



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL SUIT NO. 841 OF 2014**

**EDWARD KINUTHIA MUCHENE.....1ST PLAINTIFF**

**PETER MBUGUA MUCHENE.....2ND PLAINTIFF**

**VERSUS**

**SIMON MACHARIA MUCHENE.....1ST DEFENDANT**

**MARGARET WAITHIRA MUKIRI..... 2ND DEFENDANT**

**REUBEN KIBUE THIONG'O.....3RD DEFENDANT**

**-CONSOLIDATED WITH-**

**MILIMANI ELC CIVIL SUIT NO. 831 OF 2016**

**REUBEN KIBUE THIONG'O.....PLAINTIFF**

**VERSUS**

**EDWARD KINUTHIA MUCHENE.....1<sup>ST</sup> DEFENDANT**

**PETER MBUGUA MUCHENE.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. On 19/4/2017, the court issued an order consolidating ELC 841 of 2014 and ELC 831 of 2016. ELC 841 of 2014 is the lead file.

2. The plaintiffs in ELC 841 of 2014 through an amended plaint dated 20/4/2017 seek the following orders against the defendants;

**a) An order of a permanent injunction restraining the defendants either by themselves, their agents, servants or anybody else whatsoever from alienating, transferring, selling or in any way interfering with land parcel Land Reference Number DAGORETTI/RUTHIMITU/1282.**

**b) A declaration that the transfer of the suit property by the 1st and 2nd defendants to the 3rd defendant was fraudulent and illegal.**

**c) An order for the nullification of the transfer of the suit property to the plaintiff and entries made in respect of land Parcel Land Reference number DAGORETTI/RUTHIMITU/1282 the land transferring to Reuben Kibue Thiong'o, the 3<sup>rd</sup> Defendant herein, be revoked and Title in respect thereof to revert to Simon Macharia Muchene and Margaret Waithera Mukiri for onward transfer to the Plaintiffs.**

**d) Specific performance of the contract by an order of the court compelling the defendants to sign all the requisite transfer forms for land parcel Land Reference Number DAGORETTI/RUTHIMITU/1282 so as to vest ownership of the same into the plaintiffs.**

**e) An order that the 1st and 2nd defendants do get necessary extension of time within to get consent to transfer the suit property to the plaintiffs under Section 8 of the Land Control Act, execute the necessary transfer forms in favour of the plaintiffs failing which the Deputy Registrar of the Court to do so on their behalf.**

**f) In the alternative, a refund of Ksh. 4,180,000/- paid to the defendants.**

**g) Interest on b (2) above at the rate of 15% per annum from 16 May 2011.**

**h) Costs of the suit.**

**i) Any other just relief as the Court may deem and expedient**

3. The plaintiff in ELC 831 of 2016 is Reuben Kibue Thiongo (the 3rd defendant in ELC 841 of 2014). The defendants in ELC 831 of 2016 are Edward Kinuthia Muchene and Peter Mbugua Muchene (the 1st and 2nd plaintiffs in ELC 841 of 2014). The plaintiff in ELC 831 of 2016 seeks the following orders.

**a) An order of permanent injunction restraining the Defendant by themselves, their servants or agents from entering, remaining in trespassing or in any way interfering with property Land Title number Dagoretti/Ruthimitu/1282.**

**b) An Order for Vacant possession**

**c) Costs of the suit.**

4. The plaintiffs in ELC 841 of 2014 contend that on 16/5/2011, they entered into a sale agreement with the 1st and 2nd defendants pursuant to which the 1st and 2nd defendants agreed to sell to the plaintiffs a portion of Land Title Number Dagoretti/Ruthimitu/1039 measuring 0.18 Hectares at a purchase price of Ksh 4,500,000. They contend that they paid the 1st and 2nd Defendants Ksh 4,180,000 leaving a balance of Ksh 320,000. They further contend that in breach of the contract, the 1st and 2nd defendants purported to cancel the contract and transferred the suit property to the 3rd defendant.

5. The defendants filed an amended statement of defence and counterclaim dated 17/5/2017 in ELC 841 of 2014 in which they contend that: (i) the material agreement was vague, uncertain and incapable of being completed; (ii) the 1st and 2nd defendants terminated the said vague agreement on 20/12/2013; and (iii) because no land control board consent was obtained, the entire transaction is void for all purposes and is incapable of enforcement.

