**BTB Insurance Agencies Limited v NITIN Shah and others**

[2006] 2 EA 26 (CCK)

**Division:** Milimani Commercial Court of Kenya at Nairobi

**Division:** Milimani Commercial Court of Kenya at Nairobi

**Date of judgment:** 6 October 2006

**Case Number:** 560/01

**Before:** Ochieng J

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Civil practice and procedure – Application to strike out – Plaint.*

*[2] Land law – Whether all agricultural land transactions must have consent of the Lands Control*

*Board – Effect of failure to get the Board’s consent.*

**Editor’s Summary**

The defendant filed an application to strike out the plaint under Order VI, rule 13(1)(*a*)(*b*) and (*d*); as

well as Order VI, rule 16 of the Civil Procedure Rules; and section 6(1) and 22 of the Land Control Act.

It was the defendant’s case that the entire claim was based on the agreement for sale of shares dated

10 February 2000. The said sale would have given the plaintiff rights over some agricultural property and

thus, the transaction ought to have been consented to by the Land Control Board pursuant to section 6(1)

of the Land Control Act and thus, the entire transaction was void for lack of cause of action.

**Held** – Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement

to be a party to a controlled transaction. Section 6 of the Land Control Act prohibits any dealing with

agricultural land in a land control area unless the consent of the Land Control Board for the area is first

obtained and any such dealing is not only illegal but absolutely void for all purposes. This position is

constant even in situations in which the plaintiff, in a case involving agricultural land in a land control

area, has made payments for the purchase thereof, and thus, no estoppel arises. If the transaction is

subject to the provisions of section 6(1) of the Land Control Act, then, it does not matter that the plaintiff

might have been induced to enter into the Agreement, as the said Agreement would be void in any event.

(*Wambua v Wathome* [1968] EA 40; *Hirani Ngaithe Githire v Wanjiku Munge* [1979] KLR 50; *Simiyu v*

*Watambamala* [1985] KLR 852; *Kariuki v Kariuki* [1983] KLR 225 applied).

The amended statement of defence however asserts that the suit property had nothing to do with the

suit herein. This pleading gave rise to the possibility that the plaintiff may prove that it has an agreement

for the purchase of shares. Whether such purchase, if proved, would have any bearing on the suit

property would then need to be determined, in the light of the defendant’s contention that the shares and

the suit property were not interlinked. In the circumstances there is yet to be provided evidence to prove

or disprove the nexus between the sale of shares and suit property. There is thus a possibility that the trial

court could come to the conclusion that the shares were not linked to the suit property as asserted by the

defendant. If that were to happen, there would be no need for the transaction in the shares being

sanctioned by the Land Control Board.

Page 27 of [2006] 2 EA 26 (CCK)

Furthermore, even if the transaction should be found to be subject to the consent of the Land Control

Board, it was arguable whether or not the plaint could be amended so as to enable the plaintiff to recover

the consideration it may have paid to the first defendant. (*Njamunyu v Nyaga* [1983] KLR 282; *Simiyu v*

*Watambamala* [1985] KLR 852 considered).

Application dismissed.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Hirani Ngaithe Githire v Wanjiku Munge* [1979] KLR 50 – **AP**

*Kariuki v Kariuki* [1983] KLR 225 – **AP**

*Njamunyu v Nyaga* [1983] KLR 282 – **C**

*Simiyu v Watambamala* [1985] KLR 852 – **AP** and **C**

*Wambua v Wathome* [1968] EA 40 – **AP**

**Ruling**

**Ochieng J:** This is an application by the defendant, who wishes to have the plaint struck out. The

application has been made pursuant to the provisions of Order VI, rule 13(1)(*a*)(*b*) and (*d*); as well as

Order VI, rule 16 of the Civil Procedure Rules; and section 6(1) and 22 of the Land Control Act.

At the commencement of the hearing of this application the plaintiff raised a preliminary objection on

the grounds that insofar as the application was brought under Order VI, rule 13(*a*), amongst others, the

applicant had to make an election whether to forego reliance on the supporting affidavit if it went ahead

with the application under all the three heads, or alternatively choose to drop reliance on rule 13(*a*), and

then use the affidavit.

In a ruling delivered on 26 January 2006, I overruled the objection. I also overruled an objection to

the supporting affidavit which had been sworn by Mr Z Alibhai. Consequently, the application was

prosecuted as it had been filed.

Basically, as I understand it, the application centred on the provisions of section 6(1) of the Land

Control Act.

It is the defendant’s case that the entire claim is based on the Agreement for sale of shares dated 10

February 2000. The said sale of shares would have given to the plaintiff rights over some agricultural

property, so says the defendant. Therefore, it was contended that the transaction ought to have been

consented to by the Land Control Board, pursuant to section 6(1) of the Land Control Act.

However, insofar as there was no Land Control Board consent, the defendant contends that the entire

transaction was void *ab initio*. And as the Agreement, which is the basis of the suit was void for lack of

Land Control Board consent the defendants submitted that there was no cause of action against them.

Page 28 of [2006] 2 EA 26 (CCK)

In the case of *Wambua v Wathome* [1968] EA 40, the Honourable Farrel J held that there was no valid

cause of action due to the absence of lawful consent from the Land Control Board.

In that case the Board had made an initial decision on an application for consent. The said initial

decision postponed the application for further consideration. Ultimately, the Board made a decision in

which it granted consent. However, the said final decision was made long after the expiry of the 3 months

from the date of the application.

In arriving at the decision to strike out the plaint, the court took into account the plaintiff’s concession

to the fact that the land which was the subject of the proceedings was subject to the then “Kenya (Land

Control) (Transitional Provisions)” Regulations 1963. That being so, the plaintiff had to plead consent

before he could establish his cause of action. He therefore sought leave to amend the plaint so as to insert

the new paragraph within which he was to set out the particulars of the consent.

Having given due consideration to the contents of the intended amendment, the court came to the

conclusion that even if leave to amend was granted, the proposed amendment would not be capable of

curing the defect in the plaint, as the consent which was sought to be pleaded was not lawful in any

event.

For those reasons, the court declined leave to amend the plaint, and then proceeded to strike out the

said plaint.

As far as the law is concerned, there can be no doubt at all that:

“The position is simple and clear. Section 6 of the Land Control Act is an express provision of a statute. It is a

mandatory provision, and no principle of equity can soften or change it. The courts cannot do that; for it is not

for us to legislate but to interpret what parliament has legislated. So in this case that agreement between the

parties having been entered in June 1969 became void for all purposes (including the purpose of specific

performance) at the expiration of three months from the date of making it; and, since no consent had been

obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary

Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction.

Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the Land

Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all

purposes.”

Per the Honourable Chesoni J (as he then was) in the case of *Hirani Ngaithe Githire v Wanjiku Munge*

[1979] KLR 50 at 52.

That legal position is constant even in situations in which the plaintiff, in a case involving agricultural

land in a land control area, had made payments for the purchase thereof.

In *Simiyu v Watambamala* [1985] KLR 852 at 856, the Honourable Nyarangi Ag JA (as he then was)

said:

“Here, the appellants had to obtain consent for the controlled transaction. They did not and so the agreement

was void for all purposes including attempting to set up estoppel.”

Thus, the mere fact that the plaintiff herein had already paid a total of KShs 1 641 608,50 would be of no

consequence, in creating an estoppel, if the transaction in question involved the purchase of agricultural

land which was subject to land Control Board consent. In effect, the defendants could not be compelled

to deliver land to the plaintiff just because the plaintiff had made part payment,

Page 29 of [2006] 2 EA 26 (CCK)

and was also ready to pay the balance of the purchase price, if Land Control Board consent was a

prerequisite to the transaction in question.

According to the plaintiff herein, the trial court would need to determine the question as to whether or

not there had been inducement by the defendants, for the plaintiff to enter into the Agreement in issue.

I think that the all important question is whether or not the transaction was subject to the provisions of

section 6(1) of the Land Control Act. If the answer to that question is in the affirmative, then it would

matter not that the plaintiff might have been induced to enter into the Agreement, as the said Agreement

would be void in any event.

In *Kariuki v Kariuki* [1983] KLR 225 at 227, the Honourable Law JA held as follows:

“When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes

for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud

if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute

must be enforced if its terms are invoked.”

In the light of the law as set out in the above cited legal authorities should the plaint now be struck out, as

disclosing no cause of action; or as being frivolous or vexatious; or on the grounds that it was otherwise

an abuse of the process of the court?

I have given careful consideration to the plaint, the Amended Defence and the Reply to Amended

Defence. I did also give consideration to the original Defence.

Firstly, it is noteworthy that at paragraph 6 of the plaint, there is reference to the Agreement dated 10

February 2000, which was as between the plaintiff and the first defendant. By that Agreement, the first

defendant was supposed to sell to the plaintiff some 200 shares which had been issued by the second

defendant.

In the prayers sought in the plaint, the plaintiff seeks an order to compel the first defendant to execute

the Transfer of the 200 shares to the plaintiff.

Now, when it is borne in mind that the second defendant was the owner of the suit property, Title

number Kwale/Galu/Kinondo/682, evidence would have to be led to prove the nexus between the shares

and the said suit property.

Of course, the plaintiff itself has stated that the suit property was the only known asset of the second

defendant. That would imply that if one was buying shares of the second defendant, the intention would

be to own part of the said suit property. Indeed, that appears to be the plaintiff’s intention as is expressed

through its action of lodging a caution against the title to the suit property.

However, on 27 August 2003, the plaintiff had already drafted and filed a “statement of Issues”, in

which the very first issues were set out in the following terms:

“1 (*a*) Is the suit property known as Kwale/Galu/Kinondo/682 relevant to the suit herein?

(*b*) Does the plaintiff have a cause of action in relation to the suit property?”

Those issues were drawn up about 15 months before the defendants filed their Amended Defence.

And whereas the Amended Defence did raise the issue concerning the need for any dealings or

agreement for dealings in the shares, to have the relevant

Page 30 of [2006] 2 EA 26 (CCK)

Land Control Board consent, it also asserts that the suit property had nothing to do with the suit herein.

At paragraph 2 of the Amended Defence it is stated that:

“The defendants admit that the second defendant, a private company owns the freehold property known as

title number Kwale/Galu/Kinondo/682 (“the property”) but avers that the said property has nothing to do with

the suit herein and the plaintiff has no cause of action in relation to the said property or at all.”

However, the defendants concede that they did sign “points of agreement to purchase shares”, even

though they insist that they were surprised and induced to do so.

To my mind, the said pleading clearly gives rise to the possibility that the plaintiff may prove that it

has an Agreement for the purchase of shares. Whether such purchase, if proved, would have any bearing

on the suit property would then need to be determined, in the light of the defendants’ contention that the

shares and the suit property were not interlinked.

In the circumstances I hold that there is yet to be provided any evidence to prove or disprove the

nexus between the sale of shares and the suit property. There is thus a possibility that the trial court may

come to the conclusion that the shares were not linked to the suit property, as asserted by the defendants.

If that were to happen, there would be no need for the transaction in the shares, being sanctioned by the

Land Control Board.

Furthermore, even if the transaction should be found to be subject to the consent of the Land Control

Board, it is arguable whether or not the plaint could be amended so as to enable the plaintiff to recover

the consideration it may have paid to the first defendant. The right to recover consideration which was

paid in a dealing which becomes void was recognised both in *Njamunyu v Nyaga* [1983] KLR 282 and in

*Simiyu v Watambamala* [1985] KLR 852.

In effect, I have come to the conclusion that there are at least two issues which arise from the plaint

and the defence on record. For that reason, the plaintiff is entitled to have the suit proceed to trial.

Accordingly, the application dated 27 April 2005 is hereby dismissed with costs.

For the appellant:

*Information not available*

For the respondent:

*Information not available*