



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

HIGH COURT CIVIL CASE NO. 134 OF 2008

JOHN MICHAEL WANJAO.....PLAINTIFF

=VERSUS=

ALUBALA ABENAYO ANDAMBI.....DEFENDANT

RULING

In his plaint filed on 13th October, 2008, **John Michael Wanjao** (hereinafter “**the plaintiff**”), seeks three main orders of the court namely:-

Ø A permanent injunction restraining **Alubala Abenayo Andambi** (hereinafter “**the defendant**”), among others, from transferring, alienating and /or in any other manner interfering with LR No. Eldoret Municipality Block 9/2749 (hereinafter “**the suit land**”);

Ø A declaration that the said parcel of land belongs to the plaintiff; and

Ø The original lease certificate issued in the defendant’s names be cancelled or nullified or in the alternative payment of purchase price of Kshs 200,000/= and damages for breach of contract.

The foundation of the plaintiff’s claim is pleaded in paragraphs 4, 5, 6 and 7 which are mistyped as 1, 2, 3 and 4 in the plaint. It is pleaded in paragraph 4 that on the 15th June, 2008, or thereabouts the plaintiff and the defendant entered into an oral and/ or verbal agreement whereby it was agreed that the plaintiff would sell to the defendant the suit land at Kshs 260,000/=. In paragraph 5, it is averred that the plaintiff handed to the defendant the original lease certificate of the suit land plus a duly signed transfer form. It is then pleaded in paragraph 6 that it was a term of the oral agreement that the defendant would make full payment of purchase price upon transfer. Then in paragraph 7, the plaintiff pleads that the defendant has refused, ignored and /or neglected to pay the balance of purchase price even after effecting the transfer of the suit land in his names.

In the defence delivered by the defendant, the plaintiff’s claim is denied. The defendant specifically pleads that if there was an oral or verbal agreement of sale of the suit land, the same is not enforceable

under the Law of Contract Act. This averment formed the basis of the defendant's application dated 14th July, 2010 lodged under Order VI Rule 13 (1) (a) of the Civil Procedure Rules. The defendant seeks the striking out, and dismissal of the plaintiff's suit. Under the said sub rule, affidavit evidence is not permissible.

The defendant has however, predicated his application on one main ground that the plaintiff's suit being premised on an alleged oral and or verbal agreement, is unenforceable by dint of the provisions of the said Law of Contract, Cap 23 of the Laws of Kenya.

The Plaintiff neither filed grounds of opposition nor a replying affidavit. I however, allowed his counsel to respond to the application on matters of law only. In that regard, counsel agreed to file written submissions which were in place by 5th October, 2011. The submissions for the defendant remained the same that the plaintiff's alleged oral or verbal agreement is unenforceable.

On his part, counsel for the plaintiff submitted that the Constitution forbids vitiating suits on technicalities and that in the interest of justice, the suit should go to full hearing.

I have perused the pleadings the application and the submissions of counsel. This matter in my view is an open and shut case. The plaintiff's case collapses or stays on the construction of section 3 (3) of the Law of Contract Act, Chapter 23 of the Laws of Kenya which reads as follows:-

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

(a) The contract upon which the suit is founded,

(i) Is in writing

(ii) Signed by all parties thereto, and

(iii) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”

The language of the said section is clear: a contract for the disposition of an interest in land must be in writing, signed by all parties and the signatures duly attested, for it to be enforceable. The requirement is statutory. To insist that parties comply with a statute, in my view is not being technical or in breach of any provisions of the Constitution. The plaintiff's claim is pursuant to a contract for the disposition of the suit land. The contract had to comply with the provisions of the said section. It did not, given the plaintiff's own pleadings. Such a contract is not enforceable. I am not therefore surprised that the plaintiff filed nothing in response to the defendant's application despite opportunity afforded to him to do so.

In my view, this is a plain and obvious case. There is no genuine dispute between the parties to go to trial as the plaintiff's contract with the defendant is unenforceable.

In the premises, I accede to the defendant's application and order that the plaintiff's suit be and is hereby struck out with costs.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF NOVEMBER, 2011.

**F. AZANGALALA
JUDGE**

Read in the presence of:-

1. **Mr. Kirwa** holding brief for **Omondi** for Defendant/applicant and
2. **Mr. Marube** holding brief for M/s Mburu/**Okara** for the plaintiff/Respondent.

F. AZANGALALA
JUDGE.