

**IN THE COURT OF APPEAL
AT KISUMU
(CORAM: KWACH, TUNOI & SHAH, JJ.A.)
CIVIL APPEAL NO. 351 OF 2000**

BETWEEN

EZRA ODONDI OPAR.....APPELLANT

AND

TOTAL KENYA LTD.....RESPONDENT

JUDGMENT OF THE COURT

The appellant, EZRA ODONDI OPAR, is aggrieved by the ruling of Wambilyangah, J. made on 28th June, 2000 by which the learned Judge declined to strike out the defence and counter-claim on the ground that they were frivolous, vexatious and abuse of the process of the Court.

The facts underpinning this appeal are simple and may be briefly stated as follows. The parties executed a lease agreement in regard to the appellant's land known as Central *Karachuonyo/Konyango/1543* whereby the land was leased to the respondent company for the purposes of erecting and operating a petrol station with effect from 1st January, 1988, for a term of twenty (20) years. The main complaint by the appellant before the learned Judge was that the purported lease is void and unenforceable for lack of a valid Land Control Board consent allegedly it having been given outside the six months period limited by the *Land Control Act Cap 302* Laws of Kenya. In a reserved ruling the learned Judge held that as there is a letter of consent which appears valid on its face and as the parties had for a very long time conducted themselves on the basis that the lease document was perfectly legal, the matter before him could not be thrashed out on the basis of summary application. He thought that the suit could only be resolved by calling of witnesses; and more particularly, the Kendu Bay District Officer and the Land Registrar. Moreover, the learned Judge surmised that the respondent could in fact invoke the doctrine of equitable estoppel since the appellant had not questioned the invalidity of the lease document when he received Shs. 500,000/- from the respondent in the form of the lease rent and the appellant was apparently in the category of a party looking for a scapegoat in order to cause harm to the respondent.

The appellant through his counsel Mr. Wasunna urges us to find that the learned Judge misdirected himself in not granting the application and in not striking out the defence and the counter-claim. He contended that the consent, if any, was not valid and was not in terms of the application made to the Land Control Board and could not therefore have been valid for purposes of the *Land Control Act*. He further argued that the doctrine of equitable estoppel cannot be invoked in the particular circumstances of this case.

Looking at the substance of the matter as a whole it seems to us plain that in truth the respondent has a good defence to the claim lodged against it by the appellant. The defence raises several triable issues which can only be resolved through trial and calling of witnesses.

For these reasons we consider that the decision of the learned Judge was correct and this appeal is dismissed with costs.

Dated and delivered at Kisumu this 29th day of November, 2002.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original,

DEPUTY REGISTRAR