



REPUVBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT NUMBER E106 OF 2021

VINCENT EKEYA OMUSE.....1ST PLAINTIFF
ALFRED ONYANGO ATIENO.....2ND PLAINTIFF
ODEDE REZIN OCHIENG.....3RD PLAINTIFF
DENIS OLUOCH APOPOZ.....4TH PLAINTIFF
JAMES OCHIENG AGENGO.....5TH PLAINTIFF
ONESMUS KIMUYU KIMEU.....6TH PLAINTIFF
MICHAEL OMWANDA AJWANG.....7TH PLAINTIFF
PETER WASONGA OUNA.....8TH PLAINTIFF

VERSUS

**SAUTI SAVINGS & CREDIT CO-OPERATIVE
SOCIETY LIMITED.....1ST DEFENDANT
DAVID ELLY NDWIGAH.....2ND DEFENDANT
STELLAMARIS MUTHAMA.....3RD DEFENDANT
FRANCIS NGILA.....4TH DEFENDANT
JOHN WAMBUGU.....5TH DEFENDANT
MUREITHI WAMAE.....6TH DEFENDANT
GERALD OMBEWA.....7TH DEFENDANT
JOHNSON MUTUNGI.....8TH DEFENDANT
WINSTON ADELL.....9TH DEFENDANT
MILTON OMONDI.....10TH DEFENDANT**

RULING

This ruling relates to the application dated 11/03/2021 seeking orders for the registration of a caveat to restrict dealings with the land known as Nairobi/Block 82/8760 (“the Suit Property”) and an order of injunction to restrain the Defendants from selling transferring, entering upon, construction or in any way changing the character or registration of the Suit Property. The application was supported by the affidavits of

James Ochieng Agengo, Vincent Ekeya Omuse and Alfred Onyango Atieno sworn on 1/03/2021,

The Plaintiffs claim to be members of the 1st Defendant, which is registered under the Co-operatives Societies Act. The Plaintiffs claim that they purchased plots either directly from the 1st Defendant or from its members, which were subdivisions of the Suit Property which is registered in the name of the 1st Defendant. They produced copy of the title over the Suit Property. The court notes that the land has an encumbrance by way of a charge in favour of the Co-operative Bank Limited to secure a loan of Kshs. 34,600,000/=.

The Plaintiffs claimed that the 1st Defendant subdivided the suit land into plots measuring 7 by 14 meters and sold the plots to its members at various times. The Plaintiffs exhibited various sale agreements between them and the 1st Defendant. They also exhibited certificates of ownership for the plots, payment receipts and various correspondence exchanged on the matter. The Plaintiffs claimed that they had been waiting for the 1st Defendant to issue title deeds to them to no avail.

The Plaintiffs claimed that they were surprised when sometime in March 2021 they witnessed enhanced activity on the Suit Property with trucks and workers excavating, digging and constructing on the land. No explanation was given for the activity by the Defendants. The Plaintiffs exhibited photographs of the ongoing activities on the suit land.

The 1st Defendant filed a replying affidavit which was sworn by David Elly Ndwigah sued as the 2nd Defendant and who described himself as the Chairman of the 1st Defendant.

The 1st Defendant admitted that the Suit Property was registered in its name. That at the time when it obtained the title deed over the land, it was the 1st Defendant's intention to subdivide the land and sell it to its members. However, the 1st Defendant claimed that from the outset it was plagued by disputes and claims by other parties which gave rise to various court cases such as Nairobi High court Miscellaneous Application 239 of 2002, ELC 313 of 2008 and another claim before the National Land Commission (NLC). The 1st Defendant claimed that it had spent an enormous amount of money in excess of Kshs. 200,000,000/= in defending the suits, instituting one of the suits and in the construction of a fence all of which were aimed at protecting the Suit Property in order to ward off trespassers and squatters from the land.

The 1st Defendant further claimed that at its 38th Annual Delegates Meeting (ADM) held on 3/5/2014, its members resolved to dispose of the Suit Property so as to recover its costs and compensate its members. That that resolution was confirmed at its ADM held on 27/4/2019. The 1st Defendant thus claimed that as a result of the resolutions made at the ADM, the subdivision and transfer of the plots to its members was no longer viable. Further, that it had granted a temporary license to a church organisation to occupy and use five acres of the Suit Property and the church had taken possession and was using the land by putting up temporary structures. This arrangement according to the Defendants was meant to generate the much needed revenue.

The Defendants contended that the Plaintiffs were claiming a total of 10 plots measuring 7 by 14 meters or 980m² yet on the other hand, the entire property measures 12.277 hectares or 122,770m² square meters. That the total area which the Plaintiffs claim was equivalent to 7.98% of the property yet the Plaintiffs are seeking orders in respect of the entire Suit Property.

The 1st Defendant filed a Notice of preliminary objection dated 04/05/2021 seeking to strike out the suit and the application dated 11/3/2021.

The court has considered the various grounds raised in the preliminary objection, the submissions made and the authorities relied upon. The first and second grounds are that the suit is misconceived and is not tenable in law. That it is incompetent and cannot lie under the provisions of law upon which they have been brought. This objection vague and lacking in particulars. This ground was only substantiated in the Defendant's submissions, which raise the issue of the court's jurisdiction to hear the suit visa-vis the jurisdiction of the Co-operative Tribunal under the Co-operatives Societies Act No. 12 of 1997.

