



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 5 OF 2019

VAUXHALL LIMITED.....1ST PLAINTIFF

MARIANGELA BELTRAMI.....2ND PLAINTIFF

KAREN BLIXEN CO. LTD.....3RD PLAINTIFF

VERSUS

MTWAPA BAY INVESTMENTS.....1ST DEFENDANT

FOR BEYOND AUCTIONEERS.....2ND DEFENDANT

MALINDI AUCTIONEERS.....3RD DEFENDANT

DOLCE CASA PWANI LIMITED.....4TH DEFENDANT

Coram: Hon. Justice R. Nyakundi

Ms. Mary Njoroge for the plaintiffs

Mr. Gicharu Kimani for the defendants

RULING

The Plaintiff filed this suit on the 24th of June 2019, dated 21st June 2019 seeking a judgement against the Defendant for a permanent injunction restraining the Defendants jointly and severally from interfering with the 3rd business namely: Karen Blixen Restaurant situated at Galana Centre along Lamu Road Malindi; an order of specific performance of the sale agreement and for special and general damages against the 1st and 4th Defendants for their illegal actions and resultant loss and damage suffered and that the 1st and 3rd Plaintiffs pray for special and general damages for abuse suffered in the hands of the 1st and 3rd Defendants by sending the 2nd and 3rd Defendants to levy distress.

The plaintiff also sought a declaration that the tenancy agreement entered into between the 1st and 3rd Defendants dated 8th June, 2018 and the termination of lease dated 21st January, 2019, and further declaration that the subsequent new lease dated 21st January, 2019 entered between the 3rd Plaintiff and the 1st Defendant be voided and be deemed unconscionable and unconstitutional.

A further declaration was sought that the 2nd and 3rd Plaintiffs are not tenants but bona-fide purchasers for value and are not obliged to pay rent and that the rent so far collected by the 1st Defendant be computed and deducted from the balance of the purchase price. That after transfer of the purchase price of the purchased portion by the 2nd Plaintiff is effected by the 1st Defendant. An order be issue that the rent payment by the 2nd and 3rd Plaintiff to the 1st Defendant be stopped until such transfer is affected.

PLAINTIFF'S GRAVAMAN

The 1st Plaintiff claims to have been a tenant of the 1st Defendant since 2009 until June 2016 in respect of premises situated at GALANA CENTRE owned by the 1ST Defendant. The Plaintiff was paying the agreed requisite rent of Kshs. 100, 000/= per month in respect of Sections A and B, shops 5 and 6 and the Plaza standing on Plot No. LR 10810 (Original No. 10809) where the Plaintiff was carrying on business known as KAREN BLIXEN RESTAURANT.

It is indicated that the 1st Defendant with the 2nd Plaintiff (who is the director and shareholder of 1st and 3rd Plaintiffs companies) entered into a sale agreement on the sale of the suit properties on the 20th of August 2015. The agreed purchase price for the properties was 300, 000 Euros and the 2nd Plaintiff paid a deposit of 50, 000 Euros to the 1st Defendant. The receipt of which was duly acknowledged by signing of the sale agreement upon such terms and conditions stipulated therein with the completion date slated for 30th December, 2015 upon fulfillment of special conditions by the 1st Defendant.

The said special conditions include inter alia that the original lease be registered by the vendor in favor of the purchaser, duly executed transfer of leases in triplicate in favor of the purchaser, land rent, rates, payment receipts and duly executed but undated instrument of transfer in triplicate in favor of purchaser. The Plaintiffs' claim that pursuant to the agreement of sale for the purchase of the suit property, it was also agreed that the 1st Plaintiff ceases to pay rent to the 1st Defendant as the 1st and 2nd Plaintiffs were now the new owners of the suit property awaiting sub-division and transfer of the purchased portion from the 1st Defendant.

It is indicated in the plaint that the 1st Defendant breached the aforementioned terms and conditions of the sale agreement in June 2016 when 1st Defendant instructed DOLCE CASA PWALI LIMITED, the 4th Defendant to enter a tenancy agreement with 1st Plaintiff for the formerly leased premises (the suit property) which have now been purchased by the 2nd Plaintiff paying quarterly rent of Kshs. 522, 000/= for four consecutive quarters from 1st July, 2016.

It was averred that the 1st and 2nd Defendants (new owners) strongly protested against the move by the 1st Defendant but however their protests fell on deaf ears as the 4th Defendant failure whereof the 1st and 4th Defendant would forcefully evict the 1st and 2nd Plaintiffs and ruin their business to the ground. According to the plaint, it was pursuant to their fear of serious repercussions and execution of the threats issued by the 1st and 4th Defendants that the 1st and 2nd Plaintiffs complied and signed the lease agreement under duress and continued to pursue the 1st Defendant to fulfill the aforementioned terms and conditions.

The Plaintiffs stated that on the 16th June, 2016 the 2nd Defendant acting on behalf of the 1st Defendant issued instructions against the 1st Plaintiff purportedly to levy distress to recover outstanding rent of Kshs. 1, 600, 000/= owing to the 1st Defendant. In that respect, as per the said later tenancy agreement aforementioned, the 1st Plaintiff's landlord was a company known as DOLCE CASA PWANI LIMITED being the 4th Defendant herein and not the 1st Defendant. It is the Plaintiffs' view that the 1st Defendant had absolutely no authority or capacity to claim payment of rent from the 1st Plaintiff or to authorize 2nd Defendant to levy distress from the 1st Plaintiff for recovery of the same. The 1st plaintiff took the view that the levy of distress for rent was without legal standing. The 1st Plaintiff instructed its advocates to file suit and obtain an injunction against the 2nd Defendant which was obtained on 29th June, 2018 against the 1st and 2nd Defendants which remained in force until 2nd April, 2019 when the said advocates withdrew the suit and all attendant orders without the knowledge, consent and/or instructions from the 1st Plaintiff.

It is indicated that on the 21st of January, 2019, the 1st and 4th Defendants managed to terminate the Tenancy Agreement entered into between the 1st Plaintiff and 4th Defendant dated 8th June, 2016 and a new tenancy agreement was entered into between the 1st and the 3rd Plaintiff upon new terms. That the 1st and 2nd Plaintiffs fearing for execution of the threats of eviction and for the loss of the aforesaid deposit did reluctantly sign the termination of lease from the 4th Defendant and the 3rd Plaintiff were not paying rent directly to the 1st Defendant.

It is the 1st Plaintiff's position that the terms and conditions of the termination of the lease from the 4th Defendant and the new lease with the 1st Defendant were harsh and oppressive. The same were crafted in favor of 1st and 4th Defendants to the detriment of the Plaintiffs. That the 1st and 4th Defendants proceeded to terminate the lease and sign the new lease without effecting changes proposed by the Plaintiffs as well as the revised proposals were ignored. It is indicated that the 4th Defendants included oppressive clauses intended to benefit both the 1st and 4th Defendants and occasion loss and damage to the Plaintiffs in a bit to run them out of business and take over their hard-earned assets acquired over time and in the value of Kenya Shillings Twenty-Four Million. The 3rd Plaintiff prays that the said lease termination agreement and new lease agreement be declared unconscionable and unconditional and be rendered void.

It is averred in the plaint that on or about 23rd April, 2019 and 13th May, 2019, the Advocate for the 1st Defendant issued a demand notice against the 3rd Plaintiff claiming rent arrears to the tune of Kshs. 863, 000, 960/=. In response to the said demand letter, the 3rd Plaintiff's Advocates responded vide a letter dated 6th May, 2019 stating inter alia – that it is indeed true that the 3rd Plaintiff entered into a tenancy agreement with their client, the 1st Defendant but however the tenancy is suspended due to pending Court Case in CMCC No. 208/2018, the tenancy stands suspended. It was the advocate for the 3rd Plaintiff's position that their client was still enjoying interim orders in the matter and until when the same are discharged, the claim in the demand notice was premature.

The Plaintiffs stated that despite the foregoing, the 1st Defendant proceeded to send the 3rd Defendant to levy distress upon the 3rd Plaintiff and the 3rd Defendant issued a proclamation notice against the 3rd Plaintiff dated 16th May 2019 to the 3rd Plaintiff at the business premises known as Karen Blixen Restaurant which was to expire on 30th May, 2019. Before the expiration of the Notice, the 3rd Plaintiff instructed the firm of Njoroge M.W & Company Advocates to take up the matter and obtain an injunction against the 3rd Defendant restraining it from attaching its goods. An application was filed thereof vide CMCC NO. 205 of 2019 on 29th May, 2019 and it was not upon perusal of the court file that Katsoleh & Co. advocates had on 2nd April 2019 that the suit had been withdrawn without their knowledge, consent and/or instructions from the 1st Plaintiff who was the sole Plaintiff therein.

