



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO.180 OF 2018

LAWRENCE KINAYNJUI GITAO.....1ST PLAINTIFF

JANE WANJIKU GITAO.....2ND PLAINTIFF

=VERSUS=

JOAN W. THIONG'O.....1ST DEFENDANT

JANE W. THIONG'O.....2ND DEFENDANT

JOHN K NJUGUNA KING'ANG'I.....3RD DEFENDANT

(All being the Administrators of the Estate of DEDAN

THIONG'O KING'ANG'I a.k.a DEDAN THIONG'O -Deceased)

RULING

1. Before me is Notice of Motion dated 5.8.2020 filed by the Plaintiffs/applicants who are seeking the following orders;

- a) *That Judgment on Admission be entered in favour of the Plaintiffs against the Defendants regarding the Plaintiff's claim for a portion of 5 acres out of the sub-division of L.R. No.170/26(Original No. 170/10), herein, the Suit land.*
- b) *In the alternative, the Defendant's defence be struck out and Judgment be entered in favour of the Plaintiffs as prayed in the plaint with respect to the Plaintiffs' claim for a portion of five (5) acres of the subdivision L.R.170/26 (Original No. 170/10).*
- c) *That in the alternative, the Defendants' statement of defence be struck out in its entirety and judgment be entered for the plaintiff in respect of all prayers made in the plaint.*
- d) *That the Defendants be directed to effect the immediate transfer of the suit land to the Plaintiffs in any event within 14 days of granting orders 1 or 2 above, failure of which the transfer thereof be effected by the Deputy Registrar of the Court.*
- e) *That the Defendants do vacate and or obtain discharge of all or any encumbrance on the suit land to facilitate the transfer thereof.*
- f) *That the costs of the application be borne by the defendants.*

2. The application is premised on the grounds on its face and in the supporting affidavit and further affidavit of Lawrence Kinyanjui Gitau. The deponent avers that the Plaintiffs entered into various written sale agreements with the Vendor, Dedan Thiong'o King'angi (deceased) dated 18th November 1986, 14th December 1988, and 4th June 19991 for the purchase of LR No. 170/26(Original No. 170/10) measuring ten (10) acres. The Plaintiffs paid the Vendor full purchase price for a portion of L.R No. 170/26 measuring Five (5) acres (the suit land) and obtained the consent to Transfer from the Land Control Board in respect of the sale. The Vendor however passed away without completing the transfer of the said Five (5) acres to the Plaintiffs.

3. The deponent further avers that the aforementioned sale agreements between the Plaintiffs and the Vendor Dedan Thiong'o Kingangi (deceased) have not been contested by the Defendants. Thus the said Defendants who are the administrators of the Estate of Dedan Thiongo have no defence to the Plaintiffs' claim to the portion of five acres from L. R. No. 170/26 and are deemed to have admitted the same as:-

- i. *"The Vendor received payment of the entire purchase price thereof;*

ii. **The Vendor acknowledged receipt of such payment by applying for consent to Transfer the property from the Land Control Board in order to effect a transfer of ownership thereof to the Plaintiffs;**

iii. **The Vendor further acknowledged receipt of the said payment by executing an Indenture of Conveyance dated 6th June 1988 in respect of transfer ownership of the portion of five (5) acres of L.R. No. 170/26 to the Plaintiffs”.**

4. The Plaintiffs contend that they are truly and justly entitled to their claim for a portion of L.R. No 170/26 measuring five (5) acres as the defence filed herein does not raise any triable issues with respect to the aforementioned claim.

5. It is further averred that the 1st Plaintiff has been ailing for quite some time, has been hospitalized for a long period of time and is in dire need of securing the suit land to facilitate procuring finances for his medical treatment.

6. The Respondents have opposed the application through the replying affidavit of Jane W. Thiong’o dated 27.8.2020. She has introduced herself as the administrator of the estate of her father Dedan Thiong’o King’ang’i. She contends that the application is misconceived, frivolous vexatious and the same is an abuse of the court process.

7. She avers that the averments made by the 1st Applicant are untrue. The respondents have challenged the averments made by the applicants that the vendor sold the land. They also deny that any payments were made averring that even the issue of a dishonoured cheque was taken up with the Advocates Complaints Commission. The respondents therefore contend that the Applicants have no evidence to justify their claim over the suit property.

8. Additionally, the deponent avers that the application is an attempt to pre-empt the court to pronounce judgment at the interlocutory stage, yet the main trial is ongoing and the merits of the case ought to be canvassed in the main suit.

9. In the rejoinder made in the further affidavit of the 1st applicant, the plaintiffs claim that the averments made by the respondents are mere after thoughts as no such issues were raised in the **Succession Cause No. 676 of 2006**, In the matter of the Estate of Dedan Thiongo, where in the Plaintiffs’ claim on the suit property was recognized and set aside from the estate. Further, the applicants contend that their application does not pre-empt the court in pronouncement of the suit, but only aims to aid the court to acknowledge and determine from the evidence presented the non disputed portion of the land which is a claim of five acres.

Submissions

10. In their submissions, the applicants have reiterated the averments set out in the application and in the affidavits of the 1st Applicant. They have emphasized that there were agreements entered into between themselves and one Dedan Thiong’o King’ang’i of which the applicants were purchasing the suit land and that full payment was made. That in the **Succession Cause No. 656 of 2006 In the matter of the Estate of Dedan Thiong’o**, the probate court recognized and appreciated the claim of the applicants and confirmed the grant with a caveat on the suit property.

