



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 170 OF 2014

JOSEPH MWANGI THIGA..... PLAINTIFF

VERSUS

PETER MUNGAI MWANGIDEFENDANT

R U L I N G

The Defendant/Applicant by a Notice of Motion application dated 3rd June 2014 brought under section 3 of the Law of Contract Act, Cap 23 Laws of Kenya and Order 2 Rule 15 of the Civil Procedure Rules, 2010 prays for orders that:-

1. The Honourable court be pleased to strike out the plaint and dismiss the suit.
2. Costs of the application be provided for.

The application is supported on the following grounds:-

- a. That the suit is materially defective for non-compliance with the mandatory provisions of the law.
- b. That the joint venture Agreement the plaintiff is relying on was verbal.
- c. That the law of Contract Act, Cap 23 clearly stipulates that no suit shall be brought upon a contract for the disposition of an interest in land unless the said contract is in writing, has been signed by all the parties thereto and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
- d. That the suit is an abuse of the process of the court.

The application is further supported on the annexed affidavit of **Peter Mungai Mwangi** the Defendant herein sworn on 3rd June 2014. The Defendant states that he is the registered proprietor of land parcel **Nairobi/Block 126/194** situated at **Kamulu** within the outskirts of Nairobi and that the plaintiff has been a tenant on part of the suit premises where a Resort in the name of **Kamulu Highway Resort** has been erected at a monthly rent of Kshs.20,000/- under an oral agreement. The Defendant contends the plaintiff is basing his claim on a contract for the disposition of an interest in land which contract was not in compliance with section 3 (3) of the Law of Contract Act Cap 23 Laws of Kenya which mandatorily requires that such a contract be in writing and the signatories signatures be witnessed. The Defendant in the premises claims the plaintiff is non suited and his suit ought to be struck out for being defective and

incompetent.

The plaintiff filed a replying affidavit sworn on 4th November 2014 in opposition to the Defendant's application and avers that the suit against the Defendant is for Kshs.9,000,000/- being quantified damages and general damages and is well founded. The plaintiff states the Defendant has by his defence admitted there was an oral joint Venture Agreement between the Defendant and the plaintiff. The plaintiff further states the Defendant has by his defence admitted that he (the defendant) contributed some materials as intemised in paragraph 5 of the defence which the plaintiff utilized in the construction of the resort facility. The plaintiff avers that the suit before the court is one for claim of recovery of damages arising out of a joint venture agreement that is admitted by both the plaintiff and the Defendant.

The Defendant/Applicant filed written submissions dated 14th January 2015 on the same date. The plaintiff/Respondent elected to file no submissions and relies on his filed replying affidavit. The Defendant/Applicant in his filed submissions reiterates and contends that the agreement between the plaintiff and the Defendant did not comply with the provisions of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya which requires that all contracts relating to a disposition of an interest in land be in writing and each signatory's signature be attested and witnessed. The primary issue for determination in this application is whether the agreement between the plaintiff and the defendant related to a disposition of an interest in land such that it needed to conform to the mandatory provisions of section 3(3) of the Law of Contract Act.

Section 3(3) of the Law of Contract Act provides:-

“No suit shall be brought for the disposition of an interest in land unless:-

- a. **The Contract upon which the suit is founded:-**
 - i. **Is in writing,**
 - ii. **Is signed by all parties thereto and**
- b. **The signatures of each party signing has been attested by a witness who is present when the contract was signed by such Party”.**

My understanding of the above provision is that the contract founding the suit has to relate to a disposition of an interest in land such as a lease for a fixed term and/or a transfer. A tenancy from month to month cannot in my view be such a contract as is contemplated by section 3(3) of the Law of Contract Act to be in writing. Tenancies for periods less than 5 years are governed under the provisions of the Landlord and **Tenant (Hotels and catering Establishments) Act Cap 301 of the Laws of Kenya.** Under the Landlord and Tenant Act (Hotels and Catering Establishments Cap 301 Laws of Kenya a tenancy agreement need not be in writing to be valid. As per the plaint, the plaintiff pleads that he and the defendant agreed to enter into a joint venture where the plaintiff was to construct the **Kamulu Highway Resort** on land parcel **Nairobi/Block.126/194** on terms that the same was to be let out to him at a monthly rent of Kshs.20,000/-. It does appear that fundamental differences arose respecting the implementation and execution of the joint venture agreement necessitating the plaintiff to institute the present suit seeking to recover his capital outlay and damages. The plaintiff in his prayers is not seeking any interest in the land but a liquidated sum of Kshs.9,000,000/- being on account of his contribution to the building and value of distrained goods and general damages.

The claim by the plaintiff in my view does not relate to a disposition of an interest in land and indeed the alleged joint venture agreement did not in my opinion relate to a disposition of an interest in land so that it ought to have complied with section 3(3) of the Law of Contract Act. In my view the transaction between the plaintiff and the Defendant was in the nature of a business undertaking whose terms are subject to determination by the court at the trial.

Having found and held that the agreement, if any, between the plaintiff and the Defendant did not relate to a disposition of an interest in land it is my finding that section 3(3) of the Law of Contract Act has no

application in the circumstances of this case. Equally the authorities referred to the court by the Defendant on the application of section 3(3) of the Law of Contract Act have no relevance in the instant matter and I need not deal and/or consider them.

The upshot is that I find and hold that the Defendant's application dated 3rd June 2014 lacks any merit and the same is dismissed with costs to the Plaintiff.

Ruling dated, signed and delivered this **17th** day of **April** 2015.

J.M. MUTUNGI

JUDGE

In the presence of:

Mr. Situma for Kulecho..... For the Plaintiff

Mr. Njenga For the Defendant