeal held likewise in the case of **Cleopas Wasike –vs- Swala (1985) e KLR**. The Court of Appeal further in the case of **Simon Towett Maritim –vs- Jotham Muiruri Kibaru (2006) eKLR** held that where registration of a transfer was effected through the use of forged or fraudulently obtained documents such registration could not be

sustained.

Submissions by the 1st Defendant

The 1st Defendant submits that under the agreement of sale clause (9) (c) it was the obligation of the vendor, the plaintiff herein, to obtain all consents necessary for the sale transaction to go through. The 1st Defendant states that the plaintiff and/or his advocates obtained the consent of the Land Control Board as well as the Presidential Consent and forwarded the same to the 1st Defendant's Advocates, the 2nd Defendant herein and thus avers that if at all there was any fraud in procuring the consent as alleged by the Plaintiff, the 1st Defendant and its advocates were blameless. The 1st Defendant submitted the sale agreement was binding between the plaintiff and the 1st Defendant and the court ought not to interfere with the same and for this submission the 1st Defendant relied on the case of **National Bank of Kenya – vs- Pipe plastic Samkolit & Ano. (C.A. NO. 95 of 1999)** where the appellate Judges held:-

“-----A court of law cannot re write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

The 1st Defendant has further submitted that the land parcel **Kilifi/Jimba/669** was properly transferred to the 1st Defendant in terms of the agreement for sale dated 22nd October 1996. The 1st Defendant asserts in its submissions that the plaintiff was paid the full purchase price of Kshs.5,000,000/- although it is not clear how or when the sum of Kshs.3,100,000/- was paid to the plaintiff as it is unsupported. The 1st Defendant simply states the sum of Kshs.3,100,000/- was paid directly to the plaintiff on his insistence.

The 1st Defendant submits that the suit property was properly registered after the relevant completion documents were forwarded by the plaintiff's Advocates to the 1st Defendant's Advocates. The 1st Defendant states that the plaintiff's allegations that he was not paid the full purchase price and/or that he did not execute the transfer were investigated and were found to be untrue as the witness statement by **Mr. John Kariuki**, a Senior superintendent of Police who carried out the investigations attests.

On the assertion by the plaintiff that the letter of consent was fraudulently obtained the 1st Defendant submits that it was the duty of the plaintiff to obtain the consent and that it is the plaintiff's advocates who furnished the consent to the 1st Defendant's Advocates. The 1st Defendant contends that the plaintiff has not proved to the required standard that the 1st Defendant participated in the perpetration of any fraud in procuring the consent. The 1st Defendant states a handwriting expert has confirmed that the letter of consent was signed **Mr. Kosilbet** who was the District Commissioner and as such, Chairman of the Malindi Land Control Board and no evidence was tendered by the plaintiff to prove the consent was not genuine. The 1st Defendant states the mere production of the copy of the Land Board minutes cannot suffice as proof of fraud. The 1st Defendant refers the Court to the decision of the Court of appeal in the case of **Peterson Mokaya Abuta –vs- Perid Moraa (2013) eKLR** where the Judges commenting on the Standard proof where fraud is alleged stated thus:-

“We have also considered the evidence that was produced before the learned Judge. On the allegation that documents were forged the learned Judge held that the appellant failed to prove fraud as required in law and cited the case of Koinange & 13 others –vs- Koinange (1968) KLR 23 where it was held that allegations of fraud must be strictly proved on a standard below beyond reasonable doubt but above the usual standard in Civil proceedings”.

The Judge's upheld the Judges finding that on the evidence adduced no fraud was established to invalidate the documents that were used to transfer the land the subject of the suit to the Respondent in the appeal.

The 1st Defendant in the present case submits the plaintiff has not proved the land transfer and the consequent registration of the 1st Defendant as owner of the suit property was fraudulently procured. The 1st Defendant avers that the failure by the personal legal representative of the original plaintiff to testify means that no evidence has been produced and/or adduced on behalf of the plaintiff and that the documentary evidence relied upon by the plaintiff has not in reality been produced in evidence. The 1st Defendant thus states the plaintiff did not adduce any evidence which the 1st Defendant would be required to rebut and therefore the plaintiff's case ought to be dismissed.

Submissions by the 2nd Defendant

The thrust of the 2nd Defendant's submissions is that the plaintiff had failed to prove his case on a balance of probabilities. The 2nd Defendant relies on the old adage that "**he who alleges must prove**". The 2nd Defendant pegs his submissions on the fact that the plaintiff tendered no oral evidence and contends that without any evidence having been adduced in support of the plaintiff's claims and assertions in the plaint against the 2nd Defendant the plaintiff's claim against the 2nd Defendant must fail. The 2nd Defendant places reliance on Section 107 of the Evidence Act, Cap 80, Laws of Kenya which provides as follows:

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The 2nd Defendant asserts that the burden of proof in this case was on the plaintiff to establish the facts and contentions pleaded in the plaint on a balance of probabilities and as the plaintiff did not tender and/or adduce any evidence against the 2nd Defendant the suit against the 2nd Defendant should be dismissed with costs.

The 2nd Defendant states that the plaintiff's case against the 2nd Defendant was based on fraud, illegality, unethical conduct and professional negligence yet no evidence was tendered or led to prove these allegations against the 2nd Defendant. The 2nd Defendant referred the court to the cases of **Ratiala Goedhambai Patel –vs- Lalji Maknji (1957) EA 314 and Mpungu & Sons Transporters Ltd –vs- AG and Another (2006) IEA** to support his submissions that where fraud is alleged the burden of proof is heavier than on a balance of probabilities.

The 2nd Defendant further submits the copies of documents relied upon by the plaintiff in his submissions were not produced in evidence as the plaintiff did not testify and hence the court ought not to consider them as evidence. The 2nd Defendant argued the documents ought to have been produced and proved in evidence in accordance with the rules of evidence and cited section 35, 64 and 65 of the Evidence Act in support of his submissions. The 2nd Defendant referred to the court of Appeal decision in the case of **Prafulla Enterprises Ltd –vs- Nonake Investments Ltd –vs- Another (2014) 2EA 263** to illustrate the fact that even where documents are produced by consent the contents ought to be proved by calling witnesses. The Judges in the case held:-

“The fact that documents are produced by consent of the parties is not in itself proof of the contents of these documents. It only means that the parties agree that those are the documents the contents of which are to be canvassed, or are in controversy but as to proof of the same contents, witnesses are required to be produced and to be examined and cross-examined on the same contents unless the parties categorically admit the contents. Here the contents as to which was fake survey map and which was genuine were not admitted and so had to be proved and such proof never met the required standard”.

On the issue of general and punitive damages for non user of the property the plaintiff submitted upon in

his submissions the 2nd Defendant submitted that these were not pleaded for in the plaint and therefore cannot be considered and/or awarded by the court. The 2nd Defendant submits the plaintiff cannot adduce evidence through the final submissions and refers to the cases of **Ng'anga & Another –vs- Owiti & Another (2008) IKLR(EP) Galaxy paints Co. Ltd –vs- Falcon Guards Ltd (2000) 2 EA 385** and **Nairobi City council –vs- Thabiti Enterprises Ltd (1995-98) 2 EA 231** to support the submission that the court lacks the jurisdiction to deal with any issues that do not flow or arise from the pleadings of the parties. As the plaintiff had not by his pleadings pleaded damages for non user of the suit property the 2nd Defendant urged the court to decline the invitation to consider and/or deal with the issue.

Analysis of the evidence and determination of the issues

The 1st and 2nd Defendant have in their written submissions taken the position that since the plaintiff did not give any oral evidence during which time he would have produced the documents he wished to rely on, there is presently no evidence before the court for the court to evaluate in favour of the plaintiff to reach any determination on the claims by the plaintiff. The 1st and 2nd Defendant urges the court to find all the allegations by the plaintiff not proved since no evidence has been tendered in support thereof.

Under Order 3 rule 2 (d) of the Civil Procedure Rules a plaint is supposed at the time of filing to be accompanied inter alia with copies of documents to be relied on at the trial by the Plaintiff. Equally under order 7 Rule 5(d) of the Civil Procedure Rules a defence and counter claim is supposed to be accompanied by copies of documents to be relied on at the trial by the Defendant. The court is at the pretrial directions and conferences under Order 11 Rule 3(1) (a) of the Civil Procedure Rules required to consider compliance with Order 3 rule 2 and Order 7 rule 5 before certifying the suit ready for hearing. This matter came up for pre trial directions a couple of times and no party objected to the production of any of the documents that the parties had identified and filed in court. The ELC Practice directions Gazetted on 28th July 2014 direction 28 (viii) envisages situations where cases are determined on the basis of the documents filed by the parties.

The plaintiff in the present matter made it clear that he wished to place reliance on the documents that had been submitted by the parties. There was no objection by the 1st and 2nd Defendant to the production of any document tendered on behalf of the plaintiff in support of his case. While the documents were admissible in evidence it did not mean the contents where in dispute were admitted. My view therefore is that once the documents were filed by the parties in compliance with Order 11 of the Civil Procedure Rules they became part of the record and the court is entitled to consider them as part of the evidence. The Agreement for sale dated 22nd October 1996 and the letter of consent dated 24th October 1996 are not denied by the parties and the issue as relates to the agreement for sale is whether the terms thereof were complied with by the 1st Defendant as relates to payment of the full purchase price. As regards the letter of consent the issue is whether the same was validly and regularly issued under the provisions of the Land Control Act, Cap 302 Laws of Kenya.

The plaintiff admits having signed the agreement for sale dated 22nd October 1996. The plaintiff, the 1st Defendant and the 2nd Defendant have all exhibited the agreement for sale by including the same in their respective bundles of documents and hence the existence of the agreement cannot be denied. In the premises it is my finding that there was a lawful agreement entered into between the plaintiff and the 1st Defendant where by the plaintiff agreed to sell the suit property **Kilifi/Jimba/669** to the 1st Defendant. The plaintiff has pleaded that the 1st Defendant did not pay the full purchase price for the suit property a plea that the 1st Defendant disputes stating that the plaintiff was fully paid and relies on the witness statement of **John Kariuki**, a Senior Superintendent of police who states he investigated the claims by the plaintiff and the investigations revealed the plaintiff was fully paid. The evidence and manner of payment of the purchase price is scanty. The agreement of sale acknowledges payment of Kshs.660,000/- to the plaintiff while a cheque payment for Kshs.1,240,000/- was paid to the plaintiff by a cheque on 7th November 1996 after the transfer was allegedly executed and initially presented for registration. It is noteworthy that the agreement had provided for completion by 31st October 1996 and that the transfer was

not registered until 10th January 1997.

The 1st and 2nd Defendant state that the plaintiff was paid the sum of Kshs.3,100,000/- being the balance of the purchase price by the 1st Defendant directly. The plaintiff denies receipt of this sum. On the evidence on record I am not able to ascertain whether or not this sum of Kshs.3,100,000/- was paid and if so when and I make the finding that the plaintiff has not established he was not paid the full purchase price as alleged. The burden to prove that he was not paid lay on the plaintiff and I do not think he has discharged that burden on a balance of probability. On the first issue I therefore make a finding that there was a lawful agreement for sale between the plaintiff and the 1st Defendant of the suit property but I am not satisfied that the plaintiff has proved he was not paid the full purchase price by the 1st Defendant.

On the issue whether the consent from the Malindi Division Land Control Board for the transfer of land parcel number **Kilifi/Jimba/669** was valid it is necessary to consider the documents availed by the parties in regard to the same and the applicable law. The parties do not dispute the sale transaction was a controlled transaction within the meaning of section 6 of the Land Control Act, Cap 302 to which the provisions of the Act applied. The plaintiff and 1st Defendant indeed agree they applied and attended before the land control board.

Section 6(1)(a) of the Act provides:-

6.(1) Each of the following transactions

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which situated within a land control area;

(b)-----

(c) -----

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.

