



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO 127 OF 2017

PHILIP KIPLANGAT KORIR.....PLAINTIFF

VERSUS

JOHN KIPNGENO SANG.....1ST DEFENDANT

ROBERT KIPNGETICH KIRUI.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, KERICHO...3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

Introduction

1. The suit herein was commenced by way of Plaint. In the said Plaint dated 20th November 2017, the Plaintiff filed suit against the defendants seeking a declaration that the defendant's action of transferring the land parcel No. KERICHO/LITEIN/1793 measuring 100 X 100 feet to the 2nd defendant was fraudulent and a breach of trust and therefore null and void. The plaintiff also seeks inter alia, a cancellation of the title deed No. KERICHO/LITEIN/1793 and that the same be registered in the name of the plaintiff who is the first buyer thereof.

Plaintiff's case

2. The plaintiff's case is that he bought the suit property from the 1st defendant in 2008 and has been in occupation thereof for ten years until recently when he discovered that the 1st defendant had sold the same parcel to the 2nd defendant. He depones that the 2nd defendant obtained the title to the suit property fraudulently by colluding with the 1st defendant. At paragraph 14 of the Plaint the plaintiff states as follows:

“The Plaintiff further avers that the 1st defendant's act of transferring the the plot L.R KERICHO/LITEIN/1793 to the 2nd defendant is an act of breach of trust since the transaction between them was based on trust”

Defendants' case

3. In his Defence and Counterclaim dated 28th February 2018, the 1st Defendant denies all the averments in the Plaint and states that the plaintiff does not deserve the orders sought in the Plaint. He further states that the plaint does not disclose any cause of action and that he would raise a Preliminary objection in that regard.

4. In the Counterclaim, the 1st defendant states that the plaintiff never bought the suit property as he has no documents in support of the purported sale. He alleges that the Plaintiff was his tenant who failed to pay rent, water bills and electricity bills and was ejected from the suit property through a court order. He prays that the plaintiff be compelled to pay the rent arrears, water and electricity charges in line with the order issued in Sotik PMCC No. 104 of 2004.

5. Contemporaneously with the Plaint, the Plaintiff filed an application for injunction to restrain the defendants from occupying, subdividing, selling, evicting or doing any act which is prejudicial to the plaintiff's quiet possession of the suit property.

6. The said application was dismissed on the ground that the plaintiff had failed to demonstrate that he had a prima facie case with a probability of success.

7. Soon after the dismissal of the said application, the 1st defendant filed a Notice of Preliminary Objection dated 16th May 2018 which is the subject of the ruling. In the said Preliminary Objection he raises the following points:

i. That the Plaintiff's suit contravenes the provisions of section 38 of the Land Act, 2012

ii. That the Plaintiff's suit is scandalous, frivolous or vexatious and otherwise an abuse of the Court's process and should be struck out forthwith with costs.

8. The court directed that the Preliminary objection be canvassed by way of written submissions and only the 2nd Defendant's counsel filed his submissions. Counsel for the 1st Defendant indicated to the Court that he did not intend to file any submissions.

Issue for Determination

9. The main issue for determination is whether the Plaintiff's suit ought to be struck out for failing to comply with the provisions of section 38 of the land Act, 2012.

Analysis and Determination

10. Mr. Ombui, learned counsel for the 2nd defendant has submitted that the Plaintiff's failure to comply with the provisions of section 38 (1) of the Land Act, 2012 renders the suit incompetent and liable to be struck out.

11. He submits that the said provision is not a mere procedural technicality and goes to the substance of the suit.

12. Section 38(1) of the land Act, 2012 states as follows:

"No suit shall be brought upon a contract for the disposition of an interest in land unless

a) The contract upon which the suit is founded

i) Is in writing

ii) Is signed by all parties thereto; and

iii) The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party"

13. Furthermore section 3(3) of the Law of Contract Act, Cap 23 of the laws of Kenya provides as follows:

"No suit shall be brought upon a contract for the disposition of land unless:

a) It is in writing

b) It is signed by all the parties thereto and

c) The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party."

14. Counsel has referred me to the case of **Daudi Ledama Morintat V Christine Kiarie & 2 Others (2007) eKLR** cited in the case of **Patrick Tarzan Matu & Another V Nassin Shariff Abdulla & 2 Others (2009) eKLR** where Azangalala J stated as follows:

"The applicant in this case satisfied me that there is no agreement between he and the plaintiffs in terms of the provisions of section 3 (3) of the Law of Contract Act which the plaintiffs can enforce against her. The plaintiffs are urging the view that their claim for damages for breach of contract of sale is sound. With respect this view cannot be correct. The claims are made pursuant to an agreement that is contra statute or at the very least, does not comply with the law. So, the very foundation of their claim is untenable"

15. In the same vein, the plaintiff herein has admitted that there was no written agreement between him and the 1st defendant and that the purported sale was based on trust. That may well be so, but unfortunately the law does not recognize land sale agreements based on trust among strangers.

16. In his Defence the 1st Defendant has alleged that the Plaintiff was his tenant who has defaulted in payment of rent and utility bills. He has also stated that there are other suits between him and the plaintiff, a fact which the plaintiff has not refuted. This creates the impression that the plaintiff is not being very forthright in his pleadings.

17. I agree with counsel for the 2nd defendant that the absence of a written sale agreement in terms of section 38 of the Land Act is not a mere technicality and renders a suit based on contract untenable.

18. Under the provisions of sections 1A and 1B of the Civil Procedure Act, the Courts are required to ensure the just, expeditious, proportionate and affordable disposal of suits. This means that judicial resources ought to be expended wisely on deserving cases rather than cases which have no merit. Fixing the case for hearing will serve no useful purpose as in my view it is an open and shut case. Justice cuts both ways and the defendants who have been dragged to court without any lawful cause ought to be spared the agony of a suit hanging over their heads.

22. In view of the foregoing, I find no merit in the plaintiff's suit. I allow the Preliminary Objection and strike out the Plaintiff's suit with costs to the defendants.

Dated, signed and delivered at Kericho this 29th day of August, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Bii for the Defendant
2. N/A for the Plaintiff
3. N/A for the 2nd, 3rd & 4th Defendants