



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 108 OF 2012

DR. MARTIN MARANI:::::::::::::::::::::::::::::::::APPLICANT

VERSUS

KEN WEKULO:::::::::::::::::::::::::::::::::1ST RESPONDENT

ELITE VENTURES LTD:::::::::::::::::::::::::::::::::2ND RESPONDENT

WILSON A. CHEMNO BOINET:::::::::::::::::::::3RD RESPONDENT

R U L I N G

1. A Preliminary Objection was taken on behalf of the third defendant on two grounds namely;-

(a) That the agreements for sale of LR NO Kitale Municipality Block 16/233 and block 16/237 was contrary to the provisions of section 3 (3) (a) of the Law of Contract Act and

(b) That the sale was contrary to section 6 of the Land Control Act.

2. Mr Omboto for the third defendant argued that the two agreements were not signed as required by law. He argued that the third defendant did not sign the agreements and that those who signed the agreements were not recognised under the law. He contended that in law the only persons who can sign such agreements are lawyers, auctioneers or agents. He argued that Elite Ventures Ltd who signed the agreements were not agents and therefore the entire suit which is based on the two agreements should be dismissed.

3. On the second ground, Mr Omboto argued that the transactions in question did not receive consent of the land control board as required and therefore the transactions are null and void.

4. Mr Atudo for the plaintiff opposed the Preliminary Objection arguing that the same does not meet the threshold of what a preliminary objection should entail. Mr Atudo argued that a preliminary objection cannot be sustained where certain facts are to be ascertained. He argued that there is need to ascertain if there was an agency relationship between Elite Ventures Ltd the second defendant herein and the third defendant and if that agency was legal or was still subsisting. He further argued that though consent of the Land Control Board was not obtained, the plaintiff is entitled to refund of purchase price and that the plaintiff has claimed refund of purchase price as an alternative claim and there is need to ascertain who between the 2nd defendant and 3rd defendant should refund the purchase price.

5. Mr Atudo referred to the decision in ***Mukisa Biscuit Manufacturing Co. Ltd -Vs- West End***

Distributors Ltd (1969) EA 696. In this case, Sir Charles Newbold had this to say;-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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. In the instant case there are facts to be ascertained. They included whether there was any agency between the 2nd defendant and the third defendant and whether the said agency was subsisting as at the time the two agreements were
7. entered into. Besides this, there is an issue of refund which has been claimed. Even if it were found that the agreements are null and void, then the issue of refund will come in. Already the plaintiff has pleaded in the alternative that he is claiming a refund. The court has to decide who between the 2nd defendant and 3rd defendant should refund the purchase price. It therefore follows that the preliminary objection raised herein has no merits. The same is hereby dismissed with costs to the plaintiff.

It is so ordered.

Dated, signed and delivered at Kitale on this 29th day of January, 2015.

E. OBAGA

JUDGE

In the presence of Mr Kaosa for Mr Omboto for 3rd defendant and Mr Chemoiyai for 2nd defendant. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

29/1/2015