



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

ELC CASE NO.93 OF 2014

SAMMY AKIFUMA.....1ST PLAINTIFF

JOYCE AKFUMA.....2ND PLAINTIFF

VERSUS

KAPOSHI NJOROGE NAKUMANA.....1ST DEFENDANT

JONATHAN KAPOSHI.....2ND DEFENDANT

NTEENE OLE KAPOSHI.....3RD DEFENDANT

KENNETH OBIMBO ODHIAMBO.....4TH DEFENDANT

R U L I N G

1. The Plaintiffs lodged suit via **Plaint** filed on **24.9.2014** and undated seeking orders of specific performance inter alia as the principle relief. Along with the **Plaint** the Plaintiff filed **Notice of Motion dated 24.1.2014** seeking principle orders of injunction to restrain the Defendants from alienating suit properties, also to restrain the National Land Committee and Kenya Railways Company from paying the Defendants monies for the compulsory acquisition of the suit properties and finally prohibition orders against Defendant to prohibit alienation of the suit properties pending hearing hereof.

2. The Application is based on the grounds on the face of the Motion and supported by the affidavit of Sammy C L Akifuna sworn on the 24.9.2014 and 7 annexures thereof. The 1st, 2nd and 3rd Defendants/Respondents filed a common defence dated 6.10.2014 and thereafter the 1st and 3rd Respondents filed a joint replying affidavit sworn by Kaposhi Ole Njoroge Nakumana sworn on 6.10.2014.

3. The 2nd Respondent swore a separate affidavit on 6.10.2014 and filed the same on 7.10.2014. On the same 7.10.2014 the 1st, 2nd and 3rd Defendants filed a preliminary point of law impugning the application on the grounds that it is incompetent; it offends the provisions of Section 6 of Cap 302 and also the provisions of section 4 and 7 of Cap 22. The 1st Applicant filed further Affidavit on 31.10.2014. Also the 2nd Respondent filed a further affidavit on 17.11.2014. The court ordered the parties to file written submissions to dispose the instant motion.

4. The Applicants filed submissions on 4.11.2014 and the Respondents number 1, 2 and 3 filed their submissions on 17.11.2014. The Applicants' case is that by various agreements on diverse dates between 1989 to 1992 they agreed with the 1st Defendant to sell to them 100 trees of land that was to be excised from all that portion of land previously forming a parcel of land in Ilmamen Ranching Scheme in Kaputiei Division Kajiado District and now known as LR. No. Kajiado/Kaputiei – Central/839.

5. At the time of the transaction the land was unsurveyed and formed part of parcel in the Ilmamen Ranching Scheme in Kaputiei Division, Kajiado District. The consideration was paid in full and the 1st Defendant acknowledged that fact. The Plaintiffs paid for the survey and excision of the parcel of land they had purchased. The 1st Defendant assured the Applicants that as soon as he obtained ahead title, he would cause the bought portion transferred to the Applicants.

6. On 18.10.01 the head title was obtained but the 1st Respondent failed to fulfill the promise by transferring same to the Applicants. In February, 2010 the Applicants issued 1st Defendant with completion notice with no response forthcoming from him. In 2012 or thereabout, the Applicants learnt that the 1st Defendant had subdivided suit land Kajiado/Kaputiei-Central 839 into 2345, 2346, 2347 and 2348 and transferred them as follows; 2345 to 2nd Defendant, 2347 to 3rd Defendant, 2348 to 2nd Defendant and 2346 to 4th Defendant, vide copies of extracts of Green Cards in the Plaintiffs, bundle of documents.

7. Further the Plaintiffs discovered that compulsory acquisition on the suit land was in the process by the Kenya Railways Corporation for the purposes of construction of standard Gauge Railway and they are apprehensive that the Defendants will be compensated to the exclusion of the Plaintiffs and thus suffer irreparable damages.

8. The Respondents No.1, 2 and 3 case is that this is the 3rd suit the Plaintiffs are filing as there are ELC No.24/2012, MISC App. No.320/2012 and this ELC No.93/2014. The 1st Respondent in Affidavit sworn on his behalf and that of the 3rd Respondent confirms that the transaction for sale of 100 acres was entered and consideration paid but in 1991 the Plaintiff disappeared until 2012 (20 years later) and by then he had transferred the suit properties to 2nd and 4th Defendants and he can only refund the consideration paid to him. He confirms that the Plaintiffs filed ELC 24/2012 in Machakos but same was withdrawn after he raised a preliminary objection. He further states that the sale transaction was to be completed on 21.12.1990 which was never extended.

9. On the 2nd Respondent's part, the story is that he is the registered owner of Kajiado/Kaputiei-Central/2345, 2347 and 2348. He states further that his father, 1st Respondent is senile and he distributed to his dependents his assets namely the suit properties. The 2nd Respondent avers that at the time of the devolution of the above parcels of land to him from his father, he was not aware of the Plaintiffs' claim. As pertains to the 4th Defendant, there is no evidence on record that he was served with the pleadings in this suit nor has he filed any replies to the Plaintiff and the motion. The court will therefore treat the situation as a non-service of the 4th Defendant.

10. In their submissions, the plaintiffs argue that their application is not incompetent and rely on Section 1A, 1B, 3A of Civil Procedure Act and Article 159 of the Constitution and urges court to look at the substance rather than the form and render justice devoid of undue procedural technicalities. They also rely on the following cases; **KIPTOO ARAP KORIR SALAT VS. IEBC & 6 OTHERS (2013) eKLR, HUNTER TRADING CO. LTD. VS. ELF OIL (K) LTD CIVIL APPEAL NO. 6/2010 (URS) 2010, MICROSOFT CORP. VS. MITSUMI COMPUTER GARAGE LTD (2010) 1EA: 127.**

11. The Plaintiffs argue further that in HC. Misc.320/2012 they got orders extending period for procurement of land board consent by 30 days vide orders dated 30.5.2012. The 1st Defendant refused to be enjoined in the process of procuring the consent required to transfer land. The Plaintiffs rely on the authority of **MACHARIA MWANGI MAINA & 7 OTHERS VS. DAVIDSON MWANGI KAGIRI**

(2014) eKLR to submit that there was a common intention between parties as in the instant suit as in cited authority and thus the holding below obtains. Thus the court held:

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being void, he will not then be allowed to turn around and assert that the agreement being invalid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

12. The Applicants aver that just like the cited authority, there is a constructive trust created by the circumstances in the case. They submit that creation of trust over agricultural land does not constitute a disposal or dealing under Section 6 of Cap 302 and thus no requirement of LCB consent. They cite **GATIMU KINGURU VS. MUYA GATHANGI (1976) KLR 253.**

13. On the ground raised by Respondents that the claim is time barred, the Applicant submit that time starts to run when fraud was discovered. And the fraud is sub-division and transfer of suit land to the Defendants No.2 and 4, and refers to Section 26 of Cap 22. They also cite **SWALEH SALIM BAHANDI VS. NURU SWALE MOHAMED AND 4 OTHERS (2013) eKLR.**

14. On whether the Applicants have met the thresh hold of grants temporary injunction sought, the Applicants cite **GIELLA VS. CASSMAN BROWN & CO. LTD. (1973) EA 358, MICROSOFT VS. MITSUMI AUTHORITY (supra)** and submit that by materials before court, they have established prima facie case with probability of success and that they will suffer irreparable damage if the orders sought are not granted. They also cite **MRAO VS. 1ST AMERICAN BANK LTD & 2 OTHERS (2003) eKLR** which held that a *prima facie* case includes genuine and arguable case.

15. They also rely on **AMERICAN CYNAMIND** as cited in **MBUTHIA VS. JIMBA CREDIT CORP LTD (1988) KLR 1** to emphasize that evidence presented is demonstrating a cause of action arising from the 1st Respondent actions amounts to fraud. The Applicants cite the authorities of **FRANCIS RIOBA MOSETI VS. NANCY MOTONGORI MWITA & ANOTHER (2014) eKLR, VINCENT N. KROP & 3 OTHERS VS. MARTIN S. LIMAKOU & 12 OTHERS (2014) eKRL, SIMON NJII MWANGI VS. ANDREW SAMMY MUSYOKI (2014) eKLR** to demonstrate that they would suffer irreparable damages and loss if the orders sought are not granted.