It is indicated that the firm of Njoroge M.W. & Co. Advocates amended the application dated 29th May, 2019 to include a prayer to "re-open/reinstate the Plaintiff's case" and they did obtain an order of injunction on 30th May, 2019 against the 3rd Defendant herein. The Plaintiffs

claim that the same was served to the 3rd Defendant and on 6th June 2019 the firm of Gicharu Kimani & Co. Advocates applied that the order be vacated as it was issued in a closed file. The matter then came up inter-partes on 11th June, 2019 and it was agreed that Mr. Kimani Gicharu do find out from Mr. Obaga Muriuki (both advocates) how the file was closed without the 1st Plaintiff's knowledge, consent and/or instructions. That Mr. Conrad Atiang (Adv) filed the application for injunction on 29th May, 2019 without filing a formal application to re-open/ re-instate the suit. Further, how the amended application dated 30th May, 2019 was filed without 1st discarding the application of 29th aforementioned and filing an independent application to obtain an injunction against the 3rd Defendant.

The abovesaid application was therefore dismissed on the 30th May, 2019 with no order as to costs and the orders of 2nd March remained in force and that the file remained closed. All Plaintiffs herein are aggrieved with the actions and conduct of the 1st Defendant of instructing the 2nd and 3rd Defendants to levy distress against the 1st and 2nd Plaintiffs despite having knowledge of the existence of the agreement for sale of the suit property. Further that the 1st Defendant proceeded to sell and transfer its entire property known as LR. No. 10810 aforementioned to 3rd Parties including the portion encompassed in the agreement for sale between the 1st Defendant and the 2nd Plaintiff dated 20th August, 2015 which belonged to the 2nd Defendant. That the attachment of its properties would be irregular and improper.

It is indicated that the value of the attached goods is way more than the value of the rent and that it would cause miscarriage of justice to sell the said goods to recover such a paltry sum in comparison and moreover, the 1st Defendant is in receipt of 50, 000 Euros deposit paid in the sale agreement dated 20th August, 2015 and as such cannot and should attempt to attach the Plaintiffs' goods in the same breath as it would amount to unjust enrichment.

The 1st Defendant filed a notice of preliminary objection dated and filed on the 27th of June 2019. It is indicated therein that the Counsel contends as a preliminary point of law, which is to be determined *in limine*. The 1st Defendant contends that the Plaintiff's Application and the entire suit is fatally defective, null and void ab initio and the same ought to be struck out with costs in that the Honorable Court has no jurisdiction.

Counsel also filed further grounds of the notice of preliminary objection on the 15th of July 2019 explaining why this court has no jurisdiction to hear and determine the instant matter. According to the Counsel for the 1st Defendant, this include the fact that the Plaintiff dated 21st June 2019 the Plaintiffs seeks Prayer (e) to be declared as the bona-fide purchasers for value for the subject portion of property; which prayer this Court does not have jurisdiction to entertain as per the Constitution of Kenya and the Environment and Land Court Act, 2011 and as espoused by the Court of Appeal in **Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others (2017)eKLR**. Further that the claim itself is based on ownership of part of Land Portion Plot No. 10810 (Original No. 10809).

I have also perused the 1st Defendant's written statement defence filed on the 15th of July 2019. In response to the Plaintiffs' claim as set out in the plaint, the 1st Defendant admitted that there existed a Landlord Tenant relationship between the 1st Plaintiff and the 1st Defendant and subsequently the 1st Defendant and the 3rd Plaintiff. The 1st Defendant however denied the existence of a sale agreement as well as the payment of the consideration as claimed by the 1st Plaintiff.

The 1st Defendant contends that the Plaintiffs executed all documents on their own free will and there was no compulsion, duress and/or undue influence and they put the Plaintiff to strict proof as to the contrary. The 1st Defendant does confirm that it levied distress upon the 3rd Plaintiff as it has never paid any rent to the 1st defendant since entering into the tenancy agreement in January, 2019. Further, the 1st Defendant contends that no demand and notice to sue was ever issued and disentitles the Plaintiffs from claiming any costs to the suits.

Findings, Analysis and Determination

The issue for determination is whether the preliminary objection by the 1st Defendant has merit, and should be allowed. If not, whether the Plaintiffs' prayers ought to be granted. As to whether a preliminary objection is one of merit, the threshold to be met has already pronounced itself in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696**, in the case of **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]**:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:

‘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 ... 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 has to be ascertained or if what is sought is the exercise of judicial discretion.’

In **Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR**, in which the Court further stated [paragraph 15]:

“Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

In light of the foregoing judicial precedence, it is trite that a preliminary objection ought to be anchored upon a solid point of law, to the extent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see **Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR**). The 1st Defendant's position is that prayer (e) as sought by the Plaintiffs in the plaint dated 21st June 2019 that the 1st Plaintiff be declared the bona-fide purchaser for value for the suit property. It is the 1st Defendant contention is that this Court lacks the jurisdiction to entertain this case as per the Constitution and the Environment and Land Court Act, 2011. It placed reliance on the Court of Appeal in **C-o-operative Bank of Kenya Limited vs. Patrick Kangethe & 5 Others (2017) eKLR** in support of its case.

Thus, the contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC. The relevant provisions that grant the Environment and Land Court jurisdiction are Article 162(2) of the Constitution which provides as follows:

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

13. Pursuant to provisions, the Environment and Land Court Act was enacted which elaborates on the jurisdiction of the Environment and Land Court in section 13 thereof as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

The Supreme Court in **Republic vs Karisa Chengo & 2 Others (2017) eKLR** amplified and pertinently held that each of the Superior Courts established by or under the Constitution has jurisdiction only over matters exclusively reserved to it by the Constitution or by a statute as permitted by the Constitution.

The main dispute in this matter touches on the ownership of part of the suit property which the 1st Plaintiff claims to have purchased from the 1st Defendant at a total amount of 300 euros. That a deposit of the consideration amounting 50 000Euros was advanced to the Defendant and that the rest of the monies were to be paid up after some conditions had been met.

I have perused the agreement for sale dated 20th August 2015 produced by the 1st Plaintiff to that effect. The Plaintiff further claims that despite having advanced the said monies to the 1st Defendant, it did not fulfill the said conditions it ought to have fulfilled and therefore the purchasers of the property in question were not able to assume ownership of their property.

It follows therefore that matters touching on ownership or transfer of ownership of property in land falls within the province of the ELC. The predominant issue in this matter is as to whether the ownership of the portion of land in question resides with the 1st Defendant or with the 1st Plaintiff. I also note that the same Plaintiffs called upon this court to determine the termination of the landlord-tenancy relationship between the 1st Defendant and the Plaintiffs arguing the condition of termination were oppressive and that the 1st Plaintiff signed the same

under duress. I'm alive to the fact that the same matter also invites this court to make a determination regarding the issue of rent. This matter is therefore one of those hybrid cases where both the High Court and the Environment and Land Court have concurrent jurisdiction as the issues herein cut across the exclusive jurisdiction reserved for the two courts.

The Courts have determined the matter of concurrent jurisdiction by inquiring what the utmost predominant question or issue presented in the hullabaloo. In **Suzanne Butler & 4 Others v Redhill Investments & Another (2017) e KLR** the Court stated the test in the following words:

"When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

In view of the foregoing sentiments, I find that the issues arising in the instant matter are substantially and predominantly related to ownership and occupation of the subject property. The 1st Plaintiff seeks to be declared the bona-fide purchaser of the suit property hence these issues ought to be decided in view of the applicable land laws.

It is therefore my view that the Environment and Land Court which has the exclusive jurisdiction to decide matters with regard to the ownership, use and occupation of land in terms of Article 162 (2) (b) of the Constitution as well as appellate jurisdiction granted to it in terms of Section 13 (2) (d) of the Environment and Land Court Act.

In the interest of justice and in light of the principle of expeditious dispensation of justice, it is wise that this case be transferred to the Environment and Land Court for hearing and determination since it is the best forum for the hearing and determination of all the issues arising in this matter, exhaustively. This Court's jurisdiction is limited to hearing dispute as regards to money arising out of the landlord-tenant relationship and not any matters of ownership of land or terms of the lease. It was in this respect held by the Court of Appeal in **Mackenzie Mogere & Another vs The Trustees of Teleposta Pension Scheme & 4 Others, Civil Appeal N0. 221 of 2015**, that to order such a transfer would not be in error on the part of this Court.

In view of the foregoing findings, the 1st Defendant's Preliminary Objection partially succeeds to the extent that this suit is hereby transferred to the Environment and Land Court at Malindi for further hearing and determination. Each party shall bear its own costs of the said Preliminary Objection.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER, 2019.

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R. NYAKUNDI

JUDGE