



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 14 OF 2018

JAMES KARUGA MACHARIA.....APPELLANT

VS

JESSEE MWANGI NJOROGE.....RESPONDENT

RULING

1. This Appeal arises from the decision of the Hon Learned Senior Resident Magistrate, Hon I Gichobi delivered on the 16/8/18.
2. The grounds of Appeal are expressed as below;
 - a) The learned Senior Resident Magistrate erred in law and fact by dismissing the Preliminary Objection dated 2/5/2018 which was well anchored in law.
 - b) The learned Senior Resident Magistrate erred in law and fact in not finding that the sale transaction between the Appellant and the Respondent was void for all purposes including refund of consideration.
 - c) The learned Senior Resident Magistrate erred in law in not finding that the sale agreement between the parties was not enforceable in law.
 - d) The learned Senior Resident Magistrate erred in law by not finding that the sale agreement of land parcel No. LOC.19/KIAWAMBOGO/703 was stale in that the Appellant did not have the capacity to sell the land as it was registered in the names of the deceased person.
 - e) The learned Senior Magistrate erred in law in not finding that the sale transaction did not get the blessings of Kangema Divisional Land Control Board within six months from the date of sale. The transaction thus offended the provisions of Section 6 of the Land Control Act.
3. The Plaintiff in this case filed suit against the Defendant seeking an order for specific performance in accordance with the agreement of sale of a portion of 0.5 acres comprised in LOC 19/KIWAMBOGO/793. It was his case that the Defendant has refused to transfer to him the portion of the land purchased after the completion of the succession proceedings.
4. The Defendant on the other hand denied the Plaintiff's claim citing inter alia that the Land Control Board consent was not obtained within 6 months and therefore the transaction was null and void ab initio.
5. The Defendant then raised the Preliminary Objection fashioned as follows;
 - a. That the alleged sale transaction did not get the blessings of the Land Control Board consent within the period of 6 months from the date of sale
 - b. The suit is therefore bad in law and does not disclose a reasonable cause of action against the Defendant.
6. The Plaintiff has filed submissions which I have read and considered. The Respondent however failed to file written submissions despite the Court having directed the parties to do so.
7. Upon determination of the Preliminary Objection the learned magistrate held;

“whether the said notice of Preliminary Objection was not specific on the actual provisions of the law the Defendant is relying on,

my finding is that proof as to whether Land Control Board consent was obtained or not is a question of fact and not of law which can only be dealt with at full trial making the said Preliminary Objection premature. Further to that I cannot consider other issues submitted on but which are not subject to the Preliminary Objection before me for determination.”

11. A Preliminary Objection must be on a pure point of law. It helps if the point of law is precisely, briefly and clearly defined in the notice of Preliminary Objection. In the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the locus classicus on Preliminary Objections in this region, Law JA stated:

“So far as I’m aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

12. Still in the same case, Sir Charles Newbold JA, stated:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

8. Having reviewed the pleadings, the Preliminary Objection, the written submissions and arguments made in the lower Court, the Ruling of the learned Magistrate, the Record of Appeal and the written submissions by the Appellant the key question for determination is whether the Preliminary Objection as raised is a pure point of law.

9. The Appellant’s Preliminary Objection was anchored on the Land Control Board consent not having been obtained within 6 months. In the Memorandum of Appeal the Appellant has relied on 5 grounds of Appeal inter alia; limitation of time, want of locus on the part of the Defendant to enter into the agreement of sale; sale is not enforceable in law.

10. Save for the absence of the Land Control Board consent, the Court finds that the other grounds were not adverted in the lower Court and therefore moot. Parties are bound by their pleadings.

11. Going by the definition of a Preliminary Objection as given in para 11 and 12, for the Court to answer the issue it has to be availed evidence as to whether or not the Land Control Board consent was obtained or not within 6 months. This is a question of evidence which should be reserved for trial and cannot be determined in a Preliminary Objection. The fact that it requires evidence to be adduced means that the Preliminary Objection ceases to be a point of law.

12. On the 2nd issue that the suit does not disclose a reasonable cause of action, the Appellant has not made any submissions on the same and I deem that it was abandoned midstream.

13. In the end, the Appeal is unmerited and it is dismissed with costs to the Respondent.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 27TH DAY OF FEBRUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Gacheru HB for TM Njoroge for the Appellant

Respondent – Present in person. Advocate is absent.

Irene and Njeri, Court Assistants