



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 94 OF 2012

RAPHAEL WAMBURA.....PLAINTIFF

VERSUS

FRANCIS OKECH OGENDO..... DEFENDANT

RULING

1. Francis Okech Ogendo, the Defendant, filed and served the notice of preliminary objection dated the 21st September 2017, raising one ground of law that this court lacks jurisdiction to entertain this matter. The Counsel for the parties agreed on the 27th September 2017, that the preliminary objection be dealt with first through written submissions. The Learned Counsel for the Defendant and Plaintiff filed their written submissions dated the 2nd March 2018 and 17th December 2017 respectively.

2. The following are the issues for the Court's determination;

a) Whether the court has jurisdiction to hear and determine this suit in view of the arbitration clause in the sale agreement, to the effect that any question or dispute be referred to arbitration.

b) Who pays the costs.

3. The Court has considered the preliminary objection, written submissions by Counsel, the pleadings and come to the following conclusions;

a) That the Plaintiff's suit against the Defendant was commenced through the plaint dated the 7th November 2012, in which he seeks for;

- **Permanent injunction in respect of Kisumu/Nyalenda B/2234.**
- **An order compelling Defendant to attend Land Control Board for consent and transfer Kisumu/Nyalenda B/2234 to the Plaintiff.**
- **Alternatively the Executive Officer do sign transfer forms, subdivision for conveyance of Kisumu/Nyalenda B/2234.**
- **Costs of the suit.**

The Plaintiff avers at paragraph 3 of the plaint that they entered into a land sale agreement for a 0.15 hectare portion of Kisumu/Nyalenda /478 which was not in Defendant's name. That he was furnished with a security in the form of title to Kisumu/Kadero Got Nyabondo/2569. That the Defendant subdivided the said land into Kisumu/Nyalenda B/2234 and 2235. That the Defendant gave Plaintiff Kisumu/Nyalenda B/2234 which he fenced and erected a house upon.

b) The Defendant avers in his statement of defence dated the 24th April 2013 thus;

- **That he denied entering into the sale agreement on the 30th July 2009.**
- **That if they entered into the said agreement, it has become void and not legally enforceable.**
- **That the Plaintiff has not restored to the Defendant the title for Kisumu/Kadero Got Nyabondo/2569 given as security, even after he informed the Plaintiff that he is ready and willing to refund the payments received.**
- **That he lawfully subdivided Kisumu/Nyalenda B/478 into 2234 and 2235 and that the Plaintiff forcefully took possession of parcel 2234.**
- **Alternatively that Plaintiff, Assistant Chief and village elder coerced the Defendant to enter into a sale agreement to sell a portion of 28M by 16M (0.04) hectares of Kisumu/Nyalenda B/2234 to the Plaintiff.**
- **That the Plaintiff occupation of Kisumu/Nyalenda B/2234 is unlawful and amounts to actionable trespass and will seek**

vacant possession and general damages.

- **Prays for the Plaintiff's suit to be dismissed and or struck out with costs.**

c) That the memorandum of agreement dated 30th July 2009 in the Plaintiff's lists of documents dated 7th November 2012 has clause (g) under the heading of special conditions which states as follows;

“(g) If any question or dispute shall arise between the parties the same shall be referred to an arbitrator to be agreed on between the parties and in the absence or failure of any agreement by the parties, such arbitrator as shall be appointed by the Chairman or the Law Society of Kenya or the Chairman Arbitration Association of Kenya.”

That also attached to the said list is the memorandum of agreement dated the 27th March 2011 over sale of a portion measuring 28 x 16 M of Kisumu/Nyalenda B/2234. That the agreement do not contain an arbitration clause and the Plaintiff do not appear to have pleaded about it.

d) That from the pleadings filed, especially prayer (b) of the plaint, it appears the mandatory consents required under **Sections 6 and 8 of the Land Control Act Chapter 302 of Laws of Kenya** were not obtained within the six months from the date of each of the two agreements referred to in (a) above were made. That by dint of Sections **6, 7 and 8** of the said Act, the two agreements are void and not legally enforceable and only the consideration (monies) paid thereunder may be recovered. That the Plaintiff has not sought for recovery of the money paid under the agreements. That further, the court takes note of **Section 22** of the Act that criminalizes for example, entering into or remaining on any land on the basis of a void agreement.

e) That flowing from the finding in (c) above, the Defendant's preliminary objection based on enforcing a clause of a void and unenforceable agreement must fail. The court can only be called upon to adjudicate and enforce an existing legal and enforceable agreement.

d) That flowing from the foregoing, the court finds no merit in the Defendant's preliminary objection and the same is rejected and dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 13TH DAY OF MARCH 2019

In the presence of:

Plaintiff	Absent
Defendant	Absent
Counsel	Mr. Nyamweya for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE