



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 101 OF 2020**

**HARUN CHEBOI & ANOTHER.....PLAINTIFFS**

**VERSUS**

**THE REGISTERED TRUSTEES OF KENYA**

**PORTS AUTHORITY PENSION SCHEME.....DEFENDANT**

**RULING**

*(Plaintiffs being members of defendant pension scheme and residing as tenants in the Scheme's houses; defendant wishing to dispose of the units and floating a tender; plaintiffs claiming that they ought to have been given the first right of purchase and further asserting that the properties were not properly sold; plaintiffs seeking an injunction pending hearing of the suit; defendant stating that the properties have already been sold and raising a preliminary objection that the dispute ought to be referred to arbitration pursuant to the Trust Deed of the Scheme; the Trust Deed not produced and court unable to tell what it provides; on the application for injunction, defendant only supplying a sale agreement of one property; sale agreement on the face of it not properly attested; no evidence of any payment for the properties and no evidence of transfer; court finding that the plaintiffs have established a prima facie case and orders of injunction issued)*

1. The plaintiffs commenced this suit through a plaint filed on 6 August 2020. The plaintiffs work for Kenya Ports Authority (KPA) and are members of the Kenya Ports Authority Pension Scheme which Pension Scheme has various properties. As employees of KPA, and probably also as members of the Scheme, they have been residing, as tenants, in properties owned by the Scheme. The particular properties in issue are LR No. 209/10530/86 and LR No. 209/10530/89, which are house numbers 18 and 21 within Saika Estate in Nairobi (hereinafter referred to as 'the suit properties'). For purposes of streamlining its property portfolio, so as to comply with regulatory terms set by the Retirement Benefits Authority, the Scheme, through its registered trustees, proposed to offload some of its properties, including the properties occupied by the plaintiffs. In this suit, the plaintiffs claim that they held a legitimate expectation that they would be afforded a right of first purchase which was not done. They further aver that the properties were sold off at an undervalue. They have thus sued the trustees of the pension scheme for the following orders :-

*(a) An injunction to restrain the defendant from leasing, offering for sale, transferring, presenting any instrument for registration, dispossessing, evicting the plaintiffs, or in any other way interfering with the plaintiffs' rights and occupation of the suit premises.*

*(b) The plaintiffs be afforded an opportunity to purchase their respective units under the tenant purchase scheme pursuant to the doctrine of legitimate expectation.*

*(c) Costs and interest.*

2. Alongside the plaint, the plaintiffs filed an application seeking orders of injunction, inter alia, to stop the defendant from dealing with the suit properties, or interfering with their occupation of the suit properties, pending hearing of this suit. The supporting affidavit is sworn by Jane Kivaa, the 2<sup>nd</sup> plaintiff. She has stated that they have been tenants on the suit properties with rent being deducted directly by their employer, KPA, through a check off system. They state that they have been in employment of KPA for over 20 years. She has deposed that the suit properties were never bid for, as the bidder bid for a 3 bedroomed house, but after the tender, was allocated their four bedroomed houses. She deposes that the defendant has acted in breach of the Trust Deed and Regulations of the Pension Scheme. She has deposed that they may lose their houses thus suffer irreparable loss.

3. The defendant has opposed the motion through the replying affidavit of Alex Suyianka Ole Leteipan, who is one of its trustees. He has deposed that the defendant approved a master plan for the disposal of some of its properties. It then floated a tender KPAPS/PM/03/2019 for the disposal of the Scheme properties in October 2019. He has deposed that the plaintiffs were aware of the imminent disposal of the properties but did not choose to exercise their right to lodge an objection. He has deposed that vide an agreement dated 7 July 2020, it sold the properties to Kijiji Park Limited. He has annexed a copy of the sale agreement. He has deposed that the defendant is now no longer the

landlord of the suit premises. He maintained that the properties were sold through an open tender to the highest bidder. He has averred that the plaintiffs had the option of bidding but they did not do so. He does not think that the plaintiffs have a prima facie case.

4. A preliminary objection was also filed, asserting that the proceedings contravene the express provisions of the Trust Deed and Rules of the Pension Scheme, to wit, Clause 34, which provides for arbitration; that the proceedings offend the provisions of Section 6 of the Arbitration Act, No. 4 of 1995; that the suit was not accompanied by summons to enter appearance and the same should be struck out with costs.