16. They further state that the balance of convenience is in their favour since the alienation of the suit property would leave them with no remedy. They submit that in line with the authority of **ERINFORD PROPERTIES LTD. Vs. CHESHIRE COUNTY COUNCIL (1974) ALLER 448,** the order of status quo obtains in the circumstances to preserve the subject matter. The Applicants also cite Section 13(7) ELC Act and authorities of **DENIS ROGERS NYAMBUTO VS. DAVID OTEMA MOKEMBA (2014) eKLR** and **GRACE KERUBO OMANGA VS. ERIC MOMANYI LENGA & ANOTHER (2013) eKLR** to persuade court to issue preservative orders to avoid alienation of suit lands.

17. In reply to the Plaintiffs submissions, the Respondents No.1, 2 & 3 submit that the claim in the Plaint is principally based on relief of specific performance. The same is anchored on the agreement between Plaintiffs and the 1st Defendant and thus the relief cannot be granted as the suit lands are in the names of non parties to the agreement. On validity of the agreement, the Respondents (1, 2, 3) argue that clause 3 of the agreement dated 6.1.1990 allowed the plaintiffs to take possession of 15 acres but failed to taken possession as agreed. The completion date was in 1990 which was never extended. They argue that the Applicants are now surfacing 22 years later to allege that they were defrauded.

18. On the ground that the claim is time barred, the Respondents (1, 2, & 3) submit that under Section 4(1) (a) and (e) of Cap 22 Contractual claims can only be lodged within 6 years from the date the cause of action arose or accrued. Similarly the relief of specific performance is not available after 6 years of breach of contract. They further argue that under Section 7 of Cap 22 claim to recover land cannot be lodged after 12 years from the date the cause of action accrued. They argue that the instant claim is being lodged after 22 years. They also argue that the Standard Gauge Railway has acquired a portion of the land and thus 1st & 3rd Defendants have nothing to offer in terms of land to the Plaintiffs.

19. On the ground of absence of the Land Control Board consent to validate the transaction, the Respondent submit that same ought to have been obtained within 6 months of the agreements otherwise the agreement becomes void. They cite the case of **SITUMA VS. CHERONGO (2007) KLR 84**. They further submit that since the Plaintiffs never occupied the suit land, trust or adverse possession cannot obtain in the circumstances. Thus the suit herein cannot succeed. The Respondent (1, 2, 3) argue that sale agreement were entered between the Plaintiff and the 1st and 3rd Defendants which have now become null and void for want of LCB consent.

20. The titles in 2nd and 4th Defendants are valid and the Plaintiffs do not seek to nullify the same. They submit that *prima facie* case has not been established. They contend that the Plaintiffs can be compensated by way of damages. They further argue that the provisions of Article 159 of the Constitution, Section 1A, 1B and 3A Civil Procedure Act cannot save the motion on the instant suit.

21. After going through the above submissions and the averments in the affidavit, the court distills the following issues.

1. Whether the application is incurably defective?
2. Whether the Plaintiffs have established by way of material before the court merit for grant of interim injunction?

On the competence of the application, I out rightly overrule that ground. The motion is based on order 40 rule 1 and 2 Civil Procedure Rules, Section 9, 10, 11 and 26 of Cap 22 and Section 3A. In as much as the Motion is seeking temporary injunctions in terms of prayers 2, 3 and 4 under Order 40 Rules 1 & 2 and also Section 3A Civil Procedure Act, the same cannot be faulted.

22. Perhaps the relevance of Section 9, 10, 11 and 26 of Cap22 could have been demonstrated in the instant motion. Even if the same motion had error though not disclosed by the Respondents, the same could have been saved by the provision of Article 159, (2) (d) Constitution of Kenya and Section 1A, 1B and 3A Civil Procedure Act Cap 21. As to whether the Plaintiffs had made case for granting of temporary injunction, the Court starts by setting down the principles for grant of the same and try to apply to the material before the court. In **TRITEX INDUSTRIES LTD & OTHERS VS. NHC & ANOTHER HCC 8/011 MSA**. The court held that;

“The case of GIELLA VS. CASSMAN BROWN LTD (1973) EA 358 was to the effect that for grant of interlocutory injunctions, the following principles apply namely: Applicant must show:

i. He is lucky to prevail on merit (prima face case).

ii. He will suffer imminent irreparable harm if orders are not granted which cannot be compensated by damages.

iii. He must show the likely harm he will suffer, outweighs harm it could cause to the adverse party (balance of convenience)”.

23. It is not in disputed the agreements were entered between 1989 and 1992 for sale of 100 acres between the Plaintiffs and the Defendants No.1 and 3. Despite the clause authorizing possession of 15 acres, the Plaintiffs never acquired or took possession thereof. The completion date of sale was in 1990 and the same date has never been extended to date. The Applicants are not demonstrating in their affidavits what was happening as between 1992 to 2010 when the demand notice of completion was issued dated 12.2.2010 a time span of about 18 years.

24. Due to the Plaintiff’s failure to be diligent in 18 years, the suit land was subdivided and transferred to 2nd and 4th Defendants. The notes that the 2nd Defendant is a son of the 1st Defendant and he alleges to have been given as gift by his father some portions of suit lands. Due to the time lapse aforesaid, the provisions of Section 4 (i) (a) and (e) of Cap 23 came into play in that after the completion of payment of

the purchase price by 1992, the 1st Defendant ought to have facilitated the processing of the land Board consents and title to the Plaintiffs thereafter.

25. The agreements by virtue of Section 6 of Cap 302 became void after 6 months of the entry. The breach of the agreement is deemed to have accrued by failure to obtain land record consent thus rendering agreement null and void and thus the limitation period of 6 years commenced. By 1999 or thereabout, the claim based on the void agreement was barred. In **MACHARIA & OTHERS VERSUS KAGIRI (2014) eKLR** in which the judge in this matter was the Applicant's advocates arrived at a verdict of constructive trust on the basis of proprietary estoppel created by virtue of possession or actual occupation and development of the suit land.

26. The court cited Section 30 (g) of the repealed Cap 300. The court held that:

“the evidence on record reveals that the appellants are in possession of plots and thus protected by the provisions of Section 30(g) of Cap 300”.

The court went ahead to state:

“we hold that the Respondent having put appellants in possession of the suit property created an overriding interest in favour of the appellants, the want of land board consent could not supplant the right aforesaid created as constructive trust was created in appellant's favour. The court relied on MWANGI & ANOTHER VS. MWANGI 1986) KLR 328 which held that the rights of a person or occupation of land are equitable in rights which are binding on the land and the land is subject to those rights. Further creation of trust over agricultural land does not constitute any other disposal or dealing within meaning of Section 6 of Cap 302 and thus LCB consent not required.”

27. In our instant case in absence of possession or occupation by the Plaintiffs of the suit property, the constructive trust could not be created and thus the requirements of Section 6 of Cap 302 apply rendering the agreement subject herein void. The orders for extension of the period to get the consent by 30 days did not bear fruits as consent was not obtained and thus the agreements are still void. The Court finds that in absence of a valid agreement, the orders of specific performance cannot be available.

28. However, on paragraph 6 of the replying affidavit by **KAPOSHI OLE NJOROGE NAKUMANA** he admits that he can refund monies already paid to him. This would amount to giving the claim for recovery of the consideration a new lease of life and supplant a defence of limitation period. The 1st Defendant has not demonstrated how he would refund the amount paid as he has already transferred the suit properties to his son 2nd Defendant and the 4th Defendant avers that his father who is senile gave him the lands 2345, 2347 and 2348. The law would allow the Plaintiffs to trace 1st Defendants properties in event they were to succeed in the claim for the refund of the consideration. In **MOSES MARANGU & ANOTHER VS. ESTHER NTHIRA & OTHERS Civil Appeal No.95/09 Nyeri**, the court ordered refund of consideration even when it was not claimed in pleadings. The court invoked the overriding objectives provisions of the law (oxygen principles).

29. The court finds that the remnants of Kajiado/Kaputiei Central 2345, 2547 and 2548 after acquisition by the Kenya Railways should be preserved to await outcome of the suit. Further any compensation to the Defendant No.2 in relation to above 2 parcels of land should be withheld to await the conclusion of the suit. Parcel No.2346 will not be affected by the orders as the 4th Defendant was not served with documents.

30. The court thus makes the following orders:

1. The remnants of parcels Kajiado/Kaputiei Central 2345, 2347 and 2348 after acquisition of any of their portions at all by the Kenya Railways will be preserved to await the determination for the suit.

2. Any compensation in relation to aforesaid 3 parcels of land shall be withheld by the NLC or Kenya Railway to await determination of the suit.

3. Costs in the cause.

Signed and Delivered at Machakos this 30th day of January, 2015.

CHARLES KARIUKI

JUDGE