

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 335 of 2008

CHARLES WACHIRA NGUNDO.....PLAINTIFF

VERSUS

CORPORATE INSURANCE CO. LTD.....DEFENDANT

RULING

By its chamber summons dated 5th May 2008 the defendant seeks the striking out of this suit on the ground that having not owned the suit property until 1998 it could not have entered into any agreement to sell the suit land to the Plaintiff in the late 1980s and that in view of the provisions of Section 3(3) of the Law of Contract Act the plaintiff's claim based on the alleged oral agreement between him and the defendant for the sale of the suit land to him is untenable.

Relying on the averments in the affidavit in support of the application, Mr. Simiyu for the defendant/applicant submitted that besides the fact that a single director of the defendant company could not have entered into any valid agreement with the plaintiff, the defendant became the registered proprietor of the suit land in 1998 and could not therefore have entered into any agreement with the plaintiff. He also submitted that the alleged oral agreement between the plaintiff and the defendant cannot found a cause of action and cannot be enforced against the defendant in view of the provisions of Section 3(3) of the Law of Contract Act.

For the plaintiff, Miss Mumbi submitted that the oral agreement between the plaintiff and the defendant was entered into in late 1980s when there was no requirement of writing in such contracts. That requirement was introduced by the amendment to Section 3(3) of the Law of Contract Act in the year 2002. She said that the oral agreement in this case was entered into in late 1980s and the Plaintiff, in part performance thereof, took immediate possession and is still in possession.

The powers given to the court to strike out pleadings under Order 6 Rule 13 of the Civil Procedure Rules, sometimes referred to as a summary procedure, are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court should exercise those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure under this provision should only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously untenable or unarguable.

In this case the defendant says it became the registered owner of the property in 1998. From the affidavit evidence on record I cannot say whether or not it was the beneficial owner of the property before that date. That is a matter for the trial court to determine after hearing evidence.

Before it was amended by Act No. 2 of 2002 which came into effect on 1st June 2003, Section 3(3) of the Law of Contract Act read as follows:-

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –

- (i) has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

If the Defendant was the beneficial owner of the suit lnd before 1998 and the plaintiff’s contention that since entering into the alleged oral agreement in the late 1980s, he has, in part performance, been in possession is true, then he is covered by the proviso to the above section. In its defence, the defendant has disputed that. That issue will therefore also require oral evidence.

For these reasons I find no merit in the defendant’s application dated 5th May 2008 and I accordingly dismiss it with costs.

DATED and delivered this 29th day of September, 2009.

D. K. MARAGA

JUDGE.