



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 94 OF 2015

HELEKIAH ONG'ANY MASARA.....1ST PLAINTIFF

DALMAS ALUODO HONGO (Suing as a Personal

Representative to the Estate of PHOEBE ALUODO (DECEASED)...2ND PLAINTIFF

VERSUS

ELISHA OGUYA OGADA Alias OGUYA OGADA.....1ST DEFENDANT

JANE AKINYI KISIA.....2ND DEFENDANT

RULING

1. Elisha Oguya Ogada alias Oguya Ogada, the 1st Defendant, filed the notice of motion dated 31st March 2017 on the 24th April 2017 seeking for the striking out of the suit with costs. The application is based on the ten (10) grounds on its face and supported by the affidavits of Elisha Oguya Ogada sworn on the 31st March 2017 and 5th February 2018.

2. The application is opposed by Hezekiah Ong'any Masara and Dalmas Aluodo Hongo, the Plaintiffs, through their replying affidavit sworn on the 19th January 2018.

3. The application came up for hearing on the 23rd January 2018 when counsel for Jane Akinyi, the 2nd Defendant, informed the court that they are supporting the application. The court then gave directions on filing of written submissions. The learned counsel for the 1st Defendant and Plaintiffs filed their written submissions both dated the 27th April 2017.

4. The following are the issues for the court's determination;

a) Whether the 1st Defendant has established reasonable grounds for striking out of the suit filed through the plaint dated the 16th April 2015.

b) Who pays the costs.

5. The Court has carefully considered the grounds on the application, the affidavit evidence, the pleadings, written submissions, superior court decisions cited by counsel and come to the following findings;

a) That the Plaintiffs suit against the Defendants as discerned through the plaint, is based on land sale agreements dated 12th April 1978 and 5th August 1981 for portions of land parcel Kisumu/Wang'aya 1/2467, at a purchase price of Kshs. 1000/= per portion. This is apparent from paragraphs 8 of the plaint. The Plaintiffs avers at paragraphs 7 and 8 of the plaint that the 1st Defendant did not transfer the said portions of land to them, and that in 2013 they found out that he had instead transferred the parcels to 2nd Defendant.

b) That the pleadings and prayers in the plaint shows that the Plaintiffs' claim against the Defendants is for specific performance order to transfer the parcels of land to their names or alternatively an award of damages for breach of the sale agreements, and costs.

c) The 1st and 2nd Defendants denied the Plaintiffs' claim through their respective statement of defence dated the 22nd April 2016 and 14th August 2015 respectively. The 1st Defendant disputed the said sale agreements and alternatively, averred that the claim based on them is statute time barred and or that they are null and void for absence of Land Control Board Consent.

d) That in responding to the 1st Defendant's claim that the suit is time barred and that the sale agreements are null and void and therefore unenforceable, the Plaintiffs have averred and deponed that the person to blame for the delay and failure to get the consent was the 1st Defendant as they could not trace him to sign the Land Control Board application for consent. That whereas that may be true, the provision of **Section 6 and 8 of the Land Control Act Chapter 302 of Laws of Kenya** requires transactions over agricultural land that has not been exempted by the Minister be subject to the Land Control Board Consent being obtained within six months from the date of making the agreement. The following decisions cited by Counsel for the 1st Defendant are relevant:-

- **Kariuki vs Karuiki (1983) KLR 223 at page 227** where Law J. A. held as follows;
- ***“When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides and the statute must be enforced if its terms are invoked.”***
- **Hirani Ngaithe Githire vs Wanjiku Munge [1979] KLR** that held that failure to obtain the necessary Land Control Board Consent automatically vitiates an agreement over a controlled transaction
- **Gitanga Mwaniki & Another vs Annunciata Waithira Kibue [2013] eKLR** that held that the transaction over land that falls under an agricultural area was void for lack of Land Control Board Consent.

e) That as it is apparent from the pleadings and affidavit evidence of the parties herein that no land control board consent has to date been obtained in respect of the two sale agreements of 1978 and 1981. That therefore, the said agreements became null and void upon the expiry of six months from the date thereof. That accordingly neither of the parties in the two agreements can legally seek to execute the said agreements against the other. That the decision in case of **Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd & Another [2014] eKLR** where the Court of Appeal held ***“...Based on the foregoing, we find the agreement was not capable of being enforced through specific performance.... because specific performance is based on the existence of a valid and enforceable contract”***, is applicable in all four in this case. That accordingly the Plaintiffs claim against the Defendants based on the two sale agreements, is unenforceable and this suit based on the said agreements amounts to an abuse of the courts process. The court would not award an order of specific performance where it is clear the contracts of sale upon which the claim is based are incapable of being performed due to absence of the Land Control Board Consent which is a statutory requirement. See the decision in **Fiat Kenya Ltd vs Ali Juma Roble [1973] E.A 11**.

f) That on the claim of damages for breach of contract, the following decisions of Superior Courts are relevant:-

- **Gitanga Mwaniki & Another vs Annunciata Waithira [2013] eKLR** where the court held that ***“...the transaction was also found to be null and void and so Plaintiffs cannot be awarded for breach of that contract if any..”*** and
- **Phillip Mwenze Mumo vs Mwirithi Kakula Ivula [2004] eKLR** where the court held, ***“...the same agreement being void, there was nothing that the respondent could enforce and claim damages for breach of contract. Under Section 7 of the Land Control Act in such a case, the only recourse the respondents had was to claim the amount paid to the appellant as a civil debt.”***

That for the same reasoning as in the two decisions above, the plaintiffs alternative claim of damages for breach of the sale agreements is obviously unsustainable as there exists no valid agreements that are capable of being breached, and upon which orders for damages can be based.

g) That the Plaintiffs have not pleaded for or prayed for refund of the monies paid out over the two void agreements or for the title to the suit land under adverse possession. That their deposition in the paragraphs 7 and 8 of the replying affidavit to the effect that they have in peaceful and continuous occupation of the suit land for over forty (40) years is not based on their pleadings and prayers in the plaint. That there is no pending application to amend the plaint to accommodate such averments and prayers. That in the case of **David Sironga Oletukai vs Francis Arap Muge & 2 Others [2014] eKLR** the court held as follows;

“...it is well established in our Jurisdiction that the court will not grant a remedy which has not been applied for and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda and subject to the rules of pleadings, each party is left to formulate its case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings.”

h) That even if the Plaintiffs were in occupation of the suit land on the basis of the 1978 and 1981 sale agreements, which as shown above are void, the provision of **Section 22 of the Land Control Act** would possibly catch up with them as it criminalizes remaining on such land. That as the court held in the case of **Joseph Kamau Kiguoya vs Rose Wambui Muthike [2016] eKLR** on the implication of Section, 22 of Land Control Act, ***“...under the provisions of Section 22 of the Land Control Act, it is clear that by remaining on the land subject of this suit, the Plaintiff is in fact guilty of a criminal offence for which he can be fined or committed to jail. Those are the harsh consequences of the failure to comply with the provisions of the Land Control Act. It is the responsibility of this court to apply the law guided by judicial precedent as well.”***

6. That the findings above shows that the 1st Defendant notice of motion dated 31st March 2017 and filed on the 24th April 2017 has merit. The application is therefore allowed and the Plaintiffs' suit, commenced through the plaint dated the 16th April 2015, is for reasons set out

above struck out with costs to the Defendants.

It is so ordered

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Omondi M. M. for Mr. Ouma Njoga

For 1st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE