



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 308 OF 2017

(FORMERLY NRB ELC 553 OF 2016)

LIMURU TIIBIYA GENERAL STORES LIMITED.....PLAINTIFF

VERSUS

PETER NGANGA.....1ST DEFENDANT

ALICE WAMBUI MUGO.....2ND DEFENDANT

JUDGMENT

By a Plaint dated 20th May 2016, the Plaintiff filed this suit against the Defendants seeking for orders that;

- a) A declaration that the transaction to transfer and the subsequent registration of transfer of L.R Tigoni/Mabrouke Block 1/833 in favour of the Defendants on 18th December 2008, was irregular and fraudulent and therefore should be revoked and the property be re transferred back to the Plaintiff.***
- b) A permanent injunction to restrain the Defendants, by themselves, their agents and or servants and/or employees from transferring, charging, disposing of, alienating or in any way whatsoever dealing with L.R Tigoni/Mabrouke Block 1/833.***
- c) Costs of this suit and interest thereon.***

In its statement of claim, the Plaintiff averred that it was the registered owner of the suit property. That on 8th December 2008, the Defendants jointly purported to enter into a sale agreement with **George K. Kuria, Kepha K.Gitau and James N. Ng'anga**, all of whom are deceased and who were then Directors of the Plaintiff and purported to buy the suit property. Further that pursuant to the sale agreement, the suit property was transferred from the Plaintiff's name and registered in the joint names of the Defendants on 18th December 2008. It was the Plaintiff's contention that the sale transaction was an act of conspiracy and fraud perpetrated by the Defendants and the deceased persons aforesaid.

The Plaintiff particularised the particulars of conspiracy and fraud between the Defendants and the deceased Directors of the Plaintiff as; transferring the suit property and registering it in the name of the Defendants on 18th December 2008, failure by the deceased Directors to obtain a resolution of the General Meeting of the Plaintiff, before purporting to transfer the property to the Defendants; failure by the Defendants to exercise due diligence and to establish that the **Articles of Association** of the Plaintiff did not confer authority to the deceased Directors to transact its real property and hence the suit property without resolution of the general meeting; disposing the suit property at gross under value; the deceased Directors deliberate failure to disclose the fact of their disposal to the Defendants to the Plaintiff's **General Meeting** after the purported sale until a new Board took over and discovered the practice

It was the Plaintiff's further contention that in view of the particulars of fraud, the Defendants knew or ought to have known that the deceased Directors did not have ostensible authority to enter into the transaction to dispose off the suit property and that in entering into the transaction, they were not in exercise of their fiduciary duty.

The suit is contested and the Defendants filed a Defence dated 10th June 2016, and denied all the allegations made in the Plaintiff. It was their contention that they legally bought the suit property, pursuant to an agreement dated 8th November 2008, from the then administration of the Plaintiff Company. They further averred that they followed the correct legal procedure in purchasing the suit property and at a consideration which was in accordance with a valuation done prior to the transaction. It was further contended that the deceased Directors acted in their capacity as such in conducting the transaction on both their behalf and on behalf of the other members of the Plaintiff. Further that the

Plaintiff's suit lacks in basis, is fraudulent, misconceived and an abuse of the Court process.

After close of pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiff called one witness and the defendants also called one witness.

PLAINTIFF'S CASE

PW 1 Francis Kimani Kamau, the Chairman of **Limuru Tiibya General Stores**, adopted his witness statement as part of his evidence. He further produced the bundle of documents as exhibit 1. It was his testimony that the suit property was transferred from the name of the Plaintiff to the Defendants illegally. Further that the Plaintiff had not allowed the sale and that the Company's seal was never put on the sale agreement. He further testified that the Board of Directors looked at the minutes of the Board that authorised the transaction and noted that the transaction was never allowed at any given time.

DEFENCE CASE

DW1 Peter Nganga Mbugua, adopted his witness statement as part of his evidence. He further produced his bundle of documents as exhibit. It was his testimony that he bought a suit property from the Plaintiff and the agreement was signed by the Chairman, Secretary and treasurer. That he saw the Memorandum and Articles of Association and that he did his due diligence. It was his evidence that he went through the Memorandum of Association and that he trusted the Directors and that he was told that the Directors had the mandate to sell the suit property. He confirmed that there was no Company seal.

He further testified that he bought the land for **Kshs.390,000/=** and that the plots were valued. He denied that the plots were worth **Kshs. 1,000,000/=**. That he was informed that the Company had the right to sell the property to non-members and that it was a willing buyer willing seller transaction. It was his further testimony that he paid the purchase price through bankers cheque and after the sale, he got actual possession in the year **2008** and has only started construction. It was his evidence that the Directors had been allowed by the members to sell.

After close of viva voce evidence, parties filed written submissions which the Court has now carefully read and considered. The Court has also read and considered the Pleadings and the evidence adduced. The Court finds the issues for determination are:-

1. Whether there was a valid sale agreement

2. Whether the Plaintiff is entitled to the orders sought

1. Whether there was a valid sale agreement

The Plaintiff has alleged that the Contract entered into between the Defendants and its former Directors was invalid as the same was not affixed with the Company's seal and that there was no resolution from the Company authorising the said Directors to sell the said suit property. The Defendants however have insisted that they entered into a proper sale agreement with the Plaintiff vide its Directors. Further that the same was reduced into writing and signed by all the parties. **Section 3 (3) of the Contract Act provides that;**

“3(3)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 the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

The Court has carefully perused the sale agreement dated **8th November 2008**, produced by the Defendants and noted that the same is in writing and is signed by the Defendants and the Plaintiff's deceased Directors, who though the Plaintiff has acknowledged were its Directors, it has averred that the said Directors entered into the said Contract for sale irregularly. The sale agreement in issue herein has met the requirements of **Section 3(3)** of the **Contract Act**. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of **Nelson Kivuvani...Vs....Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

The Sale agreement having met all the requirements between the Plaintiff and the Defendant, then the Court finds the said sale agreement between the two is valid and it thus has met the requirements of **Section 3(3) of Contract Act**.

However, it is the Plaintiff's contention that the said sale agreement is invalid as the same was not affixed with the common seal of the Company. That the Directors did not follow the Articles of Association of the Company that required them to seek the resolution of the general meeting.

'It is trite that he who alleges must prove.' It was therefore incumbent upon the Plaintiff to produce before this Court its Articles and Memorandum of Association, to prove the allegations that the Directors required the resolution of the general meeting. It is not in doubt that the impugned contract was executed on **8th November 2008**, and therefore, the law applicable to it is the law that was in force at the time it was executed which is the **Companies Act Chapter 486 of the Laws of Kenya** now repealed. **Section 34 of the repealed Act** provided as follows;

"Contracts on behalf of a company may be made as follows-

(a) A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied [Emphasis Mine]

(b) A contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.

(2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto....."

Having perused the said sale agreement, it is not in doubt that it does not bear the Company's seal. However, as per the above provisions of law, it is this Court's considered view that any contract signed on behalf of the Company by a person authorized to do so binds the Company. Therefore, the said agreement is a competent contract if it was signed by a person who is authorized to do so. It is clear from the said provision of law, that there was no requirement for affixation of the Company's seal. Further the Court also notes that the cheque produced in evidence by the Defendant was addressed to the Plaintiff and therefore the Plaintiff having not controverted it or denied having accepted the said monies cannot be allowed to run away from its obligations. See the case of **Zion Mall Ltd ...Vs... Mohammed Jama Abdi [2017] eKLR** where the Court held that;-

"What this means is that a contract whether written or oral which is made on behalf of a company by any person with either express or implied authority from the company is valid and legally enforceable against the company whether or not it was executed under seal in the case of written contracts.

25. In this case, PW1 who executed the contract on behalf of the plaintiff was not just any person. He was one of the plaintiff's directors. He testified that he had authority from the plaintiff to enter into the contract with the defendant. His claims have not been controverted by any evidence to the contrary.

26. There was also another argument that the contract was invalid as it did not allegedly comply with the Plaintiff's Articles of Association. But the defendant did not produce in evidence the said Articles of Association to substantiate his claim. The law is that he who alleges must prove. Without having the benefit of reading the said Articles of Association, the court is not in a position to tell what they provided with regard to execution of written contracts on the plaintiff's behalf. That argument by the defendant cannot therefore be sustained.

27. In view of the foregoing, there is no basis upon which this court can find that the contract executed by the parties herein was invalid. I have come to the conclusion that the contract was valid and enforceable as against each of the parties.

Further in the case **Samuel Mureithi Murioki & another ...Vs... Kamahuha Limited [2018] eKLR** the Court of Appeal held that;

"We agree with the respondent's submission that whether a company has or has not complied with its internal procedures as to execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company. This is an old principle first propounded in the case of Royal British Bank v. Turquand 1856 A 11 E.R. 886 and now commonly known as the rule of Turquand's case. In the case of Ashok Morjaria v Kenya Batteries [1981] Ltd. & 2 others, [2002] eKLR, the principle was reiterated thus:

"So where, as here, a director of a company executes a loan agreement on behalf of the company and stamps it with a company stamp, as the second defendant did, the company cannot wriggle away from its obligations to pay by contending that the borrowing was not authorised, or one director's signature was not enough or the company seal was not affixed to the agreement if what he did was within his ostensible authority as director of the company as in deed it was."

Therefore, this Court finds and holds that the sale agreement was valid having been executed by the Directors of the Company who had authority to do so and the consideration having been duly paid

2. Whether the Plaintiff is entitled to the orders sought

The Plaintiff had sought for orders of declaration that the transaction was irregular and therefore the Court should order for revocation of the Defendants title. However, the Court has already held and found that the sale agreement was valid and thus the suit property was regularly transferred to the Defendants. **Section 28 of the Registration of Land Act** Cap 300 (now Repealed) provided that;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register”

It is therefore this Court’s considered view that the Defendants being the registered owners of the suit property are entitled to all the rights and privileges and consequently, a permanent injunction cannot be issued against them nor can their title be revoked as the sale agreement that was used to acquire proprietorship was valid. The Court finds and holds that the Defendant herein acquired a valid title to the suit property.

On who should bear the costs of the suit, **Section 27 of the Civil Procedure Act**, gives the Court the discretion to grant costs. However, it is trite that costs follow the events. In this instant the Defendants being the successful party are therefore entitled to the costs of the suit as there are no special circumstances not to grant them such costs.

Having now carefully considered the pleadings herein, the annexures thereto and the written submissions, the court finds that the Plaintiff has not proved its case on the required standard of balance of probabilities. For the above reasons the Court finds the Plaintiffs claim as outlined in the Plaint dated **20th May 2016**, is not merited and the same is dismissed entirely with costs to the Defendant

It is so ordered.

Dated, signed and Delivered at Thika this 23rd day of July 2020

L. GACHERU

JUDGE

23/7/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of:-

Mburu Machua Advocates for Plaintiff

No consent for the 1st Defendant

No consent for the 2nd Defendant

L. GACHERU

JUDGE

23/7/2020