11. The Applicants therefore submit that the defence does not raise any triable issues. To this end they have relied on the case of **Civil Appeal 123 of 2018 Madison Insurance Company Limited vs. Augustine Kamanda Gitau** where the court stated as follows:

“The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raised a triable issue even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or groundless or fanciful and or is brought is instituted with some ulterior motive of for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court’s resources, while taking into account the need to allot resources to other cases. (emphasis added)”

12. The Applicants have also relied on the case of **HCC No. 380/2013 Kenya Commercial Bank vs Suntra Investment Bank 2015 (eKLR)** where the court in allowing an application to strike out the defence stated as follows:

“I have looked at the Defence and I have carefully considered all the averments therein. It is in plain eye-sight that it is an assembly of mere denials. The Defendant has attempted to explain some of the averments through its submissions; not even an affidavit. Even with the explanations offered in the submissions, the defence remains a complete demurer; I do not see any hope of injecting life to it even through amendment.”

13. The Defendants/Respondents in turn have advanced their submissions premised on the contents of the affidavit of Jane Thiong’o. They contend that their defence raises triable issues whereby they have challenged the verifying affidavit of the 1st Plaintiff, the one attached to the plaint. They have also stated that the Plaintiff’s claim is time barred and that the Plaintiffs never honoured the agreement for sale hence the alleged sale agreements are not valid.

14. The Respondents have further submitted that entertaining any interlocutory application at this stage, would be manifestly prejudicial to them as the same is an attempt to prod the court to make premature comments of matters yet to be canvassed and adjudicated in the proceedings of the main suit. This would in turn deny the Respondents the right to cross examine the evidence in the main suit.

15. To this end, the Respondent have relied on the case of **Bia Tosha Distributors Limited vs. Kenya Breweries Limited and 6 Others (2018) eKLR**, where the Supreme Court stated as follows:

“ an early involvement of this court, in our opinion, would lead to pre-mature comments and the merits on issues yet to be adjudged at the Court of Appeal. This may likely expose one of the parties to prejudice, with the danger of leading to an unjust outcome.”

Determination

16. Having regard to all the material presented before me, I discern that the claim of the applicant is anchored on alleged sale agreements between themselves and one Dedan Thiong’o King’ang’i who is now deceased. In their plaint dated 19.2.2014, the Plaintiffs claim for the following orders:

- a) ***A declaration that L.R. No. 170/26 (Original Number 170/10) belongs to the Plaintiffs;***
- b) ***An order directing the Defendants to transfer L. R. No. 170/26 (Original Number 170/10) to the Plaintiffs;***
- c) ***Costs of this suit;***
- d) ***Any other order that this Honourable Court deems fit; and***
- e) ***Interest on (c) above at court rates.***

17. The issue for determination is whether the Plaintiffs claim ought to be allowed at this stage through summary judgment.

18. In the case of **Vehicle and Equipment Limited vs Coca Cola Juices Limited (2017) eKLR**, Judge Ongutto cited the case of **Ideal Ceremics vs Suraya Properties Group Limited HCC 408/2016** where the court stated as follows in matters summary judgment;

“ The law on summary procedure vide a judgment on admission is now relatively clear. The purpose of the law laid out under Order 13 of the Civil Procedure Rules is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.

The court’s power to enter judgment on admission is discretionary: see Cassam vs. Sachania (supra). The discretion is to be exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous: see Choitram vs. Nazari (supra) and Momanyi vs. Hatimy & Another [2003]2 EA 600. The admission ought to be obvious on the face thereof and leave no room for doubt.

An admission may be formal (typically an admission made in the pleadings) or informal (typically admissions made pre-action being filed in court but after demand has been made)”.

19. I have perused the entire statement of defence and nothing therein can be construed as an admission of plaintiffs’ claim. In particular, the respondents have in paragraph 5 of their statement of defence challenged the issue of payments. It follows that whether there was a valid sale agreement between the Plaintiffs and Dedan Thiong’o is an issue that is subject to proof through evidence. To this end, the court makes reference to paragraph 3, 4 and 6 of the further affidavit of the 1st applicant which clearly depicts a situation where documentary evidence needs to be tendered and to be subjected to the usual rigours of cross examination. Similarly, the replying affidavit of Jane Thiongo raises issues of facts relating to the alleged transactions between their father Dedan and the plaintiffs of which evidence needs to be tendered.

20. It is further noted that in paragraph 7 of the statement of defence, the Respondents contend that the suit is time barred as it was filed outside the statutory period provided for such claims. The applicants contend that the execution of the indenture of conveyance was made in 1988. The deceased Dedan passed on in year 2004 while this suit was filed in year 2014. Here in lies an issue of TIME which cannot be dealt with at this stage of the trial.

21. The applicants have submitted that their claim was recognized in the probate court **Case No. 676 of 2006, In the matter of the Estate of Dedan Thiongo**. However, such recognition does not amount to a determination of the claim, In the case of **Isaac Kinyua & 3 others v Hellen Kaigongi [2018] eKLR**, I stated as follows in respect of such claims;

“when a dispute regarding ownership in respect of the property of a deceased person arises, then the court can set aside the share in dispute to await the outcome of the resolution of the dispute from the court with jurisdiction”.

Also see in the **Estate of Julius Ndubi Javan (Deceased) [2018] eKLRI, Re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR**

22. In the case of **Endebess Development Company Ltd. vs Coast Development Authority 2018 eKLR**, the court made reference to; In **Wenlock vs Moloney [1965] 2 All E.R 871 at page 874**, where it was stated that;

“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power....”

23. From the analysis of the material presented before this court, it is apparent that there are protracted issues of law and facts which cannot and should not be dealt with through affidavit evidence. In the circumstances, I find that the application dated 5.8.2020 is not merited and the same is hereby dismissed with the costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Maina for the Respondent/Defendant

Ms Ndirangu for the Plaintiff/Applicant

Court Assistant: Edel Barasa