



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE 150 OF 2011

TRUELANDS HOLDINGS LIMITED.....PLAINTIFF
FRANCIS KANGU KIOKO.....DEFENDANT

RULING

On 24th June, 2011 Truelands Holdings Limited, as a plaintiff mounted this suit against the defendant, **Francis Kang’u Kioko**. In the suit, the plaintiff pleaded for an order extending the period to apply for the Land Control Board Consent to transfer 20 acres out of the defendant’s parcel of land, parcel Mavoko Block 3/2669 “*the suit premises*”, an order for the Deputy Registrar of this court to execute all transfer documents on behalf of the defendant, an order for the defendant to accept and collect the balance of the purchase price in the sum of Kshs. 1,800,000/= failing which the same be deposited in court, costs and interest.

The facts leading to the suit are that the defendant is the registered proprietor of the suit premises. On or about 17th January, 2011 the plaintiff and defendant executed an agreement for the sale of 20 acres out of the defendant’s suit premises for a consideration of Kshs. 3,000,000/=. The plaintiff has so far paid the purchase price leaving a balance of Kshs. 1,800,000/=. However, when the plaintiff subsequently forwarded the same, the defendant refused to accept it nor had he transferred the 20 acres to the plaintiff. Instead the defendant commenced negotiations with other purchasers and eventually sold them the entire suit premises, hence the suit.

Contemporaneously with the filing of the suit, the plaintiff took out an application under a certificate of urgency by way of chamber summons seeking injunctive orders against the defendant to restrain him from alienating, transferring, charging, entering, encroaching, trespassing, transacting or dealing in any manner with the suit premises pending the hearing of the application *inter-partes*, and thereafter the suit. The defendant also prayed that pending the hearing of the application, it be allowed to deposit in court the balance of the purchase price aforesaid. The grounds as well as the affidavit in support of the application merely reiterated what I have already set out hereinabove.

The plaint was subsequently amended on 30th June, 2011 to include a prayer for a permanent injunction to restrain the defendant from in any manner dealing with suit premises. The ex parte application for injunction eventually came before **Kihara Kariuki, J** (*as he then was*) and was granted pending the hearing and determination of the application *interpartes*.

Served with the application, the defendant filed a defence and a notice for Preliminary Objection. In the defence, he denied description, of the parties in the amended plaint, any agreement for sale and in the alternative the defendant pleaded, if the alleged agreement existed; the same remained unsatisfied for want of the purchase's particulars. The agreement was incapable of enforcement in any event as it did not confirm with the mandatory provisions of the law of contract act. Otherwise the suit as drawn did not disclose any cause of action, was scandalous, vexatious and abuse of the court process. It was the plaintiff who orchestrated the breach of the alleged agreement, thereby giving the defendant the only option to repudiate the same. In any event the suit is incompetent for want of consent of the relevant Land Control Board to the transaction. Finally, he averred that the suit offended the mandatory provisions of law and at that at an appropriate time, during the hearing of the suit, he would raise a preliminary objection on points of law and have the suit dismissed.

In his notice of preliminary objection filed on 2nd November, 2011, the defendant wanted the plaintiff's suit impugned on the grounds that the plaintiff had no *locus standi* to file the suit by virtue of order 30 of the Civil Procedure rules, its affidavit offended Order 20 of the Civil procedure rules, the suit was frivolous, vexatious and legally unsustainable for purporting to oust the rights of a *bona fide* proprietor as envisaged and enshrined in sections 27, and 143 of the Registered Land Act. The whole suit was therefore fatally defective and prayers sought wholly unattainable in view of section 6(1) of the Land Control Act.

