



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 463 OF 2017

JENNIFER MUTHONI MORIGI.....1ST PLAINTIFF

JANE WANJIKU HIRAM.....2ND PLAINTIFF

JULIA WAMBUI GAKUNGI (*Suing as trustees and*

officials of **WOMEN TRUST HOUSING**

WELFARE ORGANIZATION).....3RD PLAINTIFF

VERSUS

HOMELANDS DEVELOPMENT INVESTORS LTD....DEFENDANT

RULING

1. What is before me is the Application dated 16th January, 2019 in which the Defendant is seeking for the following orders:

a. The main suit herein and the Plaint dated 23rd November, 2017 be dismissed, since there is no triable cause of action that can be sustained in the trial of the main suit.

b. The Applicant be awarded costs of this Application.

2. The Application is supported by the Affidavit of the Defendant's Attorney who has deponed that this suit was commenced by way of a Plaint dated 23rd November, 2017 which culminated into a Ruling of 27th September, 2018; that the Defendant is the registered proprietor of land known as L.R. No. 20523, I.R 126163 Mavoko Municipality and that vide the orders dated 27th September, 2018, this court set aside the orders of 2nd March, 2018 and vested the suit land in the Defendant.

3. The Defendant's Attorney finally deponed that in light of the orders of the court dated 27th September, 2018, the prayers sought by the Plaintiffs in their Plaint have become academic and lack any basis for a full hearing; that there is no triable cause of action that can be sustained at trial of the main suit and that the issues herein have been conclusively dealt with through inter-partes hearing of the Notice of Motion dated 30th July, 2018.

4. In response, the Plaintiffs filed Grounds of Opposition in which they averred that the suit has progressed to pre-trial conference and is almost at the hearing stage; that the Application is meant to delay the hearing of the main suit and that the Application should be dismissed with costs.

5. In his submissions, the Defendant's counsel submitted that the suit should be dismissed; that there is no pending triable issue; that the purchase price in respect of the suit land between the Plaintiffs and the Defendant was Kshs. 90,000,000 and not Kshs. 135,000,000 and that the Defendant produced evidence from the advocates who were involved in the transaction showing that the agreed purchase price for the land was Kshs. 90,000,000.

6. Counsel submitted that the Plaintiffs did not controvert the Defendant's evidence that the agreed purchase price was Kshs. 90,000,000 and that the Plaintiffs conceded to this assertion.

7. The Defendant's advocate finally submitted that the Plaintiffs should have adduced evidence when the Application dated 30th July, 2018

was argued but they failed to do so; that there is no evidence controverting the Defendant's evidence that the purchase price of the suit land was Kshs. 90,000,000 and that the suit should be struck out.

8. In response, the Plaintiffs' advocate submitted that it is not true that the issue of the purchase price has been settled by the court; that the Notice of Motion sought for the setting aside of the default Judgment and the proceedings and that the Defendant was allowed to defend the suit.

9. Counsel submitted that the consent to the Notice of Motion dated 30th July, 2018 was only to allow the Defendant to defend the suit and was not an admission that the purchase price of the suit land was Kshs. 90,000,000; that the Defence that has been filed has raised the issue of fraud on the part of the Plaintiffs and that the advocates' Affidavits that the Defendant is relying on do not form part of the Defendant's List of Documents.

10. The Plaintiffs have further averred that the parties agreed to have the suit land transferred in favour of the Defendant upon payment of a total of Kshs. 90,000,000 with the balance of Kshs. 45,000,000 being paid upon registration of the title in favour of the Defendant.

11. It is the Plaintiffs' case that the Defendant only paid Kshs. 55,000,000 and started avoiding them; that it was a term of the agreement that should there be a breach by the purchaser, the purchaser was to forfeit 10% of the purchase price and that the Defendant has breached the agreement by failing to pay to the Plaintiffs the balance of the purchase price.

12. In the Complaint, the Plaintiffs have prayed for an order declaring the Sale Agreement of 28th September, 2010 repudiated and for the Defendant to forfeit 10% of the purchase price to the Plaintiffs. The Plaintiffs have also sought for an order cancelling the title for L.R. No. 20523 and for a new title to be issued in their names, together with the costs of the suit.

13. The matter proceeded for hearing ex-parte on 2nd March, 2018, and the court allowed the Plaintiffs' claim as follows:

a. An order be and is hereby issued declaring the Sale Agreement dated 28th September, 2010 repudiated at the instance of the breach of the Defendant and the Defendant forfeits the 10% deposit of the purchase price to the Plaintiffs.

b. An order be and is hereby issued cancelling the grant/title for L.R. No. 20523 Mavoko Municipality in the name of the Plaintiffs.

c. A new title/grant be issued by the Chief Land Registrar in the name of the Plaintiffs forthwith.

d. The Defendant to pay to the Plaintiffs the costs of the suit.

14. After the said Judgment, the Plaintiffs had the title in respect of L.R. No. 20523 Mavoko Municipality registered in their names. However, when the Defendant learnt about the decision of this court, it filed an Application dated 30th July, 2018 in which it sought to set aside the Judgment of 2nd March, 2018 and the entire proceedings. The Defendant further prayed for leave to defend the suit as per the draft Defence.

15. To show that it had a Defence that raises triable issues, the Defendant annexed the Affidavits of the Vendors' and the Purchaser's advocates who were involved in the transaction. According to the said Affidavits, the purchase price in respect of the suit land was Kshs. 90,000,000 and not Kshs. 135,000,000 as alleged by the Plaintiffs.

16. The Plaintiffs did not oppose the Application to set aside the ex-parte Judgment and for leave allowing the Defendant to defend the suit. The said Application was allowed by the court.

17. In my view, the consent by the Plaintiffs was in respect to the setting aside of the proceedings, and to allow the Defendant to file the Defence. The Plaintiffs did not *per se* concede to the allegations that the purchase price of the suit land was Kshs. 90,000,000, notwithstanding the fact that their advocate in the conveyancing stated so.

18. Indeed, it is only after the Defendant files its Defence that the court can make a determination on whether the Plaintiffs' suit raises any cause of action or not.

19. I have read the Defendant's Statement of Defence that was filed on 1st October, 2018. In the said Defence, the Defendant has stated that after receiving the full purchase price of Kshs. 90,000,000, the Plaintiffs have uttered a false document alleging that the purchase price for the suit property was Kshs. 135,000,000. The issue of whether the purchase price was Kshs. 90,000,000 or Kshs. 135,000,000 is indeed a triable issue.

20. To the extent that every party is entitled to an opportunity to state his or her case, however hopeless the case may look, the Plaintiffs should be accorded that opportunity. Indeed, despite the advocates in the conveyancing transaction deponing that the purchase price was Kshs. 90,000,000, the Plaintiffs have a right to cross-examine them on those assertions, to state their own case. The court will then make a final determination on the actual purchase price of the suit land that was agreed upon.

21. In light of what I have said above, I find that this suit should be set down for hearing to enable the court ascertain the truth, not just on the basis of Affidavits, but after *viva voce* evidence has been taken. Consequently, the Notice of Motion dated 16th January, 2019 is dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE