



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 7 OF 2016

(AS CONSOLIDATED WITH ELC NO. 8 OF 2016)

SAMUEL MBUTHIA MACHARIA.....PLAINTIFF

VERSUS

BEATRICE WANGARI.....DEFENDANT

RULING

1. Two Notices of Motion both dated **5/4/2019** were filed by the plaintiffs on **8/4/2019**. Save for the amounts in terms of consideration and dates of sale agreements, the two applications are otherwise similar in their prayers and involve the same issues. On a preliminary basis I now order that they are hereby consolidated for the purpose of issuance of one ruling.
2. The plaintiff in **Kitale ELC No. 8 of 2016** is **Elizabeth Wambui Maina**. The defendant is the **Beatrice Wangare** in both suits.
3. Each of the application seeks an order of stay of judgment scheduled to be delivered on **29/4/2019** pending the hearing and determination of this application inter partes and upon granting that prayer the court be pleased to grant leave to amend their pleadings in the terms of amended plaint annexed hereto. They also pray for costs.
4. The applications are founded on the grounds set out at their foot which, save for the dates of the agreements relied on by each respective plaintiff are also similar, and on the facts in the respective supporting affidavits of the plaintiffs **Samuel Mbutia Macharia** and **Elizabeth Wambui Maina** respectively, sworn on **5/4/2019**. Again, save for the amounts in terms of consideration and dates of sale agreements, the two affidavits are otherwise similar.
5. The facts in the affidavits are that vide sale agreements dated **14/2/2015** and **15/10/2013** respectively the applicants purchased from the respondent the suit land and having fulfilled all the terms of the agreements on their part they were given vacant possession and have remained on the land to date; that the applicants have on numerous occasions requested the respondent to execute the transfer of the property in their favour but to date she has not done so; that for failure to execute transfer of the suit land to their name, the applicants filed this suit seeking specific performance; that at the time of the agreement and thereafter, the applicants were not aware that the respondent could not execute the transfer of the suit land as she had charged its title; that it only came to the knowledge of the applicants during the defence hearing of the case that the respondent had charged the suit property; that in view of the unfolding events, it has become necessary for the applicants to amend their respective complaints to include the prayer for refund of the purchase price; that the respondent herein will not suffer any prejudice in any way if the orders sought are granted and that this application is made without delay and is in good faith.
6. The respondent opposed both applications through sworn replying affidavits dated **15/7/2019** filed in each suit. She admitted the agreements in question but denied that the land was sold free from any encumbrances. She stated that by the time of close of pleadings the plaintiffs were aware of the legal charge registered over the said property since she had pleaded it. Further the defendant averred that the amendment sought was overtaken by events and that the agreements were rendered void by operation of the law and that she has been willing to refund the purchase. In paragraph 13 of her replying affidavit she appears to question and disagree with the sum sought by the plaintiffs as refund.
7. The applicants filed their respective written submissions on **19/7/2019**. The respondent filed her submissions on **6/8/2019**.
8. In their submissions the plaintiffs relied on **Joseph S. Wafula -vs- Elena Chepkurgat Talam [2019] eKLR** as cited in **Central Kenya Ltd -vs- Trust Bank Ltd [2000] EA 365**, **Pamela Alividza Abwao -vs- Christian Lwanga Kitale ELC No. 22 of 2018** and **Mose Nyambega Ondieki -vs- The Vice Chancellor Masai Mara University & 2 Others ELC No. 2234 of 2017**. They further urged the court to be guided by provisions of **Article 159 2(d)** and **(e)** of the Constitution and avoid giving regard to undue technicalities in order to promote the principles of the Constitution.

9. On her part the respondent submits that the covenants were void *ab initio* since the suit land was charged at the time of their execution and the charge was still undischarged as at the time of the hearing and that the applicants are only entitled to a refund. Again she appears to defer with the plaintiffs of the amount to be refunded.

10. In attempting to distinguish the authorities cited by the plaintiffs she submits that in **Kitale ELC No. 1 of 2018**, the **Joseph S. Wafula Case** the court allowed the application because parties had not tendered evidence nor closed their case and pleadings had not closed. Relying on that same decision she submitted that the proposed amendments herein should not be allowed as they would materially change the cause of action.

11. This court must determine whether or not to grant the applicants' leave to amend their pleadings. The plaintiffs' case was closed on **26/2/2019**. The applications in question were filed on **8/4/2019**.

12. Further the defendant appears to admit a substantial part of the claims in both cases and also that the land had a legal charge registered over it at the time of sale to the plaintiffs.

13. The refund was not sought in the original plaint. Only the orders of specific performance had been sought. If the pleadings went unamended the only bone of contention would have been whether the court is able to order specific performance in the face of an existing legal charge or to order a refund of the purchase price.

14. An order of specific performance of a contract is an equitable remedy and subject to the discretion of the court upon the establishment of certain facts.

15. On the other hand an order of a refund is a legal remedy that the plaintiffs now seek to avail themselves in the alternative in the event that the court does not grant the equitable remedy of specific performance.

16. It would appear to me that from the contents of the replying affidavit in both applications the possibility of refund was within the contemplation of the defendant even before the proposed amendment and that she only disputes the amount refundable. For this reason this court finds that granting the orders sought would not prejudice the defendant in any manner.

17. In principle amendments should be allowed at any time before the final judgment. See the case of **Castellino -vs- Eastern Bakery Limited**.

18. I have examined the reply to amended defence filed and found that it is the case that the plaintiffs noted the existence of a charge from the contents of the amended defence and responded the same. The applications were filed on 8/4/2019 about 9 months after the filing of a reply to amended defence. Does this knowledge, taken in conjunction with the 9 months delay disentitle the plaintiffs from obtaining the orders sought?

19. In my view the plaintiffs were represented by counsel who directed their action including formulating the pleadings and prayers in the matter. Inadvertent slips on the part of the counsel do often occur in litigation and I have no doubt that the failure to consider the possibility of a refund in this case is one of them. I have also considered the age of the two suits and found that the delay that may be occasioned by granting the prayers sought is not extreme.

20. In the circumstances above I find that the two application have merit and I hereby grant the orders as sought in prayer No. **(b) and (c)**.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Wanjala holding brief for Waweru for plaintiff

N/A for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/9/2019