The Court is alive to its obligation to deal with the issue of jurisdiction as soon as the same is raised for without jurisdiction the Court has no power to take one more step. This dispute relates to the sale of land registered under the repealed Registered Land Act. The Environment and Land Court (ELC) is established under **Article 162 (2) (b) of the Constitution** to hear and determine disputes relating to the environment and the use, occupation of and title to land. Section 13 of the ELC Act gives the court jurisdiction to hear and determine specified disputes. Section 150 of the Land Act also provides for the jurisdiction of the ELC to hear and determine disputes, actions and proceedings concerning land under that Act.

Section 76 of the Co-operative Societies Act, 2007 confers jurisdiction upon the Co-operatives Tribunal. Section 76 of that Act envisages that the Tribunal will handle disputes between the parties set out under Section 76) (1) (a), (b) or (c). This being a dispute between the Plaintiffs, the Society and members of its committees can only fall under Section 76 (1) (b) which deals with disputes **between members, past members or deceased members, and the society, its Committee or any officer of the society**. Section 76 of the Act excludes disputes by non-members against a cooperative society. In this suit only the 1st Plaintiff claims to be a member of the 1st Defendant. The Defendants claimed that the Plaintiffs were its members but no proof was provided of that membership. The sale agreements attached to the affidavits of the Plaintiffs whose authenticity was not denied by the Defendants do not indicate that the Plaintiffs were making purchases of the plots as members or through members of the 1st Defendant. The agreements appear to be made between the Plaintiffs as purchasers and the 1st Defendant as the vendor.

The definition of a member under Section 2 of the Co-operatives Act includes a person or a co-operative society joining in the application for the registration of a society, and a person or co-operative society admitted to membership after registration in accordance with the by-laws. Save for the 1st Plaintiff who admits to being a member of the 1st Defendant, no evidence was placed before the court to show that the other Plaintiffs are members of the 1st Defendant. The court is not satisfied that the sale agreements exhibited were specifically for members only. Those grounds of objection fail.

The contention that the Plaintiffs' claim is time barred under the Limitation of Actions Act can only be determined at the trial when the court will be able to determine when the Plaintiffs causes of action arose. The Defendants contended that the cause of action arose from the date of the sale agreements while the Plaintiffs claim that the cause of action arose from the date the Defendants started the acts of interference with the Suit Property in March 2021. The court notes that the various sale agreements contain different completion dates which can only be determined through calling evidence at a trial. Considering the facts and documents presented in this suit, the issue of limitation cannot be determined at this preliminary stage as it can only be determined at the full hearing of the suit when evidence will be adduced by the parties.

In this court's view, a preliminary objection ought to raise points of law which do not require further proof by way of evidence. This would be based on the assumption that all the facts have been pleaded correctly by the other party hence the points of law can be clearly deduced from the pleadings.

The other issues raised by the Defendants are for trial and cannot be determined at this preliminary stage.

The Defendants claimed that the 3rd and 4th Plaintiffs had not exhibited any agreements in writing for the purchase of the plots which they claim. The court notes that the plaint shows that the 4th Plaintiff purchased plot no. 533(1317). The question as to whether or not any there is contravention of Section 3(3) of the Law of Contract Act should be reserved for determination at the hearing.

In the application dated 11/03/2021, the Plaintiffs claimed that they purchased various plots from the 1st Defendant and other previous persons who had purchased land from 1st Defendant, which were subdivisions of Nairobi/Block 82/8760. They claimed that the Defendants had failed to issue titles over the plots to them and had instead commenced acts of interference with possession and ownership of the plots sold to the Plaintiffs.

The 1st Defendant did not deny selling the plots to the Plaintiffs. However, it claimed that at the 1st Defendant's ADM of 3/5/2014 a resolution was passed to dispose of the Suit Property to recover costs and that that resolution was confirmed at the ADM of 27/4/2019. The Defendants further stated that the intention was to sell the Suit Property and refund or compensate the purchasers and its members. The activities complained of by the Plaintiffs as taking place on the land were not denied by the Defendants.

The resolution passed by the 1st Defendant at the Annual Delegates Meeting of 3/5/2014 which was confirmed at the ADM of 27/4/2019 states at minute 6/ADM/2014 (1) that the Central Management Committee had been mandated to look for the best option to dispose of the Donholm project and recover monies accrued by the society. The resolution was proposed by Ms. Agnes Gichina and seconded by Ms. Roselyne Odulla.

Looking at that resolution, it does not clearly state that the 1st Defendant resolved to sell the Suit Property so that it could compensate the Plaintiffs. The resolution does not in any way recognise the part of the Suit Property which was already sold to the Plaintiffs or any other parties. From the resolution the rights which the Plaintiffs may have gained over the land by entering into the sale agreements exhibited are at risk of being defeated by the Defendants' conduct and their activities on the suit land.

The court has further considered the Defendants' that the Suit Property measures 12.77 Hectares or 122,770m² and that the total area of the land which the Plaintiffs claim is 98m² and that it represents 7.98% of the whole land. The Plaintiffs stand to suffer harm if the 1st Defendant's resolution is implemented.

The court has considered the application, affidavits, submissions filed and the authorities cited. It has also considered the principles for the grant of injunctions. Taking into account the totality of the facts of this case and in order to do justice to all the parties and to preserve the subject matter of this case, an order is issued for the *status quo* pertaining to Nairobi/Block 82/8760 to be maintained pending hearing and final determination of this suit. The costs of the application be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF AUGUST 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Keith Wesonga for the Plaintiff

Ms. A. Sebastian holding brief for Mr. S. Sarvia for the Defendants

Ms. Lusweti holding brief for Mr. Migad for the proposed Interested Party

Mr. Vincent Owuor- Court Assistant