



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 85 OF 2016

DAUDI LEDAMA MORINTAT PLAINTIFF

VERSUS

MARY CHRISTINE KARIE 1ST DEFENDANT

REBEKA WANJIRU MWAURA2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

R U L I N G

1. The plaintiff vide a plaint dated 22nd March 2016 filed in court on 4th April 2016 claims that he is the legal owner of land parcel known as Kilgoris Township **9102/60** which he states he has occupied since 2008. The plaintiff avers that the 1st defendant is the beneficial owner of the said suit premises which hitherto was registered in the name of one Job Letion Sakawa (now deceased) who was the plaintiff's father. The plaintiff further claims that the defendant has trespassed and/or encroached onto the suit property and has closed the plaintiff's house doors and gate to the suit premises thereby interfering with the plaintiff's peaceful and quiet enjoyment of the suit premises.

2. The plaintiff seeks judgment against the defendants for:

(a) Declaration that the plaintiff is the absolute proprietor/owner of Kilgoris Township 9102/60.

(b) An order for a mandatory injunction requiring the defendant to deliver up quite occupation of the property known as Kilgoris Plot Number 9110/10.

(c) Costs of the suit.

3. Simultaneously with the plaint the plaintiff filed a Notice of Motion seeking mandatory and prohibitive injunctive orders against the defendants. The application for the injunctive orders was predicated on grounds set out on the face of the Notice of Motion dated 22nd March 2016 and inter alia the plaintiff/applicant averred that he had purchased the suit premises from the 1st defendant for the sum of kshs. 300,000/= sometimes in November 2008. That he paid a sum of kshs. 240,000/= leaving a balance of kshs. 60,000/= which was to be paid at the time of the transfer of the land. The plaintiff states he took possession of the land in 2008 and built a house thereon including a toilet and that he has been in possession and occupation of the suit premises since 2008 until on or about 10th March 2016 when the 1st defendant forcefully entered the suit property with the objective of forcing the plaintiff out of the suit

property.

4. The 1st and 2nd defendants filed a joint statement of defence and the 2nd defendant raised a counter claim against the plaintiff dated 25th April 2016. The 1st and 2nd defendants under paragraph 17 of the statement of defence pleaded thus:

17. The 1st and 2nd defendants herein contends that the suit herein is bad in law and discloses no cause of action in so far as the alleged oral agreement between the plaintiff and the defendant, to buy the suit property, if any existed which is denied, is a nullity and void abinitio and incapable of being given effect.

Particulars of illegalities of the alleged oral agreement the basis of the suit herein:

(a) The alleged oral agreement between the plaintiff and the 1st defendant the basis of the suit herein is expressly statutorily barred by dint of Section 3 of the Contract Act.

(b) The alleged transaction is void for want of the Land Control Act, in particular, Section 6 and 7 of the Land Control Act.

(c) this court cannot enforce illegal contract.

(d) That the plaintiff's failed to actualize the sale and even the claim for refund of the amount of kshs. 240,000/= hitherto paid is time barred.

5. Simultaneously with the statement of defence and the counterclaim the defendants filed a Notice of Preliminary Objection dated 25th March 2016 but filed on 25th April 2016 on the following grounds:-

1. The honourable court is devoid of jurisdiction to grant the prayers sought by the applicant.

2. That this suit is premised on a claim expressly statutorily barred by the provisions of Section 3 (3) of the Law of Contract Act.

3. That the transaction the subject of the suit was devoid of the mandatory consent stipulated under Section 6 and 7 of the Land Control Act.

4. The jurisdiction of this court is expressly ousted by statute and thus the suit herein is a nullity which should be determined in limine.

6. On 26th April 2016 the court gave directions for the preliminary objection to be heard and determined first and further directed that the parties canvass the preliminary objection by way of written submissions. The parties complied and filed their submissions. The defendants filed their submissions on 5th June 2016 and the plaintiff filed his submissions on 16th November 2016.

7. The defendants submit that the plaintiff has pleaded and deponed under oath that the basis of his claim is that in the year 2008 he purchased the suit property from the 1st defendant pursuant to an oral agreement at the agreed consideration of kshs. 300,000/= out of which the plaintiff paid the defendant kshs. 240,000/= and the balance of kshs. 60,000/= was to be paid to the 1st defendant before an advocate at the time they were to sign and execute a transfer document which never happened. The defendants thus submit the plaintiff's instant suit is founded on an alleged agreement entered into in 2008 that was not in writing as required under Section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya and consequently the suit is unsustainable.

