



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO

ELC NO. 18 OF 2019

ERICK K. MARITIM.....1ST PLAINTIFF
JOSEPH LABOSO2ND PLAINTIFF
ROBERT C. KORIR.....3RD PLAINTIFF
WELDON TONU4TH PLAINTIFF
ROBERT LANGAT.....5TH PLAINTIFF
BERNARD KORIR.....6TH PLAINTIFF
GILBERT SIGEI 7TH PLAINTIFF

VERSUS

ESTHER CHEPKEMOI BIRIRDEFENDANT

RULING

INTRODUCTION

1. This Ruling is in respect of the Notice of Motion application dated 29th April 2019 by the Plaintiffs seeking the following orders:

1. *Spent*
2. *Spent*
3. *That pending the hearing and disposal of this suit a temporary order of Injunction do issue to restrain the Respondent by herself, agents or servants from selling, subdividing, transferring, mortgaging and/or doing anything against the land parcel number **KERICHO/KIBWASTUYO/707***
4. *The Land Registrar, Kericho be ordered to ensure compliance with Order 2 and 3 above*
5. *Costs be provided for.*

2. The Application is based on the grounds stated in the Notice of Motion and the Applicants' Supporting Affidavit sworn on 29th April 2019.

3. The Application shall be determined contemporaneously with the Defendants' Preliminary Objection dated 20th May 2019 which is based on the following grounds:

- a) **THAT** the Plaintiff's suit contravenes the ambits of Section 38 of the Land Act, 2012
- b) **THAT** the Plaintiff's suit is scandalous, frivolous or vexatious and otherwise an abuse of the court process and should be struck out forthwith with costs

4. By consent of the parties the court directed that the application dated 29th April 2019 be canvassed by way of written submissions and that the Preliminary Objection be subsumed in the Application. Both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

- i. Whether the Plaintiffs/Applicants suit should be struck out for failing to comply with the provisions of section 38 of the land Act, 2012
- ii. Whether the Plaintiffs have met the threshold for the grant of a temporary injunction
- iii. Who bears the costs of this application.

ANALYSIS AND DETERMINATION

- i. Whether the Plaintiffs/Applicants suit should be struck out for failing to comply with the provisions of section 38 of the land Act, 2012

5. The first order of business is to determine what a Preliminary objection is and thereafter whether the Defendant herein has raised one that is sustainable.

Law J.A. in the much-celebrated case of Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696 had the following to say: -

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

6. Similarly, *Mwita, J.* in the case of John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR put the foregone legal position in clearer terms when he stated that: -

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law

7. The Defendant raises her Preliminary Objection under Section 38 of the Land Act, 2012.

Section 38(1) of the land Act, 2012 states as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless

a) The contract upon which the suit is founded

i) Is in writing

ii) Is signed by all parties thereto; and

iii) The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party”

8. This section essentially reproduces section 3(3) of the Law of Contract Act, Cap 23 of the laws of Kenya provides as follows:

“No suit shall be brought upon a contract for the disposition of land unless:

a) It is in writing

b) It is signed by all the parties thereto and

c) The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”

9. Counsel for the Defendant submits that 1st 2nd 4th 5th 6th and 7th Plaintiffs did not sign any land sale contract with the Defendant nor did the Defendant consent to any contract over the suit property to warrant the prayers sought by the Plaintiff.

10. Counsel for the Defendant went on to submit that in view of section 38 (1) of the Land Act, 2012, no suit can be entertained by the court if there is no compliance with the requirements set out in the said section.

11. The Defendant's counsel relied on Leo Investment Ltd v Estuarine Estate Ltd [2017] eKLR which inter alia provides that:

“Informed by the legal framework in Section 3(3) of the Law of Contract Act, and guided by the prevailing jurisprudence on the tenor and import of that legal framework, I hold the view that it would be an affront to the unequivocal text of the statute and to the well-established principles of statutory interpretation to hold that a suit seeking to enforce an unsigned contract for the disposition of an interest in land is tenable within the existing statutory framework and prevailing jurisprudence. To the contrary, such a suit is a nullity ab initio to the extent that it seeks to enforce an unsigned contract. Similarly, a suit seeking damages for breach of an unsigned contract for disposition of an interest in land is a nullity ab initio.”

12. In his submissions, counsel for the Plaintiffs merely submitted that the Preliminary Objection is not sustainable in its entirety.

Perusal of the Complaint, Notice of Motion Application in tandem with the Preliminary Objection raised, clearly demonstrates that the crux of this matter is the validity of the sale agreements between the parties herein.

Hon. Ojwang, J (as he then was) in the case of Oraro vs- Mbaja (2005) KLR 141 after quoting the statement of **Law, JA.** in the Mukisa Biscuits case (supra) went on to state that: -

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

11. The Preliminary objection in this matter clearly deals with the disputed facts and derives its foundation from the information which stands to be tested by the normal rules of evidence during the hearing and determination of the main suit.

12. Accordingly, I find no merit in the Preliminary Objection raised by the Defendant and I dismiss it.

ii. Whether the Plaintiffs have met the threshold for the grant of a temporary injunction

13. Having dismissed the Preliminary Objection, I must then shift my attention and consider the Notice of Motion Application dated 29th April 2019 and the orders sought therein.

14. The principles for granting a temporary injunction were set out in the celebrated case of Giella V Cassman Brown 1973 E.A 358 as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

15. The first issue that the court must determine is whether the plaintiff has established a prima facie case with a probability of success. In the case of Mrao V First American Bank of Kenya Limited (2003) eKLR Bosire JA (as he then was) stated as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter

The Plaintiffs submit that they have established a prima facie case.

16. It is the Plaintiffs/Applicants submission that their right emanates from the various contracts of sale they entered with the Respondent and or agents of the Respondent and they took possession after surveying the land with the full knowledge and involvement of the Respondent.

17. In order to establish a prima facie case it was incumbent upon the Applicant to produce title documents or letter of allotment to show that that he has a legal claim over the suit property.

18. In the instant case Plaintiffs/Applicants failed to attach any title documents to their Supporting Affidavit to show that they are the registered proprietors of the suit property. They have alluded to attaching a Copy of bundles of agreements marked as JL1 and have additionally attached a Copy of bundles of photographs marked as JL2 showing that the Plaintiffs are in occupation of the respective portion where each has built houses and planted crops.

19. The Defendant has denied the validity of the purported sale agreements (which have only been attached in the Plaintiff) between herself and the Plaintiffs. Moreover, in their submissions, the Plaintiffs admit that the Respondent is the registered owner of the land parcel number **KERICHO/KIBWASTUYO/707** measuring 4.15 Ha.

20. In the circumstances, the Plaintiffs have not established that they have a better claim than the Defendant and thus they have failed to prove that they have a prima facie case with probability of success.

As the Plaintiffs have failed the first test for the grant of an injunction, I need not examine the other tests.

21. In the instant case the issue of ownership of the suit property is not that clear cut as there are competing interests over the suit property and it is one that can only be resolved at a full hearing.

22. I have carefully considered the pleadings, application, affidavits, annexures and rival submissions herein and on the material placed before the court I find and hold that the Plaintiffs have not met the threshold for a temporary injunction as sought in their Notice of Motion dated 29th April 2019.

23. In view of the foregoing, I find that the application is not merited and I hereby dismiss it.

The costs of this Application shall be in the cause.

Dated and signed thisof January 2020.

J.M ONYANGO

JUDGE

Dated, signed and delivered at Kericho this 10th day of February, 2020.

ANTONY KANIARU

JUDGE