REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. 2 OF 2016

SUZANNE ACHIENG BUTLER.....1ST PLAINTIFF

MARTIN NJEMA MUTURA.....2ND PLAINTIFF

MARGARET C. MURINGA IRERI.....3RD PLAINTIFF

WILSON KIMUTAI MUGUNGEI.....4TH PLAINTIFF

CONSTANCE ANJIRI ANYIKA.....5TH PLAINTIFF

VERSUS

REDHILL HEIGHTS INVESTMENTS LIMITED.....1ST DEFENDANT

IMPERIAL CONCEPTS LIMITED.....2ND DEFENDANT

RULING

A. INTRODUCTION

1. The Plaintiffs herein filed this suit on 01/07/2016. Paragraphs 4 and 5 of the Plaint almost entirely summarize the entirety of the claim. Paraphrased, the claim is that the 1st Defendant was the registered proprietor of property known as LR No. 20517/3 situate in South East Limuru Township in the Limuru area. The 1st Defendant, then, demarcated the land into 28 residential units measuring 0.25 of an acre and sold some of these plots to various purchasers including the plaintiffs by way of 99 years lease from 1st December, 2011. The 1st Defendant was to develop the land into a gated residential estate comprising 28 Town Houses with all access ways and ancillary infrastructure and the purchasers were to pay for the construction of the Townhouses. Each of the Plaintiffs entered into an agreement to purchase one of the 28 units and paid for the cost of the land and part of the construction of the Townhouse and ancillary infrastructure. The 2nd Defendant was the Architect in charge of the development.

2. The Plaintiffs case is that while they have paid the full amount of the land acquisition (and the land transferred to them), and significant amounts of the construction price as detailed in a schedule to the Sale Agreement, the 1st Defendant has failed to carry out the constructions in terms of the contract thereby breaching the agreement between the parties. The Plaintiffs pray for damages, mesne profits, interests, costs and any other relief deemed just by the Court.

3. The 1st Defendant filed a Defence on 23/08/2016. In it, it raised a Preliminary Objection to the suit. The Objection is based on the jurisdiction of the Court. The 1st Defendant is of the opinion that the matter substantively relates to land and that, under the Constitution and the Environment and Land Court Act, only the Environment and Land Court has sole jurisdiction to entertain the matter.

4. Earlier, the 1st Defendant had, through its lawyers, Walker Kontos, filed a Notice of Preliminary Objection. The 2nd Defendant similarly, through Macharia Nderitu & Co. Advocates, filed a Notice of Preliminary Objection in the same vein.

B. <u>THE JURISDICTIONAL QUESTION: THE PARTIES' RESPECTIVE VIEWS</u>

5. The lawyers for the three parties appeared before me on 03/10/2016 and made oral arguments on the Preliminary Objection.

6. Mr. Karungo argued the Preliminary Objection for the 1st Defendant. He argued that the proceedings relate to a parcel of land described in the Plaint and referred to the extensive details on the subdivisions, demarcations, sale agreements to various parties including the five Plaintiffs. His main point was that the subject matter is land and the dispute relates to land. He argued that the Plaintiffs have attempted to camouflage the true nature of the suit by seeking damages for breach of contract – but that the true nature of the proceedings is revealed in their second prayer for mesne profits.

7. Mr. Karungo relied on the well-known case of ***Karisa Chengo & 2 Others v R*** **[2015] eKLR** to urge the Court to find that it has no jurisdiction and strike out the suit. There is a striking line in that decision at page 15: "….[J]udges appointed to the High Court and ELRC have no constitutional and statutory mandate to deal with ELC matters. Indeed, the Constitution expressly prohibits the High Court (which can only be constituted by a judge appointed to that Court), from hearing matters to do with environment, land and employment."

8. Mr. Karungo's point was clear: The subject matter of this suit is land; the Constitution and Statutory law, as interpreted and given life in the ***Karisa Chengo Case***, explicitly provide that matters related to land shall only be heard in the ELC Court. By deductive reasoning, Mr. Karungo, then, would urge the Court to strike the suit for lack of jurisdiction.

9. Mr. Macharia, for the 2nd Defendant, reiterated the submissions of Mr. Karungo. He asked the Court to refer to the definition of land in the Constitution to confirm that the dispute is, indeed, about land. That one of the remedies prayed for is mesne profits is a tell-tale sign that this is a land dispute. Mr. Macharia joined Mr. Karungo in arguing that the dispute relates to one Sale Agreement in which the construction contract was conjoined with the land purchase contract to form one indivisible contract. As such, the dispute in the matter involves both ownership and construction. Mr. Karungo made reference to special condition F which explicitly state that the purchase contract and the construction contract are part of one indivisible contract.

10. Naturally, Mr. Njuguna for the Plaintiff was of a diametrically opposed view. He argued that the Contract between the Plaintiffs and the Defendants has two distinct parts: an agreement for the sale of property; and a construction contract. He referred the Court to paragraph 3 of the Agreement for Sale which indicates a separate price for land acquisition and a separate price for construction contract. Mr. Njuguna is of the view that this clear demarcation of sale price and construction price clearly shows that they were two distinct contracts.

11. Further, Mr. Njuguna argued, the Plaintiffs had already paid the full purchase price and the 1st Defendant had transferred the land to them meaning that the only obligations remaining are limited to construction which was to be done in 18 months. The entirety of the dispute, Mr. Njuguna argues, is on the construction of the townhouses with the Defendant claiming more money than what was agreed upon to complete the construction.

12. Finally, Mr. Njuguna urged the Court to dismiss the Preliminary Objection on the argument there is

no dispute over ownership or rights to use property. The dispute here, he asked the Court to find, is about the breach of the contract to construct townhouses – not on their ownership. Mr. Njuguna argued that the issue of ownership was long determined as title passed to the Plaintiffs and the individual parcels registered in their names. The Plaintiffs already have their leases and they have attached copies to the Plaint.

13. To this last point, Mr. Karungo was of the view that the leases were only registered in the names of the Plaintiffs for administrative convenience (to "help" the Plaintiffs, is the word Mr. Karungo used). Referring to Clause 9.1 of the Agreement for Sale, Mr. Karungo pointed out that the transfer of the property was conditional – and that the issue of transfer is, therefore, not closed. Mr. Karungo maintained that the 1st Defendant retains the right to recover the property by giving 30 days' notice.

C. FIRST PRINCIPLES: THE CORRECT APPROACH TO THE QUESTION OF JURISDICTION

14. I begin the analysis with what I consider salutary legal principles in determining jurisdictional questions.

15. First, jurisdiction is the soul of judicial work. A court cannot legitimately function without it. As Justice Nyarangi famously stated "jurisdiction is everything….[and] a Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." (***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*****).**

16. The Constitutional implication of this is that since the Court is vested with authority to exercise on behalf of the people Kenya, the Court can only exercise the limited authority it has been vested with. A court cannot by invention or innovation or judgecraft aggrandize its jurisdictional reach as this would amount to overreaching the mandate bequeathed by the people. This is the reason the Supreme Court, in refusing to enlarge its jurisdiction stated, in***Supreme Court of Kenya Application No.2 of 2011 involving Samuel Kamau Macharia v. KCB and Others [2012] eKLR*** as follows*:*

> A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law……the Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.

17. At the same time, however, it is imperative that a Court should not approach jurisdiction in an ultra-technocratic fashion as an essentialist parsing of sticks in a bundle. Jurisdiction is a substantive standard aimed at ensuring only the right court or tribunal clothed with the legitimate mandate deals with a dispute or controversy. It is not a jurisprudential thaumatrope to keep litigants guessingtowhich Court their controversy belongs at the pain of having their timeously pleaded case struck out for not pigeon-holing their claim in the correct box. The correct approach to jurisdiction is one which treats the question functionally as opposed to technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis.

18. Happily, this is the approach taken by our Courts to the question. In this regard, I can do no better than quote Justice Abuodha of the Employment and Labour Relations Court, who, faced with a "mixed grill case" delivered this jurisprudential gem:

> The objection rekindles the debate on what a Court should do in mixed grill cases. Would an employee who during the tenure of his employment borrowed money or took a mortgage predicated on the employment relationship upon contesting termination of his services split his claim among the various Court? This Court in the case of ***Peter Mutisya Musembi & another v. National Bank of Kenya*** **(2014) eKLR** borrowing from the Australian cases of ***Dean Patty v. Commonwealth Bank of Australia*** **2000 FCA 1072** and ***Philip Morris Inc. v. Adam P. Brown Male Fashions Ltd*** **(1981) 148 CLR** became of the view that the argument that this Court and indeed other Courts of concurrent jurisdiction properly siezed of a matter cannot adjudicate upon consequential or factual

question which on the face of it appear to be within the exclusive jurisdiction of another Court in the same judicial tier would unreasonably emasculate and whittle down the inherent power of a Court of law to do justice without undue regard to technicalities.

D. ANALYSIS: DOES THE HIGH COURT HAVE

JURISDICTION IN THE PRESENT CASE?

19. Does the High Court have jurisdiction to hear this dispute? Article 165(5) provides that the High Court shall **not** have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).

20. Article 162(2) of the Constitution provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in Article 162(2). It was on the basis of this provision that Parliament enacted the Environment and Land Court Act, No. 19 of 2011, which came into effect on 30th August 2011. The object of the Act is stated as follows:

> "**An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and to make provision for its jurisdiction, functions and powers, and for connected purposes**"

21. In Section 13, the ELC Act provides that:

> 13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> (2) In exercise of its jurisdiction under Article 162
>
> (2) (b) of the Constitution, the Court shall have power to hear and determine disputes?
>
> a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> b. relating to compulsory acquisition of land;
>
> c. relating to land administration and management;
>
> d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> e. any other dispute relating to environment and land.

22. These constitutional and statutory provisions are well known and the ***Karisa Chengo*** decision amplifies them. While the provisions are clear that jurisdiction in land-related matters belong to the ELC, the provisions are less clear what "land-related" means. In all honesty, it would not be possible for such direction to come from the Constitution or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here.

23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the ***Pre-dominant Purpose Test***: In a transaction involving

both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

25. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.

26. In my view, the following factors are significant in determining the nature of the contract:

a. The language of the contract;

b. The nature of the business of the vendor;

c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials;

d. The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and

e. The remedies sought by the Plaintiff

27. What makes the instant case complex is the dynamic nature of the contract between the parties: what began as pre-dominantly a contract for the sale of land in the initial phases of the relationship between the parties subsequently evolved to become predominantly a contract for the construction of a townhouse on the purchased property. To complexify the matter, there are what seem like contradictory textual provisions of the contract as to whether the contract can be severed and treated as two distinct parts or whether it must be interpreted as a singular and indivisible contract.

28. I begin with the legal proposition that it is jurisprudentially possible for a contract to evolve a long a temporal continuum from a pre-dominantly sale of land transaction on the one end to predominantly non-land (e.g. sale of goods, services, works, etc) on the other end. Differently put, such a contractual relationship evolves over time meaning those in contractual privity may objectively perceive their primary contractual relationship as having land as a central part of it or not.

29. In determining both whether a contract is dynamic in this sense and, if so, what the pre-dominant purpose of the contract is at a given time in the temporal continuum, the Court looks at the same five factors listed above and especially the language of the contract, the context and circumstances including the actual dispute between the parties as well as the remedies sought or appropriate for the dispute.

30. As I pointed out above, in this case, the task is made more complex by seemingly conflicting contractual provisions which I will now consider.

31. On the one hand, the Agreement for sale contains the Preambular Clauses B, F and G which state as follows:

(B) The Developer [1st Defendant] intends to develop or procure the development of the Land as per Approvals (hearinafter defined) into a gated residential estate to be known as “Redhill Heights” which will include: -

i. 28 four bed-roomed houses and staff quarters to be erected on a plot of land measuring 0.24 of an acre or thereabouts;

ii. Access roads serving the estate;

iii. Borehole; and

iv. Common fence, street lighting and other ancillary common facilities.

…..

(F) It is a fundamental term of each sale that the purchase price in each case will be apportioned between the acquisition price for the plot of land and the cost of construction of the house and infrastructure. The acquisition price for the plot and the construction of the house will in each case be an inseparable and indivisible transaction.

(G)The Developer has at the request of the Purchaser agreed as follows:

i. The sale to the Purchase by way of sub-lease of the Plot marked as Number "17" on the Estate Plan;

ii. The construction on the said plot of a four bed-roomed town house comprising 240 square metres or thereabouts with staff quarters as per the Approvals; and

iii. the development of the ancillary infrastructure;

For a consideration of the sum of Kshs. 14,800,000 (the "Purchase Price") payable in the manner and on the other terms set out in this Agreement.

32. On the other hand, there is, principally, Clause 3 of the Agreement for Sale which states:

The Purchase Price for the Property together with the cost of construction of the Town House is the sum of Kenya Shillings Fourteen Million Eight Hundred Thousand (Kshs. 14,800,000) and is notionally split between the value of the Property and the cost of the construction of the Town House and the ancillary infrastructure as follows:

3.1 The sum of Kenya Shillings Six Million (Kshs. 6,000,000) (the "Land Acquisition Price") is deemed by the parties to be the cost of the acquisition of the Property; and

3.2 The balance of Kenya Shillings Eight Million Eight Hundred Thousand (Kshs. 8,800,000)(the "Construction Price") is the agreed cost for the construction of the Town House and ancillary infrastructure as per the Approvals.

33. As I analyse below, there are other provisions of the Agreement for Sale which seem to support the construction that the overriding understanding of the parties was that the bargain they were entering into had two distinct parts and the nature of the relationship was envisaged to evolve over the period of contractual performance.

34. First, the Court must answer the question, what should one make of Preambular Clause F as read together with Clauses (B) and (G) quoted above?