8. Section 3(3) of the Law of Contract Act provides;-

“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 found-

(i) Is in writing

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

This provision came into force in June 2002 and amended and replaced the previous Section 3 of the Law of Contract Act which had provided as follows:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

Provided that such suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract:-

(i) Has in part performance of the contract taken possession of the property or any part thereof; or

(ii) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

9. In the case of **Patrick Tarzan Matu & Another –vs- Nassim Shariff Abdulla & 2 Others [2009] eKLR Azangalala, J.** (as he then was) struck out the plaintiffs case where he found the contract relied upon was in contravention of Section 3(3) of the Law of Contract Act and declined to entertain the claim for damages for breach of the contract. Inter alia he stated:-

“...The applicant in this case has satisfied me that there is no agreement between her 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 the contract of sale is sound. With respect, that 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.”

10. In the case of **Silverbird Kenya Limited –vs- Junction Ltd & 3 Others [2013] eKLR** which came before me sitting at a different court station (Milimani Environment and Land Court, Nairobi) an application had been made by the 1st defendant to strike out the plaintiff’s suit on the ground that the lease on which it was anchored had not been signed in contravention of Section 3(3) of the Law of Act. In the suit, I stated inter alia:-

“...In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirements of Section 3(3) of the Law of Contract Act to be the foundation of the plaintiff’s claim against the defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff’s suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya.”

11. In the present suit there can be no dispute that the plaintiff's suit is predicated on the alleged oral agreement of sale entered into in 2008 as can be deciphered from the pleadings and material placed before the court by the plaintiff. Without placing reliance on that oral agreement, the plaintiff would be without any cause of action against the defendants. The plaintiff under paragraph 3 of the affidavit in support of the application for injunction depones:

3. That having had oral agreement with the 1st defendant, I was to purchase the parcel for a consideration of kshs. 300,000/=. I paid the defendant kshs. 240,000/=, the remainder of kshs. 60,000/= I was to pay before an advocate at the time we were to sign and execute the transfer documents, which was never to be.

12. The plaintiff thus makes admission that there was no agreement that was in writing yet the foundation of the suit is the said alleged oral agreement. The said agreement having not been in writing contravened Section 3(3) of the Law of Contract Act and cannot be relied upon to sustain the present suit by the plaintiff. The contract is unenforceable as it related to a disposition of an interest in land and such a contract has to have been in writing and signed by the parties to it and witnessed as required under Section 3(3) of the Law of Contract Act. See the cases of **Rainald Schumacher –vs- Aubrey Garth Monsey [2008] eKLR, Laikipia Mifugo Ranching Co. Ltd –vs- Nanyuki Ranching Ltd [2007] eKLR** and **John Michael Wanjao –vs- Alubala Abonayo Andambi [2011] eKLR** where the courts declined to enforce contracts which fell foul of Section 3(3) of the Law of Contract Act and proceeded to strike out the suits for non compliance thereof.

13. In the instant suit, I am satisfied the plaintiff is seeking to effectuate a contract that clearly did not comply with the provisions of Section 3(3) of the Law of Contract Act. The plaintiff's suit against the defendants is not maintainable. Having come to that conclusion, I need not consider the other limb of the preliminary objection that the consent of the appropriate land control board was not obtained as required under Section 6 and 7 of the Land Control Act, Cap 302 Laws of Kenya. I agree with the plaintiff that whether or not the consent of the land control board was obtained and/or necessary would be a matter of evidence at the trial but since I have held the suit is unsustainable for non compliance with Section 3(3) of the Law of Contract Act, the issue is of no consequence. Possession by the plaintiff of the suit property was pursuant to the impugned agreement for sale and cannot give the plaintiff right of ownership and neither can it be relied upon to found a cause of action.

14. The net result is that the 1st and 2nd defendants' preliminary objection succeeds. I accordingly order the plaintiff's plaint herein struck out as it does not disclose a reasonable cause of action against the defendants. The plaintiff shall pay the costs of the suit and the preliminary objection to the 1st and 2nd defendants.

15. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 28th day of April, 2017.

J. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Ms. Mireri for O. M. Otieno for the 1st and 2nd defendant

Milcent court assistant

J. MUTUNGI

JUDGE