The Plaintiff maintains that no consent was granted by the land board on 24th October 1996 and asserts that the land board “**deferred**” consideration of the application for consent when the plaintiff and the 1st Defendant appeared before the board on 24th October 1996 as evidenced by the copy of the minutes of the meeting produced by the plaintiff as per the plaintiff’s list of documents. The recorded minutes of the Land Board meeting of 24th October 1996 clearly show the day’s meeting was chaired by **Mr. N.O. Hirirae D.O1** and that the application in regard to land parcel **Kilifi/Jimba/669** then registered in the plaintiff’s name was discussed as item 8 on the days agenda and the application was “**deferred**” and not approved. Once the application was deferred the same could only have been reconsidered at a subsequent board meeting. There is no evidence that there was such a subsequent board meeting at which the application was reconsidered and approved. The consent therefore relied upon by the 1st Defendant dated 24th October 1996 was not granted at the meeting of 24th October 1996. The person shown to have signed the same, **MR. L.K. Kosilbet** as Chairman did not chair the meeting of 24th October 1996. The board on 24th October 1996 did not give its consent to the transaction and in my view in the absence of any explanation, and none was offered by the 1st Defendant, the said consent prima facie on the face of the minutes of the board meeting of 24th October 1996 cannot be genuine. **How did L.K. Kosilbet come to sign the consent as the Chairman?** Section 15(1) of the Land Control Act provides for the meetings of the board to be presided over by the chairman and/or a member elected by the other members to preside over the meeting. The meeting of 24th October 1996 was chaired by the D.O 1 who ought to have signed the letter of consent. The letter of consent signed by **Mr. Kosilbet** did not correctly communicate the decision reached by the board which was a deferral of the application. In the premises it is my

holding and finding that consent letter dated 24th October 1996 was not genuine and/or valid and that the same was irregularly issued.

There is yet another reason why the consent letter of 24th October 1996 cannot be valid. The plaintiff has pointed out the directors/shareholders of the 1st Defendant company were not Kenya Citizens and the Land Control Act Cap 302 Section 9(1)(c) requires that the land control board refuses consent in all cases where non citizens are concerned and/or in cases where the transaction of sale transfer or lease is to a private company or co-operative Society where all members are not Kenya Citizens. In the documents of Transfer/lease of Beach plots the 1st Defendant submitted in seeking what is described as presidential consent annexed to the 2nd Defendant's list of documents filed on 11th October 2012 which the 1st Defendant adopted as its documents the directors/shareholders are shown as **Cozzi Corrado** and **Cozzi Eleonara** and their Nationality is given as Italians. There is no denial that they are not Kenya Citizens. The 1st Defendant company being owned by non Kenyans, it was under the provisions of the Land Control Act not eligible to obtain consent for the transfer of the suit land. By virtue of Section 9(1)(c) of the Act.

The wording of section 9(1)(c) referred to earlier is in mandatory terms that a Land control Board “**shall refuse consent in any case in which the land or share is to be disposed by way of sale, transfer, lease exchange or partition to a person who is not-**

- i. **A citizen of Kenya, or**
- ii. **A private company or co-operative Society all of whose members are citizens of Kenya”.**

In the circumstances the land board meeting of 24th October 1996 and/or indeed any other meeting could not have the power or jurisdiction to grant consent to the transaction. That power has been expressly denied them by statute and cannot be exercised by them. Therefore the consent they purportedly gave was a nullity as they could not give that which the law precluded them to give. The 1st Defendant was represented by counsel in the transaction who ought to have been aware of the legal position and advised the 1st Defendant appropriately.

While it may be argued that the decision of the Land Control Board is final and not liable to be questioned in court I state that the Land Control Board is expected to follow and apply the law and cannot be allowed to flagrantly flout the law. I echo the observations of **Madan, JA in the case of Gatere Njamunyu –vs- Joseck Njue Nyaga (1983) eKLR** when he commented on a similar issue and stated thus:-

“with respect the magistrate erred in holding that once consent of the Land Control Board has been obtained, then irrespective of anything else the transaction must be concluded for according to the magistrate, thereupon a dealing in agricultural land, which is otherwise void for all purposes, becomes legally binding, it cannot be questioned in court, and the parties cannot rescind the agreement. True the decision of the Land Board is final, there is no appeal against it, and it cannot be questioned in court, save that the court has supervisory jurisdiction to examine whether consent was validly given”.

I agree this court has supervisory jurisdiction over the land control board whenever it exercises quasi Judicial functions such as determining to grant or refuse to grant consent in regard to controlled transactions under the Act.

