



**Mosoti v Obinchu (Environment & Land Case E006 of 2024)
[2024] KEELC 5501 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E006 OF 2024**

JM KAMAU, J

JULY 18, 2024

BETWEEN

BONIFACE NYAGAKA MOSOTI PLAINTIFF

AND

JACKLINE BONARERI OBINCHU DEFENDANT

RULING

1. This ruling is in relation to the Notice of Preliminary Objection dated, 9.04.2024, on grounds:
 - a. That the suit that the suit is a non starter as the alleged partnership agreement involved a transaction that required the consent of the land Control Board which consent was not obtained and hence rendering the whole transaction null and void for all purposes and therefore unenforceable and as a result this suit should be struck out with costs to the defendant.
 - b. That the alleged partnership is forgery and that as much as the defendant is described therein as one of the administrators of the estate of the deceased Zebedeus Willbrodeus Obinhu the consent and /or participation of the other administrator was necessary in order for the said partnership to be enforced and hence this suit should also be stuck out with costs to defendant.
2. The Preliminary Objection was opposed by the Plaintiff vide their response dated 20th May, 2024 on the following points:-
3. I. That the Plaintiffs claim is not fatherly defective, incompetent and untenable as contended by the Defendant as the same has been brought under the Provisions of The Partnership Act Cap 29 Laws of Kenya and the specific provisions being Sections 2, Section 44 and Sections 47 of the said Act.



4. II. That the Plaintiff further opposes the other preliminary objection of the issue of forgery as the same is part of her defense and this court has the jurisdiction to here and determine whether the Partnership agreement is binding between the Plaintiff and defendant on merit.

5. A Preliminary Objection consists of a point(s) of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit as was held in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 at page 700.

“It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

6. On the first issue regarding the Consent of the Land Control Board, Section 6 of the [Land Control Act](#) provides that:

Transactions affecting agricultural land

(1) Each of the following transactions that is to say—

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

(b) ...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.

7. The doctrine of constructive trust comes into play in this case and I will delve into the Court of Appeal decision in *William Kipsoi Sigei v Kipkoech Arusei & another* [2019] eKLR this Court, in upholding the decision of the trial court, stated that:

“We come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the [Land Control Act](#). We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent”.

8. In my view, from the time the Applicant entered into an agreement with the Respondent, a constructive trust in his favour was created in respect of the land and such became an overriding interest over the suit land.

9. The failure on the part of the Applicant to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable him deal the suit land does not render the present transaction void. Equity and fairness, the guiding principles in Article 10 of [the Constitution](#), require that the [Land Control Act](#) is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the Applicant.

10. That being said, the Respondent’s allegation that the transaction within the partnership agreement required the consent of the Land Control Board, remains an allegation and is indeed a trial issue for that matter. I will also not dwell on the second issue that the partnership is a forgery, as the same can only be determined via viva voce evidence adduced during the trial.



11. The upshot of the above is that the Preliminary Objection therefore fails, and it is hereby dismissed with costs to the Applicant.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 18TH DAY OF JULY, 2024.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Brenda

Plaintiff's Counsel: Mr. Ondima

Defendant's Counsel: Mr. Soire