6. By way of counterclaim in ELC 841 of 2014, the defendants sought the following orders against the plaintiffs.

**a) A declaration that the sale agreement entered into between the plaintiffs and the 1st and 2nd defendants for the alleged sale of a portion of land which was to be excised from Land Title Number DAGORETTI/RUTHIMITU/1039 was void in law and incapable of being enforced.**

**b) A declaration that the 3rd Defendant is the lawful owner of land title number DAGORETTI/RUTHIMITU/1282.**

**c) An order of permanent injunction restraining the plaintiffs by themselves, their servants or agents from entering, remaining, trespassing or in any way interfering with the property land Title number DAGORETTI/RUTHIMITU/10282.**

**d) An order of vacant possession.**

**e) Costs of this suit and Counter-Claim**

7. Subsequently, on 23/6/2017, the defendants in ELC 841 of 2014 brought a further Amended Notice of Motion dated 23/6/2017 for an order striking out the plaintiffs' suit in ELC 841 of 2014 on the grounds that: (i) the material land sale contract cannot be enforced because consent of the land control board was not obtained; (ii) the land subject matter has since been sold; and (iii) under Section 22 of Cap 302, the material transaction was illegal and criminal and the plaintiff's claim for interest on the money paid is frivolous and unfounded. The application is supported by affidavits sworn by Simon Macharia Muchene and Reuben Kibue Thiong'o.

8. The plaintiffs oppose the application through a replying affidavit sworn by Edward Kinuthia Muchene on 14/12/2016 and a further affidavit sworn by the same deponent on 16/2/2017. The plaintiffs contend that under the material agreement, it was the obligation of the 1st and 2nd defendants: (i) ensure that all necessary measures are taken to deliver title to the plaintiffs; and (ii) obtain the consent of the land control board. The plaintiffs further contend that the deliberate failure by the 1st and 2nd defendants to obtain the consent cannot be used by the same defendants as a basis to void the sale. They further contend that the 1st and 2nd defendants received purchase price and used it to build rental houses.

9. The application was canvassed through written submissions. The defendants/applicants filed written submissions dated 18/7/2017. The plaintiffs/respondents filed written submissions dated 10/7/2017.

10. I have considered the tenor and import of the Further Amended Notice of Motion dated 23/6/2017 together with the supporting affidavit, the plaintiffs' response to the Notice of Motion, the parties respective submissions, relevant legal framework and relevant jurisprudence. The single issue to be determined in the application is whether the applicants have satisfied the criteria for striking out pleadings/suits.

11. The principles upon which the draconian jurisdiction to strike out pleadings is exercised were spelt out by the Court of Appeal in the case of **D.T. DOBIE & COMPANY (KENYA) LTD V JOSEPH MBARIA MUCHINA & ANOTHER**, in which Madan, JA stated:

**No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real live by amendments, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.**

12. I have carefully analyzed the tenor and import of the Amended plaint. Among the prayers sought by the plaintiffs are: (i) a declaration that the transfer to the 3rd defendants was fraudulent and illegal; (ii) a nullification of the transfer; and (iii) an extension of the time within which to get the consent of the land control. More importantly, the plaintiffs have made an alternative prayer for a refund of the sum of Ksh 4,180,000 paid to the 1st and 2nd defendants. The defendants do admit that they received the money.

13. The defendants have contested the claim through their defence. They have also raised a counterclaim. The question that then calls for an answer in determining the present application is whether the pleadings on record disclose any triable issue to warrant trial. In my view, the answer to that question is in the affirmative. One triable issue calling for determination is whether the material contract is unenforceable through compelling orders in the manner sought by the plaintiffs. The second triable issue is whether the money paid by the plaintiffs to the 1st and 2nd defendant is refundable. The third issue is whether any of the parties breached the material contract in any way. The fourth issue is whether the plaintiffs are entitled to interest at 15% per annum from 16/5/2011 as prayed.

14. Consequently, having considered the totality of the pleadings on record, I am not persuaded that the plaintiff's suit in ELC 841 of 2014 suffers from the hopelessness contemplated by the jurisprudence guiding the exercise of the courts draconian jurisdiction to strike out pleadings. I will therefore not lock the plaintiffs out of the seat of justice. I will let all the parties have their day in court to ventilate their respective cases and articulate their respective legal positions.

15. The net result is that the defendants' Further Amended Notice of Motion dated 23rd June 2017 is dismissed. The Plaintiffs in ELC 841 of 2014 shall have costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MAY 2018.**

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Mogikoyo Advocate for the Plaintiffs in ELC 841 OF 2014

Mr Muturi Advocate for the Defendant ELC 841 of 2014

Ms Kajuju - Court Clerk