Conclusions and decision

The court in the present case has been invited to consider whether the alleged consent of 24th October 1996 was validly given. The court finds that it was not as the 1st Defendant was a private company that was foreign owned. The consent ought to have been outrightly refused by the land control board at its meeting. The only recourse/option available to the 1st Defendant was to seek presidential exemption from

the provisions of the Land Control Act pursuant to section 24 of the Act.

Section 24 of the Act provides:-

24. The president may, by notice in the Gazette, exempt:-

(a) any land or share, or any class of land or share, or

(b) any controlled transaction or any class of controlled transaction; or

(c) any person in respect of controlled transactions or some class of controlled transactions,

from all or any of the provisions of this Act, or from any prohibition made under Section 23, on such conditions (if any) as he may think fit to impose.

The 1st Defendant did not seek to be exempted from the provisions of the Land Control Act and proceeded on the basis that it had obtained a valid consent from the Land Control Board which regrettably could not have been the case. The subsequent so called presidential consent/approval accorded to the 1st Defendant for the transaction cannot be of any aid. It cannot be equated to an exemption under section 24 of the Act. There is no provision in law for such consent/approval and my own view is that perhaps such consent/approval was intended for administrative purposes only for the government to have a record of all persons who acquired land fronting the ocean and/or on the 2nd row. This however cannot supplant the express provisions of the law. It is thus my holding and finding that no valid consent of the land board was obtained from the Malindi Land Control Board under the provisions of the Land Control Act, Cap 302, Laws of Kenya and that owing to the fact that the 1st Defendant was a foreign owned private company the Malindi Land Control Board could not give any consent under the Act to the transaction.

Having held that no valid consent was given by the Malindi Land Control Board for the sale transaction it follows that no valid transfer of the property land parcel Kilifi/Jimba/669 could be effected on the basis of the impugned consent. There being no valid consent the sale transaction to the 1st Defendant was incapable of being effectuated and the same became null and void. The transaction as observed above could only be salvaged if a presidential exemption from the provisions of the Act was sought and obtained. Exemption under Section 24 of the Act can only be signified through a Notice in the Gazette and this having not been done the transaction became a nullity. The transfer effected to the 1st Defendant on the reliance of the invalid consent issued or given on 24th October 1996 was irregular and/or illegal and therefore null and void and the same is for cancellation.

In spite of the allegations by the plaintiff that the transfer was forged, no evidence of forgery has been tendered and it is my finding that no forgery of any document has been proved to the required Standard. Equally I do not find any fraud proved against any of the Defendants. The parties, I think were less than careful and/or diligent in ensuring the law and procedure was followed. True, there was irregularity in the issue of the letter of consent dated 24th October 1996 when the meeting of the board did not give any consent but who was the culpable party? Is it the DC who signed the consent when he did not chair the Board or the plaintiff or his advocate who were obligated to obtain the consent under the agreement for sale? I choose not to place blame on anybody but to rule the consent issued as invalid as the minutes do not support it and consequently to hold the consent as void as it should in the first place have been refused under section 9(1) (c) of the Land Control Act.

The plaintiff further in the submission alluded to negligence by the 2nd Defendant in their handling of the transaction. The allegations of negligence were not supported by any evidence and I find the same not proved.

Having considered and evaluated the material evidence relied upon by the parties I find and hold that the plaintiff has proved on a balance of probabilities no valid consent was given by the land control board for

the transfer of land parcel **Kilifi/Jimba/669** to the 1st Defendant and that the transfer effected to the 1st Defendant was irregular and illegal and therefore null and void. I enter judgment, in favour of the plaintiff as against the 1st Defendant and make the following orders:-

1. **That the registration of Land Parcel Kilifi/Jimba/669 in favour of Sunplam Limited be and is hereby declared null and void and is ordered to be cancelled forthwith.**
2. **That the Chief Land Registrar through the Land Registrar, Kilifi be and is hereby ordered to register Mohamed Saibu Shosi the personal legal representative of Mohamed Siaka Ali (deceased) as the owner of land parcel Kilifi/Jimba/669 in place of Sunpalm Limited, the 1st Defendant herein.**
3. **That the suit against the 2nd Defendant is hereby dismissed.**
4. **That each party will bear their own costs of the suit.**

Judgment dated, signed and delivered this **31ST** day of **JULY** 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants