



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 78 of 2008

VIVIENE NJERI MATIRU.....PLAINTIFF/APPLICANT

VERSUS

**KIBABA NGURU.....1ST DEFENDANT/RESPONDENT
JOYCE WANJIKU KARIUKI.....2ND DEFENDANT/RESPONDENT
GRACE MUTHONI WANJIKU3RD DEFENDANT/RESPONDENT**

RULING

The plaintiff herein, sued the defendants for mandatory injunction orders to have them evicted from land title LR.NO.LOC 1./CHOMO/672 and 676. They were also supposed to be restrained from claiming any interest or title whatsoever, in the said properties or interfering with the plaintiff's interest thereon. The plaintiff is the registered proprietor of both pieces of land aforesaid. These were first registrations and it is her case that her titles are indefeasible.

The defendant filed a defence and counterclaim to the plaint. On 29th April, 2008, Ang'awa J. gave a mandatory injunction the consequence of which the defendants were evicted. Going by the pleadings, one would be right to believe that this would be the end of this suit. However, this did not end the dispute. There is now an application before me by way of a Notice of Motion under Order VI Rule 13 (c) and (d) of Civil Procedure Rules; Registered Land Act, Cap 300 Laws of Kenya; Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya, and Sections 6 and 7 of the Land Control Act Cap 302 Laws of Kenya seeking orders that;

- 1. The caution lodged by the 1st defendant on 21st May, 2008 claiming purchaser's interest on the suit properties LR. NOs LOC 1/Chomo/672 and 676 be lifted and withdrawn forthwith.**
- 2. That the defendants' defence and counterclaim filed on 24th April, 2008 be struck out and judgment be entered as prayed in the plaint, and**
- 3. That the costs of this application be borne by the defendants.**

The grounds upon which this orders are sort are listed on the face of application which is also supported by an affidavit sworn by the plaintiff.

The 1st defendant swore an affidavit in reply to oppose the application by the plaintiff. The summary of this dispute is that the plaintiff and 1st defendant at one stage cohabited as husband and wife and lived in the suit premises. After they fell out, the 1st defendant was ordered out of the said premises but offered to buy parcel No.Loc.1/Chomo/672.

There is a copy of Sale Agreement signed by both parties which has been challenged by the plaintiff. It is the plaintiff's case that, there is no valid Sale Agreement because the said agreement does not bear her signature or those of any witnesses and it is also not attested. It is also her case that, the 1st defendant's signature was not witnessed. In addition, the said agreement does not confer any interest in land as required under Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya and in any case, the consent of the land Control Board was never obtained as required by law.

As regards the defence and counterclaim it is the plaintiff's case that no triable issues have been disclosed and it is intended to delay the fair trial of this suit, and is an abuse of court process. She repeats that the said agreement for sale is null and void and cannot be the basis for an order for specific performance because it did not comply with the Law of Contract and the Land Control Board regulations. If the defendant has any claim, which is denied, his only remedy is an action for the refund of any sums paid.

The 1st defendant on the other hand said he placed the caution against the suit properties to protect his interest until the counterclaim for specific performance is heard and determined. He should also be given an opportunity to prove his right and interest in the suit properties.

Both learned counsel have filed written submissions and cited several authorities. I have taken some time to read all those authorities but it will not be necessary to address all of them in this ruling. I note that the 1st defendant's affidavit fails to address the salient issues raised in the supporting affidavit of the plaintiff. These relate to whether or not there is a valid agreement between the plaintiff and the 1st defendant, and whether or not there was any Land Control Board consent granted to facilitate the transfer of any interest in land from the plaintiff to the 1st defendant.

Section 3(3) of the Law of Contract Act provides that an agreement for the disposition of land must be in writing, signed by both parties, and their signatures thereto witnessed accordingly.

The agreement relied upon by the 1st defendant which is disputed by the plaintiff was not signed by the plaintiff. Although signed by the 1st defendant, it was not witnessed according to the law. It cannot therefore be said to be a legal document that can facilitate the disposition of land under the law.

In **Civil Appeal No.257 of 2001, Peter Waweru Waititu – vs –Cyrus J. Karanja**, the Court of Appeal held that Sale Agreements relating to agricultural land are void unless consent to transfer by the Land Control Board has been given. It also held that, in such circumstances, the purchaser has no legal right or interest capable of being protected by a caveat – **see also Kariuki –vs – Kariuki (1982) KLR 225 and Nabro Properties – vs – Sky Structures (2002)2 KLR 299**.

In view of the foregoing, I have asked myself whether there any triable issues capable of compelling this suit to go for trial. With respect, I see none. I know that striking out the pleading is a drastic measure which should be taken with alot of caution. This is because such an action deprives a party of his or her day in court. On the other hand however, the courts should never shy away from making such orders in clear and unambiguous cases.

In my view, this is a clear case that discloses no cause of action or triable issues that should go for trial.

Consequently, the plaintiff's application succeeds and I make an order that, the defendants' defence and counterclaim is hereby struck out. Additionally, the caveat lodged against the title is hereby lifted. The plaintiff shall have the costs of the application and the main suit.

Orders accordingly.

Dated, signed and delivered at Nairobi this 7th day of July, 2010.

A. MBOGHOLI MSAGHA
JUDGE