



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELC 512 OF 2010**

**WESTLANDS RESIDENTIAL RESORT LTD .....PLAINTIFF**

**V E R S U S**

**KAWAKANJA LIMITED .....1<sup>ST</sup> DEFENDANT**  
**JANE GATHONI MURAYA KANYOTU .....2<sup>ND</sup> DEFENDANT**  
**MARGARET NYAKINYUA MURIGU.....3<sup>RD</sup> DEFENDANT**  
**MARY WANJIKU KANYOTU .....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

The 1<sup>st</sup> Defendant company is the registered proprietor of the suit premises, that is L.R. No. 11540/3 (IR No. 109051). The company was fully owned by the deceased James Kanyotu by reason of holding 999 shares with one share being held by Tropical Registrars as his nominee. It would appear from the replying affidavit of the 4<sup>th</sup> Defendant that after the deceased's death the shares of the company were increased ("MWK- 1") so that present shareholders are as follows:-

- a) The Estate of James Kanyotu – 999 shares;
- b) Tropicl Registrars – 1 share;
- c) Mary Wanjiku Kanyotu – 3,000 shares;
- d) John Kariuki Kanyotu – 2,000 shares;
- e) Christopher Ngata Kanyotu – 2,000 shares; and
- f) Sandra Gathoni Kanyotu – 2,000 shares.

This shareholding is contested.

The 2<sup>nd</sup> to 4<sup>th</sup> Defendants are the Interim Administrators of the Estate of the deceased, having been appointed in **HC. Succession Cause No. 1239 of 2008** which is pending. The suit property is an issue in those proceedings.

It does not appear to be in dispute that an Agreement for Sale was signed between the Plaintiff, as purchaser, and the 1<sup>st</sup> Defendant, as vendor, over this suit property. The 1<sup>st</sup> Defendant was selling it for

KShs. 775,550,000/= (at the rate of KShs. 3,300,000/= per acre) to be paid as follows:-

- (a) KShs. 100,000,000/= deposit to be paid by the Purchaser after the execution of the Agreement by RTGS transfer to an account in the name of the Vendor and notified in writing by the Vendor's Advocates to the Purchaser's Advocates, and
- (b) KShs. 675,550,000/= (the balance) to be paid within 14 days of successful registration of the Transfer in the name of the Purchaser or its nominee.

The completion date was on or before 180 days from the date of the execution of the Agreement. The Agreement was not dated. The Plaintiff pleaded that dating was to be done upon payment of the deposit of the purchase price, which was awaiting the Defendant's production of a certified search from the Companies Registry and confirmation of whom its *bona fide* directors are.

It was the Plaintiff's case that on or about 18<sup>th</sup> June 2010 the 2<sup>nd</sup> Defendant objected to the Agreement and the payment of the deposit of the purchase price on the basis that the suit property was the subject the **Succession Cause** in which she had made an application seeking the Court's approval of the sale of the property to offset debts to the Estate. The Plaintiff continued that on or about 23<sup>rd</sup> June 2010 the Interim Administrators to the Estate recorded a consent order in the **Cause** to value the property, sell it and the proceeds be distributed/dispensed in accordance with the consent of the Administrators and beneficiaries of the Estate. The suit property was subsequently valued at KShs. 760,000,000/= by Crystal Valuers Limited and KShs. 764,799,500/= by Petrum Valuers. The Plaintiff states that it is ready and willing to perform its obligations under the Agreement and pay the deposit and balance but that the Defendants have refused and/or failed to accept the money and have instead offered the suit property to C & P Shoe Industries Limited thereby breaching the Agreement.

The suit was brought for the Defendants to be ordered to specifically perform the Agreement, to deliver to the Plaintiff the completion documents upon the Plaintiff's payment of the deposit. The Plaintiff sought an injunction to restrain the Defendants or its agents, servants or otherwise howsoever from advertising, offering for sale, leasing, mortgaging, charging, transferring other than to the Plaintiff, assigning and/or otherwise dealing with the property. Lastly, a mandatory injunction was sought directing the Defendant to give the Plaintiff vacant possession of the property upon the Plaintiff's payment of the deposit, for the purpose of fencing only and on the Plaintiff's undertaking not to make any developments thereon until after the payment of the balance of the purchase price. It is notable that under paragraph 8 of the Agreement it was contracted as follows:-

#### **"8. POSSESSION**

*The property is sold in vacant possession. The Purchaser shall take possession of the property upon payment of the deposit on the purchase price for the purpose of fencing ONLY but shall not make any developments until after payment of the balance of the Purchase Price."*

Filed along with the suit was a motion for a temporary injunction and a mandatory injunction in terms of what is indicated in the foregoing pending the hearing and determination of the suit property. The motion is the subject of this Ruling.

The 1<sup>st</sup> Defendant denied the claim as did the 4<sup>th</sup> Defendant. They then sought the striking out of the suit and the application on the grounds that:-

- (a) the suit property is agricultural land subject to the provisions of the Land Control Act (Cap. 302) and yet the transaction did not receive the consent of the Land Control Board;
- (b) the Agreement was undated and therefore invalid and no consideration has been paid on it; and
- (c) the Agreement is an instrument chargeable with stamp duty under the provisions of the Stamp Duty Act (Cap. 480), and the same not having been stamped it offends the provisions of section 19 of the

Act.

The position taken by the 2<sup>nd</sup> Defendant was that she was not opposed to the sale of the suit property to the Plaintiff or to any other competitive purchaser provided that such sale has to be supervised by the Probate Court or this Court in order that the interests of the beneficiaries be protected. The 3<sup>rd</sup> Defendant swore a replying affidavit in which she proposed that a fresh agreement be drawn between the parties and the Plaintiff and be presented to court for approval; that in the agreement it deposits 20% of the agreed price within 7 days into an account to be operated by the advocates of the 2<sup>nd</sup> to 4<sup>th</sup> Defendants; the transactions be completed within 90 days; and that the completion documents be signed by the Administrators of the Estate. She opposed the grant of the injunction.

The application was argued by Mr. Havi for the Plaintiff, Mr. Mwenesi and Mr. Adala for the 1<sup>st</sup> Defendant, Mrs Thongori for the 2<sup>nd</sup> Defendant, M/s Wahome for the 3<sup>rd</sup> Defendant and Mr. Nyiha for the 4<sup>th</sup> Defendant.

The parties herein made reference to the consent order recorded in the Probate Court on 23<sup>rd</sup> June 2010 and 29<sup>th</sup> June 2010 which was that the Interim Administrators with consultation of the beneficiaries and the approval of the court had approved the sale of the suit property on such terms as parties may agree. The Interim Administrators were authorized to sign all necessary documents to enable the transfer of the property to the purchaser. The proceeds of the sale were to be held by the Advocates of the Interim Administrators to be finally distributed/disbursed to the beneficiaries. The Plaintiff sought to rely on the consent order as a basis for saying that the transaction between it and the 1<sup>st</sup> Defendant had the blessing of the Interim Administrators and the Probate Court. However, the consent order did not direct that the suit property be sold to the Plaintiff. It was a general order in which the Interim Administrators were allowed to sell the property. Secondly, the Agreement herein was between the Plaintiff and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant is a limited liability company, separate from the 2<sup>nd</sup> to 4<sup>th</sup> Defendants who were not parties to the transaction. The 1<sup>st</sup> to 4<sup>th</sup> Defendants may all have been in court on the day of the consent order, but that is not the same as saying they have all agreed to sell the property to the Plaintiff.

The parties do not appear to dispute that the suit property was agricultural land subject to the provisions of the Land Control Act whose section 6 provides that the sale was void for all purposes if the consent of the Land Control Board is not obtained (**Kiungani Farmers Co. Ltd. –Vs- Mbugua [1989] KLR 432**). There is no dispute no consent has so far been obtained, or even applied for. Mr. Mwenesi and Mr. Nyiha asked that the Agreement be found to be void for lack of consent. Mr. Havi's response was that under the Agreement it was for the 1<sup>st</sup> Defendant to obtain the consent which it had not done and cannot therefore benefit from its own failure. Secondly, he argued that the consent was, by virtue of section 8 (1) of the Act, supposed to be applied for within 6 months of the making of the Agreement, and that, in any case, the High Court could be approached to extend that time. Section 6 is applicable irrespective of the fact that it is the 1<sup>st</sup> Defendant who was supposed to apply for the consent, or obtain the same. Either the transaction has the consent or it does not have. Regarding section 8(1), it is material that the Agreement was executed but is not dated. But paragraph 5 of the Amended Plaintiff stated that the Agreement was executed on or about 6<sup>th</sup> May 2010. If that is true, 6 months have since expired and there has been no extension of the period by the High Court. It must follow that the Agreement is void and cannot be the basis of this suit and application.

The other material objection raised by Mr. Mwenesi and Mr. Nyiha was that the Agreement subject of the suit and application has not been duty-stamped and cannot therefore be admissible. Mr. Havi, relying on the decisions in **Darshan Shah –Vs- Roopman (K) Ltd And Others, HCCC No. 52 of 2001 at Nairobi** and **Surgipharm Limited –Vs- Aksher Pharmacy Limited And Another, HC (Milimani Commercial Courts) CC No. 295 of 2004**, stated that stamp duty will be payable upon payment of the deposit and purchase price. He asked that the non-payment at this stage should not form the basis for denying his client the injunction sought. I have looked at the decisions in the two cases referred to. With respect, section 19 (1) prohibits in mandatory terms the use of unstamped instrument in evidence, except in criminal proceedings; and in civil proceedings by a collector to recover stamp duty. Section 19 (3)

provides for steps to be taken by the Court which has received an unstamped instrument. Under Section 19(3) (a) the unstamped instrument is supposed to be impounded and forwarded to a collector. Under Section 19 (3) (b) the court, at the request of the person seeking to rely on the instrument, can grant him a reasonable opportunity to apply to a collector for leave to have it stamped out of time. Under section 19 (3) (c), the instrument may be received in evidence upon the payment into court of the duty and penalty. Mr. Havi did not request for opportunity to apply to a collector for stamping out of time and neither has his client paid the due duty and penalty. Subsection 3(b) and (c) are therefore not available to his client.

It is clear to me that the Agreement is not admissible in this case. The intention of the law appears quite clear that the court should not be used by parties who seek to avoid the payment of duty. The court should at all times strictly refrain from accepting unstamped instruments to be used in evidence. A party who seeks to use any unstamped instrument must demonstrate that the omission or neglect to stamp as required did not arise from any intention to evade payment of duty or otherwise defraud; and that the circumstances of the case are such that the instrument could not be stamped. Further, when notice is issued that stamping of the instrument is going to be an issue, the party in default should at that stage seek leave to go and have the collector to stamp it. I find the Plaintiff has not demonstrated any intention to have the Agreement stamped. The Agreement cannot therefore be used in evidence as a basis for the case and application.

I am aware that striking out a suit or pleading is a summary remedy that should only be done in clear and obvious cases and with great caution (**D.T Dobie & Co. (K) Ltd –Vs- Muchina [1982] KLR 1**). The court should aim at sustaining rather than terminating a suit; and has to be sure that the suit is beyond redemption and cannot be cured by amendment, before it can strike it out. After finding that the Agreement is void for lack of the consent of the Land Control Board and that it is, in any case, not stamped and is therefore not admissible, I do not think the suit can be cured in any way.

Consequently, the application and suit are hereby struck out with costs.

**DATED AND DELIVERED AT NAIROBI  
THIS 29<sup>TH</sup> DAY OF MARCH 2011**

**A. O. MUCHELULE  
J U D G E**