



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 679 OF 2006 (OS)

ROSE OF SHARON ACADEMY LIMITEDPLAINTIFF

AND

DELLIAN LANGATA LIMITEDDEFENDANT

R U L I N G

The Plaintiff instituted these proceedings by way of Originating Summons dated 7th December 2006 and filed in court on 11th December 2006 in which plaintiff seeks in the main an order for Specific Performance of the Agreement for sale dated 1st December 2003 between the plaintiff and the Defendant. Simultaneously with the Originating Summons the plaintiff filed a Supporting Affidavit sworn by Anthony Wahome Githinji a director of the plaintiff.

The Defendant filed a Replying Affidavit dated 3rd January 2007 sworn by its director one Phyllis Christabel Wambura Maranga and filed in court the same day. Thereafter on the 4th day of January 2007 there was filed in court a Memorandum of Appearance dated 3rd January 2007 by M/s Nd'ungu Githuka & Company Advocates for the Defendant.

M/s Ochieng Onyango Kibet & Ohaga Advocates for the Plaintiff did file a Chamber Summons under Order 36 Rule 8A of the Civil procedure Rules for directions for the hearing of the Originating Summons filed herein, among other prayers. This chamber Summons is dated 8th February 2007 and was filed in court on the 12th February 2007. Such directions were given by Lesiit J. on the 19th April 2007 that this matter proceed by way of viva voce evidence.

The Advocates for the Plaintiff then fixed the hearing of the Originating Summons for 14th February 2008. In the interim the plaintiff filed a supplementary Affidavit on 13th February 2008 sworn by its director Anthony Wahome Githinji whose main purpose was to annex letters relating to Land Control Board consent. Earlier on the 26th April 2007 M/s Ndungu Githuka and Company Advocates for the Defendant had given notice of Preliminary Objection.

And therefore when the Originating Summons came up before me for hearing on 14/02/08 Mr. Githuka Advocate sought to raise the preliminary objection. The Notice of Preliminary Objection reads:

“TAKE NOTICE that the defendant shall, at the first hearing of the Originating Summons filed

herein or any proceedings herein, raise a Preliminary Objection on points of Law raised in paragraphs 3,4,5 and 6 of the Replying Affidavit of PHYLLIS CHRISTABEL WAMBURA MARANGA sworn and filed on 3rd January, 2007.”

In his oral submissions before me in court counsel for the Defendant argued that no valid land Control Board consent was obtained and therefore the validity of the Contract herein was questioned and challenged. He further submitted that order 36 of Cap 21 of the Laws of Kenya under which the originating Summons herein is brought excluded matters such as where the validity of Contract is challenged as the equitable remedy of specific performance here sought will depend on whether or not there was a valid Contract in the first place. For that reason he submitted that the Originating Summons was brought under the wrong Order and should therefore be dismissed. He further argued that as the matter now under consideration was brought under the wrong Order, this court has jurisdiction to protect itself from entertaining matters wrongly before it. He then went ahead to submit that this court has no jurisdiction to hear the Originating Summons herein and quoted the case of **MUKISA BISCUIT MANUFACTURING CO. LTD. V WEST END DISTRIBUTORS LTD CA** at page 700 to the effect that it is not mandatory that all the issues must be agreed so long as the jurisdiction of the court is questioned. Counsel for the Defendant added that this matter was in any case not a Commercial one and it was therefore wrongly filed before this court. He referred this court to the Chief Justice’s circular dated 18th November 1997 paragraph 4 thereof excluding any matter relating to land affected by the land Control Board from being heard by the Commercial court and Submitted that the Originating Summons herein being wrongly instituted is liable to be dismissed and prayed that it be so dismissed with costs.

Mr. Kibet Advocate for the Plaintiff submitted that the Preliminary Objection was not only frivolous but it was also a gross and grave abuse of the process of the court. Every Originating Summons filed requires the directions of the court. Counsel for the Defendant raised no objection at the stage of taking directions and Mr. Kibet Advocate felt that that was the right stage at which this Preliminary Objection should have been raised. If the presiding judge of this court had considered this a non-commercial matter she would have given effect to the Chief Justice’s Circular on 19/04/07 when she gave directions. She did not. He further submitted that counsel for the Defendant did not, at that stage of taking directions, raise the point that this matter should not have been brought by Originating Summons but by Plaint. He strongly submitted that this belated attack on the court’s jurisdiction is an abuse of the process of the court and the Preliminary Objection is brought at the day of the hearing to derail the hearing. He further submitted that there cannot be any issue on this Court’s jurisdiction as this is the High Court and what there are are Divisions of the High Court. He argued that the matter herein is a Commercial one and referred to the letter from the Lands office stating that the land the subject matter hereof is not subject to Land Control Board consent. He stated that the suit herein is not about the validity or otherwise of the Contract as that has never been in question. The contract has in any event been partly performed by part payment of the purchase price and the balance is lying with the Defendant’s Advocate. He submitted therefore that Order 36(3) is the right Order under which the Originating Summons should have been brought and was brought. Finally he dealt with the issue of the Defendant asking that the Originating Summons be dismissed and stated that there was no formal application in court for the dismissal of the Originating Summons. He submitted that the present one was not a proper Preliminary Objection and prayed that the same be dismissed as being a derailment of the hearing and he prayed for getting up fees as he was ready for hearing of the Originating Summons.

I have carefully considered both counsel’s submissions herein. I begin at the point of what really a Preliminary Objection is. The celebrated case of **MUKISA BISCUIT (Supra)** at page 700 letters (d) to (e) Law, J.A said:-

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

The same case at page 701 letter B in the Judgment of Sir Charles Newbold it is said:-

“A preliminary objection is in the nature of what used to be a demurrer. It raised a pure point of law which is argued on the assumption that all the facts pleaded by the opposite side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

I agree and adopt the words in the above case into this matter. There is a dispute on whether or not the transaction in this matter required consent of the Land Control Board. Whereas counsel for the Defendant avers that that consent is necessary Counsel for the plaintiff thinks the opposite and has referred to some document from the Lands office. This is a matter requiring ascertaining, thereby taking this Preliminary Objection outside the set principles in the case of MUKISA BISCUITS (Supra).

The argument that the present Originating Summons is brought under the wrong order, even if it were true, which I find not to be true, does not hold. There is a cure under order 36 (10) for an order that the suit proceed as a plaint but as I have already said I do not find that the Originating Summons was brought under the wrong order.

The further argument that this matter is not a commercial one must fail. The prayer sought in the main in the Originating Summons, is one of specific Performance of a contract. That is within the purview of this court. I have nothing more to add to the plaintiff’s counsel’s submission that the High Court is the High Court and the divisions created are merely administrative. At any rate the matter canvassed in the Originating Summons falls to be heard in these courts.

I find nothing in the submissions of the Defendant’s counsel and the authorities quoted to persuade me to dismiss the Originating Summons. I find, with respect to Defendant’s counsel, that this is an improper Preliminary Objection that ought not to have been raised. The matters complained of therein are to be properly dealt with at the hearing of the Originating Summons. This Preliminary Objection fails the test and must be disallowed with costs and it is so disallowed.

Let parties herein proceed quickly to dispose of the matter.

DATED and DELIVERED in open court this 7th day of March 2008

In the presence of :

Kibet Advocate for Respondent/Plaintiff

Githuka Advocate for Applicant/Defendant

P. M. MWILU

JUDGE