35. I have come to the conclusion that Clause F not aimed at signalling the contract as one solely over land – but to forestall the possibility that a prospective buyer would pay enough money for the land and then refuse to engage the Vendor to construct the house. The indivisibility of the contract refers to the impossibility of a Purchaser contracting another vendor to construct a house to them after the early transfer of property to them in accordance with Clause 9 of the Agreement for Sale.

36. Second, it should be borne in mind that Clause F is a preambular clause – which, while important for interpreting and constructing the contract, it cannot oust independent clauses in the contract itself. The other independent clauses of the contract seem to verge in the opposite direction. I will now consider the contractual terms which seem to suggest that the parties intended that their contract could be bifurcated between the two portions – the land acquisition portion and the construction of the townhouse and ancillary infrastructure – provided that the Purchasers was not at liberty to complete only one contract but not the other.

37. First, as reproduced above, Clause 3 of the Agreement for Sale explicitly bifurcates the two aspects of the contract and applies two distinct considerations for each: Kshs. 6 Million for land acquisition which it calls the "Land Acquisition Price" and Kshs. 8.8 Million for the construction of the townhouse and other ancillary infrastructure which the clause calls the "Construction Price". The parties must have intended that the two parts of the contract be construed as distinct by this provision.

38. Second, if the Parties were not explicit enough by the treatment in Clause 3 of the Agreement of Sale, the parties proceed, in two separate clauses to outline how each of the two separate considerations for the distinct parts of the contract would be paid up. In Clause 4, the Parties agree on how and when the Land Acquisition Price will be paid. In Clause 5, the Parties provide a schedule for the payment of the Construction Price in an explicit nod to what they call "staged payments." What is more is that the Parties clearly assign a "Completion Date" for the land acquisition portion of the contract. As the Plaintiffs argue, that Completion Date is now passed and the parties met all their obligations respecting it – and, indeed, title to the land passed on and was registered in the name of the Plaintiffs.

39. Third, the Parties are, again, explicit in bifurcating their treatment of what would happen in the event of breach, by the Purchasers, of the Agreement of Sale for the two different portions of the Agreement for Sale. In Clause 7, the Parties address delay in payment of the Land Acquisition Price – and provide remedies and recourse that are consistent with breach of a contract for the sale of land – including rescission of the Agreement and forfeiture of any monies paid. Clause 8, on the other hand, in a clear nod to the fact that title would already have passed upon completion of payment of the Land Acquisition Price, is explicit that delay in payment of the Construction Price or any part thereof would make the Purchasers liable in liquidated damages (pre-agreed remedies for breach).

40. Finally, Clause 9 of the Agreement for Sale is clear that the Parties envisaged and provided for what the Agreement calls "Early Transfer of Property" provided that the Purchaser has completed paying the Land Acquisition Price or has procured a Financier or their advocates to provide an acceptable undertaking to pay the Land Acquisition Price.

As the Plaintiffs have argued here, they have each already paid the Land Acquisition Price and, pursuant to Clause 9.1, registration of the leases in their names has already occurred indicating that any dispute on ownership of land is moot. In my view, it is unavailing for the Defendants to argue that the registration was only done for the "convenience" of the Plaintiffs and that the 1st Defendant retains the right to rescind the registration. The text of the contract seems to belie that position. As things stand, land has been registered in the names of the Plaintiffs and it appears a stretch aimed at jurisdictional hook only to say that there is a dispute as to ownership.

E. CONCLUSION AND DISPOSITION

41. In my view, therefore, it appears clear that the parties intended that their contract involved two distinct parts – one for the sale of land and, the other, for the construction of townhouses and ancillary infrastructure. It is also my finding, based on the above analysis, that the parties also intended the contract to be dynamic in nature where the pre-dominant purpose of the contract would change over the contractual period: while the contract was predominantly for sale of land at the inception, it evolved, in its present contractual form to become one for construction of townhouses and ancillary infrastructure. It is, finally, my finding that the Land Acquisition Price having been paid (as it is undisputed from the pleadings), and the title to the properties having been registered in the name of the Plaintiffs, there is no dispute as to ownership of land – the only contest being whether there has been a breach of the

Construction Contract between the parties, and if so which party is in breach and what the consequences for the breach are. Consequently, it is my finding and holding that the dispute between the Plaintiffs and the Defendants that is presented to court is a dispute that is not primarily about land. I therefore hold that this Court has jurisdiction to hear the suit.

42. Given my findings above, the Preliminary Objection is not merited. It is therefore dismissed with costs.

Dated and delivered at Kiambu this 12th day of October, 2016.

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JOEL NGUGI

JUDGE