



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 343 OF 2017

DOMINIC KARANJA GATHITU.....PLAINTIFF

VERSUS

SALIMU SULEIMAN MAHABA...DEFENDANT

RULING

1. The plaintiff/applicant filed a notice of motion dated 14/8/2017 seeking to restrain defendant whether by himself, his agents and/or servants from trespassing or wasting, constructing or , alienating or otherwise interfering or dealing with the plaintiff's property Kwale/Bamburi "A"/759 pending the hearing and determination of the main suit.

2. The defendant upon being served with the said notice of motion and copies of plaint filed a notice of preliminary objection dated 10/11/2017 and filed in court on 13/11/2017. The grounds are:-

i. That the suit be struck out having been premised on a claim expressly statutorily barred by the provisions of Section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya.

ii. That the jurisdiction of this court is expressly ousted by statute and thus the suit is a nullity which should be determined *in limine*.

3. On the 13/11/2017, the court directed that the preliminary objection be heard first and that it be canvassed by way of written submissions.

4. When the matter came up on 5/3/2018, counsels indicated that they did not wish to highlight their submissions. A date for ruling was then given.

The Defendant's submissions

5. It is the defendant's submissions that Section 3(3) of the Law of Contract is set in mandatory terms. That in the absence of a written contract, memorandum or note there is no case. The plaintiff has not taken possession of the suit property. Further that there is no contract at all as allegation of its existence is denied *in toto* to wit part performance hence the proviso to the amended section is in applicable. The plaintiff relies solely on the purported agreement of sale of 30/4/1980 as the basis of his claim which is not written, executed, witnessed and not existing contrary to the mandatory provisions of Section 3(3) of the Law of Contract Act.

6. They have put forward the case of: (1) **Daudi Ledama Morintat vs Mary Christine Kiarie & 2 others [2017] eKLR**; (2) **Patrick Tarzan Matu & Another vs Nassim Sharriff Abdulla & 2 others [2009] eKLR** and (3) **Silverbird Kenya Limited vs Junction Limited and 3 Others [2013] eKLR**. They urge that the plaintiff's suit be struck out with costs for noncompliance with the mandatory provisions of Section 3(3) of the Law of Contract.

The plaintiff's submissions

7. Does the Honourable court lack jurisdiction on account of Section 3(3) of the law of contract Act?

That under Section 23(3) (e) of the Interpretation and General Provisions Act, Chapter 2 Laws of Kenya it provides *inter alia*;

“Where written law repeals whole or part of another written law, unless contrary intention appears, the repeal shall not:-

Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed.”

8. That Section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya provides;

“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, part performance of the contract and has done some other action in furtherance of the contract”.

9. They have put forward the case of. The **Owners of Motor Vessel “Lilian S” –vs- Caltex Oil Kenya Ltd [1989] KLRI**. Also **D. T Dobie & Co (K) Limited -vs- Muchira [1982] KLR 1**.

10. I have considered the rival submissions. The issue for determination is whether the preliminary objection is merited.

11. There is no doubt that the agreement between the plaintiff and the defendant is an oral one. As to whether there were any witnesses this will come out during the hearing. The plaintiff states that the agreement was on 30/4/1980. This was before the relevant section of the law of contract Act was amended in 2002. The transfer was effected in favour of the plaintiff who even charged the suit property to Barclays Bank for a loan.

12. In the case of **D.T. Dobie & Company Kenya Limited -vs-Muchiria [1982] KLR** the court of appeal held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.

I am guided by the above authority.

13. I am of the view that the authorities relied on by the defendant are not relevant to this case as they relate to agreements entered into after 2002. The circumstances in the instant suit are different as the plaintiff already has title.

14. The defendant disputes the signatures that led to the transfer of the title to the plaintiff. I find that this is a matter that would be ventilated by way of adducing evidence.

15. All in all I find no merit in the preliminary objection and the same is dismissed with no orders as to costs.

It is so ordered.

Dated and signed in Nairobi on this.....day of2018

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L. KOMINGOI

JUDGE

Dated and delivered at Mombasa on this 5th day of October 2018.

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A. OMOLLO

JUDGE