



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**LAND AND ENVIRONMENTAL LAW DIVISION**

**CIVIL CASE (ELC) NO.193 OF 2010**

**ALTON HOMES LIMITED.....1<sup>ST</sup> PLAINTIFF**  
**JOHN KANGOGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DAVIS NATHAN CHELOGOI.....1<sup>ST</sup> DEFENDANT**  
**JOHN NDUATI NJUGUNA.....2<sup>ND</sup> DEFENDANT**  
**SAMUEL KUGEKA NDEGWA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Alton Homes Limited and John Kangogo (hereinafter referred to as the plaintiffs), filed a suit in this court against Davis Nathan Chelogoi, John Nduati Njuguna and Samuel Kugega Ndegwa (hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively). The suit which was commenced by a way of a plaint, sought judgment against the defendants for various orders. Notable amongst the orders sought, are a declaration that the 1<sup>st</sup> defendant's sale and transfer of property known as Nairobi/Block 26/113 (suit property), to the 2<sup>nd</sup> defendant on the 14<sup>th</sup> January, 2010 was obtained in breach of the law, is fraudulent, null and void, and should be cancelled. Secondly, that the 1<sup>st</sup> defendant should be ordered to perform the agreement dated 21<sup>st</sup> May, 2007, together with the agreement dated 4<sup>th</sup> August, 2009, and deliver to the 1<sup>st</sup> plaintiff the original certificate of lease, duly executed together with all necessary consents and forms, to facilitate the registration of the suit property in the name of the 1<sup>st</sup> plaintiff. Thirdly, that the 3 defendants, their servants and agents should be restrained from entering upon the suit property, levying distress, or attaching the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff's furniture and chattels, or evicting the 1<sup>st</sup> plaintiff, or in any manner whatsoever interfering with the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff's occupation of the suit property, and fourthly, that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant be ordered to pay the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs damages for breach of contract and unjust enrichment, and also damages for trespass, wrongful seizure, conversion and illegal distress.

2. Each of the defendants has filed a statement of defence denying the plaintiffs' claim. Filed contemporaneously with the plaintiff's suit, is a notice of motion dated 27<sup>th</sup> April, 2010, in which the plaintiff seeks interlocutory orders under Sections 1A, 1B, 3, 3A, 63(c) & (e) of the Civil Procedure Act, and Order XXXIX Rules 1, 2, 3 & 5 of the Civil Procedure Rules. Amongst the orders sought in the application, are orders of interlocutory injunction restraining the defendants from offering the suit

property for sale, or levying distress on the premises or in any way interfering with the plaintiffs' possession of the suit premises.

3. The 1<sup>st</sup> defendant has raised a preliminary objection to the plaintiff's suit and the plaintiffs' motion. The notice of preliminary objection which was filed on 12<sup>th</sup> May, 2010, raises several grounds. However, when the preliminary objection was heard, only two grounds were argued. The first was the ground that the suit is incompetent and fatally defective as it has been instituted by plaint rather than originating summons.

4. It is contended that the suit revolves around the construction of the agreements dated 27<sup>th</sup> May, 2007, the addendum thereto dated 3<sup>rd</sup> May, 2009, and the final agreement dated 4<sup>th</sup> August, 2009. It is argued that since the agreement of sale entered into on 4<sup>th</sup> August, 2009, is not disputed, and the plaintiffs are merely seeking to enforce the terms of that agreement, the plaintiffs ought to have come to court by way of originating summons under Order XXXVI Rule 3 of the Civil Procedure Rules, so that the rights' of the parties under the contract of sale could be determined by the court. It is therefore argued that the suit having been commenced by way of plaint, the suit is fatally defective. In support of this submission, ***Kenya Commercial Bank vs Osebe [1982] KLR 296***, was relied upon.

5. The 2<sup>nd</sup> ground argued was lack of jurisdiction. It was submitted that this court lacks jurisdiction to hear and determine the plaintiffs' suit. This is because, the plaintiffs' claim being one for possession or occupation, under Section 159 of the Registered Land Act, the suit ought to have been referred to the Land Disputes Tribunal under Section 3(1) of the Land Disputes Tribunal Act. Other grounds raised in the 1<sup>st</sup> defendant's notice of preliminary objection, were not submitted on, but the 1<sup>st</sup> defendant's counsel indicated that he would argue the same in support of the 1<sup>st</sup> defendant's notice of motion dated 7<sup>th</sup> May, 2010 filed on 7<sup>th</sup> May, 2010. In that motion, the 1<sup>st</sup> defendant is seeking to have the plaintiff's suit struck out.

6. In response to the preliminary objection, counsel for the plaintiffs referring to the case of ***Mukhisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696***, submitted that a preliminary objection can only be raised where the facts are not in dispute. Counsel submitted that in this case, issues of breach of contract and fraud were in dispute, the same having been denied in the defence. It was further contended that fraud was a complex issue which could only be determined by way of originating summons. In that regard ***Kenya Commercial Bank vs Osebe*** (supra), where it was held that the procedure of the originating summons is intended for simple matters and that the procedure was not intended for determination of matters that involve a serious question was relied upon.

7. It was maintained that the suit was properly before the court by way of a plaint. It was contended that Section 159 in fact gives jurisdiction to the High Court. It was argued that the Lands Disputes Act is limited to determination of boundary disputes over agricultural lands. In this case the suit property is a residential property in Nairobi. The court was therefore urged to overrule the preliminary objection.

8. I have given due consideration to the preliminary objection. As was stated by Sir Charles Newbold, P in the case of ***Mukhisa Biscuit Manufacturing Company vs West End Distributors*** (supra), which was cited by the plaintiffs' counsel, a preliminary objection: -

***“raises a pure point of law which is argued on the assumption that all the facts pleaded on the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”***

9. In this case, the pleadings disclose several issues which are in dispute. Both the plaintiffs and the defendants have pleaded various contending facts which will require ascertainment by the court. The issues raised are not purely points of law, but are issues dependant on the ascertainment of facts and the application of the law. Thus, the objection has been improperly brought by way of a preliminary objection.

10. Regarding the substance of the objection, it is clear from the plaint and the defences filed that the plaintiffs' claim is not a simple one, or one that merely requires the determination of the rights of the parties to the contract of sale. There are complex issues involved such as, breach of contract, fraud and damages. In that regard, this case is essentially similar to *Kenya Commercial Bank vs Osebe* (supra), in which the Court of Appeal held that such a claim cannot be determined by way of an originating summons. Nor would a Judge have powers to award damages on an originating summons. Thus, I am satisfied that the suit has been properly initiated by a way of plaint.

11. On the issue of jurisdiction, the plaintiff contended that the suit property is not agricultural land but is a residential property in Nairobi. This contention has not been disputed. Secondly, the plaintiffs' claim is not merely a claim for possession or occupation. It is a claim which arises from contract. As stated hereinabove, issues of fraud have been pleaded, as well as a claim for damages. These are not matters which fall within the purview of Section 3 of the Land Disputes Tribunal Act which limits the jurisdiction of that Act to dealing with disputes involving:

- “(a) The division of, or the determination of boundaries to land, including land held in common;***
- (b) A claim to occupy or work land; or***
- (c) Trespass to land.”***

12. For the above reasons, I overrule the preliminary objection and order the parties to take a date for the hearing of the plaintiffs' motion. Those shall be the orders of the court.

**Dated and delivered this 5<sup>th</sup> day of July, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Anzalla H/B for Havi for the plaintiffs

Kinga for the defendants

Eric - Court clerk