5. Counsel agreed that the application and the preliminary objection be argued together and I have taken note of the submissions filed by Mr. Waziri, learned counsel for the plaintiffs, and Mr. Lumatete, learned counsel for the defendant.

6. Starting with the preliminary objection, it is the position of the defendant that pursuant to the Trust Deed and Rules of Kenya Ports Authority Pension Scheme, to wit, Clause 34, this matter should first be taken to arbitration. Well, the problem is that the defendant did not avail to this court the said Trust Deed and Rules and I cannot tell what they say. Such document is nowhere in the replying affidavit of the defendant. I have also tried to see if it is in the defendant's list of documents but it is not among the documents listed. Given that position, I regret that I am unable to allow the preliminary objection on account that there is provision to arbitration. The last limb of the preliminary objection relates to summons. I see absolutely no issue here since the defendant has already filed a Statement of Defence to the suit. The purpose of summons is to inform the defendant that there is a suit filed and provides information on the number of days that the defendant has to enter appearance and/or file defence. Here, a defence has already been filed and the purpose of the summons is thus spent. I am unable to strike out the suit because of any defect in the summons. It will be seen that I see no merit in the preliminary objection and it is hereby dismissed with costs. If the defendant so wishes, she can file a formal application for reference to arbitration for consideration. Having done away with the preliminary objection, I now turn to the application for injunction.

7. The position of the plaintiffs is that they are occupants of the suit properties and ought to have been given a first right of purchase. They also question the tender process and the sale of the suit properties. In fact, they claim that the suit properties were never actually sold through the tender process and that the purchaser's bid was for a different property. In reply, the defendant has asserted that the suit properties were sold following the tender and that they were sold to Kijiji Park Limited.

8. I have gone through the replying affidavit of Mr. Leteipan and I can see that he has annexed one sale agreement dated 7 July 2020 to show that the property LR No. 209/10530/86 was sold to Kijiji Park Limited. I have not seen any document that demonstrates that the property LR No. 209/10530/89 has ever been sold. From the material presented before me, it would mean that the defendant is still the owner of LR No. 209/10530/89. I have had a second look at the annexed sale agreement over LR No. 209/10530/86. In as much as it purports to claim that the said property has been sold, the attestation page does not say who signed the agreement. All I see is signatures with the other required wordings of who has signed the same not appearing. One is thus at liberty to question the sale agreement. Mr. Leteipan also annexed a transfer instrument. I have looked at it. It relates to a property No. IR 57737. I have not been given any instrument to show what connection the grant No. IR 57737 has with the two suit properties in issue. Moreover, when I have a further glance at the said transfer, I can see that the transferor is not the defendant herein, but Kenya Commercial Bank Limited as Custodian Trustees of Kenya Cargo Handling Services Limited Staff Pension Scheme, which to me, appears to be a completely different entity from the defendant. I doubt if that transfer instrument relates to the suit properties.

9. Thus, an assessment of the material supplied to me, at least at this stage of the proceedings, by both plaintiffs and defendant, make me come to the preliminary finding that LR No. 209/10530/89 is yet to be sold. There is also doubt as to the veracity of the sale of LR No. 209/10530/86. Instructively, I have not been shown any payments by the defendant for the suit properties.

10. In the face of the allegations by the plaintiffs that the properties were not sold, or not properly sold, and without the defendant demonstrating that the suit properties were indeed sold, or properly sold, I will have to come to the finding that the plaintiffs have demonstrated a prima facie case with a probability of success. The plaintiffs are members of the defendant and would be entitled to have a legitimate expectation that any sale of the suit properties would be above board. The defendant is the custodian of all material regarding the sale but has decided to be very vague and economical with what it has supplied to court and the only conclusion one can reasonably come up with is that the defendant is trying to hide something. The plaintiffs are in occupation of the houses and if they are evicted, they stand to suffer great loss, which may not be compensated by an award of damages, as their lives may be turned upside down. The balance of convenience also tilts towards maintaining the status quo that prevailed before the purported sale until this case is heard and determined.

11. I will thus allow the application of the plaintiffs as drawn. I further order that the status quo prevailing before the purported sales be maintained. The plaintiffs will also have the costs of the application and of the preliminary objection.

12. Orders accordingly.

**DATED AND DELIVERED THIS 3RD DAY OF MARCH, 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**