When the application came up before me on 10th February, 2012 for *inter partes* hearing, **Mr. Mulyungi**, learned counsel holding brief for **Mr. Mutisya** for the plaintiff informed the court that **Mr. Mutisya** wished to withdraw entirely the application for injunctive orders dated 23rd June, 2011. **Mr. Kimeu** learned counsel for the defendant not objecting, an order to that effect was duly made. However, **Mr. Kimeu** insisted on urging his notice of preliminary objection as according to him it went to the root of the suit. Counsel agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

As stated by **Gicheru, Kwach and Shah, JJA** in **Notin Properties vs Jagjit Singh Kalsi and another**, **Civil Appeal No. 132 of 1989**, a preliminary objection 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. Ofcourse in stating so the learned judges of the Court of Appeal were merely reiterating what had been stated 26 years earlier in **Mukisa Biscuit Manufacturing Limited vs West End Distributors Limited [1969] E.A. 697**. For my part I would add that preliminary objection if successful should be capable of disposing the matter preliminary without the court having to ascertain the facts elsewhere, a part from looking at the pleadings. These being the perimeters within which preliminary objections should be taken, I do not see how the objections raised by the defendant in his Notice of Preliminary Objection dated 26th October, 2011 can really qualify for preliminary objection. Those issues from the pleadings filed so far are joined. Parties are not agreeable on the issue of *locus standi*, whether or not verifying and supporting affidavit are competent. In any event, if we were to accept that the said affidavits were offensive, would such holding lead to having the suit disposed of? I do not think so. In any case, opinion as to the consequences of holding an affidavit incompetent is varied. There are those who say, and that is my view, too that such an omission is not fatal. The offending affidavit can be struck out and leave granted for proper affidavit to be filed. Others hold a contrary view. Further, in his own written submissions in support of the preliminary objection, the defendant has not expounded on what he finds offensive about those affidavits. He only addressed himself to the consequences of not obtaining the consent of the Land Control Board to the transaction that gave rise to the suit. It is not for this court to go into the mind of the defendant and try to gauge what was it that he found offensive in the verifying and supporting affidavits. He mentions though in the Notice of Preliminary Objection that, those documents offended Order 20 of the Civil Procedure rules. This order however, deals with application for an account. That order therefore has nothing to do with affidavits

With regard to the 3rd ground of the Preliminary Objection, that is not a question of law really. Whether or not the suit is purporting to oust the rights of a *bonafide* proprietor as envisaged in sections 27 and 143

of the Registered Land Act is a matter of Evidence and law. In any event what is wrong with that? A title under the registered Land Act can be impeached unless it is a first registration. Even then if fraud is proved, the title can be impugned even if it is a first registration. In any event, I do think that the above provisions of law are really relevant in this suit. This is due the fact that the plaintiff has not in the suit challenged the registration of suit premises in the defendants name but is merely seeking to enforce his right as a *bonafide* purchaser for value.

Reverting again to the 1st Preliminary Objection raised by the Defendant, he has hinged it on Order 30 of the Civil Procedure Rules. It is his case that the plaintiff does not harbour the *locus standi* to institute and maintain this suit. However, Order 30 cited deals with suits by or against firms, and other persons carrying out business in names other than their own. The defendant once again has not expounded on this Preliminary point in his written submissions. The plaintiff described itself in the plaint as a limited liability company. There is no evidence on record that it is not such. In any event preliminary objections proper do not require evidence to buttress them. If that was to happen, it ceases forthwith to be a preliminary objection. In view of the fact that the plaintiff is a limited liability company, it is a corporate entity capable of suing and being sued in its corporate name. Accordingly, the provisions of Order 30 of the Civil Procedure rules do not apply to it in anyway.

On grounds 4 of the Notice of Preliminary Objection, I would say that the same is wholly misguided. Whether or not the plaintiff has obtained a consent to the transaction or not and the consequences thereof are matters of evidence. In any event there is a prayer in the plaint for extension of time for the application to the Land Control Board to be made under section 8 of the Land Control Act. This court has jurisdiction to extend the period within which an application for the consent of the Land Control Board can be made if the period has already expired, provided it considers that there are sufficient reasons to do so upon such terms and conditions, as it may think fit. In view of the prayer in the plaintiff's amended plaint, it would be improper in the circumstances to deem the plaintiff's suit totally unsustainable on that account.

For all the above reasons, I deem the Preliminary Objections raised by the defendant to be inappropriate. They are dismissed with costs to the plaintiff.

RULING DATED, SIGNED and DELIVERED at MACHAKOS, this 12TH day of JULY, 2012.

ASIKE-MAKHANDIA
JUDGE