



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 347 OF 2015

GRAIN BULK HANDLERS LIMITED.....PLAINTIFF

-VERSUS-

JUJA COFFEE EXPORTERS LIMITED...DEFENDANT

RULING

1. For determination is the defendant's preliminary objection dated 23rd December 2015 that:

- i. The honourable Court is denied jurisdiction to entertain this suit by virtue of section 38 (1) of the Land Act and section 3 (2) of the law of Contract Act.**
- ii. The remedies sought in the suit cannot be granted in light of the provisions of section 59 of the Land Registration Act and section 87 of the Land Act.**
- iii. The suit discloses no or no reasonable cause of action known in law.**

2. The preliminary objection was argued by way of written submissions filed by both sides. The defendant relied on the provisions of the law stated in their preliminary objection and the following Court decisions:

- a. Kirkdale Ltd vs Mount Agencies Ltd & 3 others (2009) eKLR**
- b. Jane Catherine Karani vs Daniel Mureithi Wachira (2014) eKLR**
- c. Nyeri Teachers Investment Co. Ltd vs Solio Ranch Ltd & Another (2015) eKLR**
- d. Hannington Malingi Njanji vs Katana Pekeshe & 7 others (2013) eKLR**
- e. Schon Noorani vs Damji Ramji Patel & 2 others (2006) eKLR**
- f. Muchanga Investments Ltd –vs- Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR**

All the cases cited above emphasized the proposition in law under the provisions of section 38 (1) of Land Act and section 3 (2) of Law of Contract Act that no suit can be brought 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 the

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

3. The preliminary objection is opposed by the plaintiff who has filed grounds of opposition and submitted that the prayers in the plaint does flow from prayer (a) to the effect that

“A declaration that the plaintiff has a legitimate expectation that the suit property was to be transferred to her in the terms of the draft agreement and upon the defendant receiving part payment of the purchase price thereof”.

The plaintiff in support of their grounds of opposition placed reliance on the following authorities:

i. Mukisa Biscuit Manufacturing Co. Ltd vs Westend Distributors (1969) EA 2696

ii. A Commentary on Civil Procedure Act 2nd Edn by Steve Ouma

iii. Civil Procedure Act 2010

iv. Constitution of Kenya 2010

v. Ukwala Supermarkets & 2 others vs Paul Mburu Wainaina & Another

vi. John Harun Mwau vs Linus Gitahi & Others (2016) eKLR

vii. John Khamasi Bewgisen vs Joseph Murote Wanjiku (2014) eKLR

4. In summary, the plaintiff states that she should not be driven away from the seat of justice by way of interlocutory proceedings. That section 5 of the Civil Procedure Act clothes the Court with jurisdiction to ***“try all suits of a civil nature excepting suits of which its cognizance is either expressly or implied us barred.”*** Further that Order 3 rule 9 mandates the Court to adjudicate on a dispute where a party seeks declaratory orders as in the present case. Lastly that justice should be administered without undue regard to procedural technicalities as stated in article 159 of the Constitution. Therefore it is the plaintiff’s case that the objection to have the entire suit struck out is misconceived and untenable and that the defendant who is still holding the plaintiff’s Kshs 15.4 Million as deposit stands to suffer no loss were the instant suit to be determined on its merits.

5. My simple task is to determine whether there is any merit in the preliminary objection as outlined by the defendant. From the pleadings, it is revealed no agreement has been executed between the parties herein. This is set out in paragraphs 9, 10 and 13 of the plaint and prayer (c) of the plaint. Prayer (c) reads thus, ***“An order of performance of the sale contract herein by the defendant over the suit property to wit Mombasa/Block 1/392.”***

6. The defendant submitted that in the absence of a signed agreement there is no reasonable cause of action and or that the Court is denied jurisdiction to entertain the suit by virtue of section 38(1) of the Land Act Cap 280 and section 3(2) of the Law of Contract Act. The plaintiff did not rebut this provisions other than quoting the case of **Mukisa Biscuits** supra which is distinguishable and does not aid them much since the defendant’s objection is based on non – compliance of the requirements of the law as regard to disposition of an interest in land where there was no contract that was signed by the parties. This does not require to be ascertained by facts nor do the orders sought require the exercise of judicial discretion. An order for specific performance does not fall under instances where the Court’s exercise of

discretion is called into play.

7. The plaintiff seems to place her reliance on legitimate expectation to have the suit property sold and transferred to her on the basis of the draft agreement forwarded to the defendant's advocate and by virtue of the fact that the sum of Kshs 15.4 Million paid as deposit has not been refunded. Unfortunately the relevant provisions of the law herein is couched in mandatory terms and where there is no signed document no legitimate expectation can be derived therefrom in which case the Court can issue the declaratory order. In the case of **Patricia Bini vs Melivia Investments Ltd and 3 others (2015) eKLR**, Angote J quoted at paragraph 188 the case of **A.G of Belize et al vs Belize Telecom Ltd & Another (2009) I WLR 1980** at page 1993 quoting **Lord Person in Trollope Colls Ltd vs N. West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609** as follows:

“The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves.”

8. Further the editors of Chitty in Contract, 30th edition Volume 1 at paragraph 27 – 003 observed as follows, *“the jurisdiction to order specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect such as failure to comply with formal requirements or mistake or illegality...”* In the instant case the payment of deposit without a signed contract cannot by itself translate to a contract capable of being enforced as prayed in prayer (c) of the plaint. Consequently there is nothing upon which the plaintiff can state as a foundation for her legitimate expectation for the suit property to be transferred to her.

9. Since prayer (a) and (c) of the plaint fails for lack of a contract between the parties, prayer (b) & (d) which are consequential prayers would automatically fail. I am therefore satisfied that there is no reasonable cause of action to go for trial. I conclude by finding merit in the preliminary objection. The result of this is I hereby strike out the plaintiff's suit. Given the circumstances and nature of the claim and considering that the preliminary objection was raised before filing of the defence I order each party to bear their respective costs of the suit.

Dated, signed & delivered at Mombasa this 22nd day of September 2017.

A. OMOLLO

JUDGE