



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 79 OF 2014

JOSEPH MUOKI KAKENYI
MATHEW MWEU KAKENYI, AND
ANNOUCEATAH MARITIA KITETA

(Suing on their own behalf and Administrators of the estate of PETER

MWIKYA KAKENYI (DECEASED).....PLAINTIFFS/RESPONDENTS

VERSUS

DR. DAVID HOPCRAFT.....1ST DEFENDANT/APPLICANT

GAME RANCHING LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. In the Application dated 19th November, 2014, the 1st Defendant is seeking for an order that the suit as against him be struck out with costs.
2. The Application is premised on the grounds that the suit does not disclose a reasonable cause of action against the 1st Defendant; that the 1st Defendant is wrongly enjoined in the suit and that the 2nd Defendant is the duly registered proprietor of the suit land.
3. In his Affidavit, the 1st Defendant has deponed that it is not true that the deceased entered into an agreement to purchase 81.48Ha out of L.R. No. 7590/6 as alleged; that the present claim is embarrassing because the Plaintiffs are asserting title under contract and adverse possession at the same time and that the Plaintiffs cannot assert adverse possession posthumously on behalf of the deceased.
4. In response, the 1st Plaintiff deponed that he is one of the administrators of the Estate of the late Peter Mwikya Kakenyi; that the Plaintiffs' claim is not based on contract but adverse possession and that the contract merely shows how the Plaintiffs came into possession of the suit land.
5. According to the Plaintiffs, the 1st Defendant was and still is the Managing Director of the 2nd Defendant and is a necessary and proper party in the proceedings.
6. The 1st Defendant's/Applicant's advocate submitted that the 1st Defendant is the Managing Director of the 2nd Defendant; that a limited liability company is a body corporate with a legal personality of its own

and that the 1st Defendant cannot be held liable for the acts of the 2nd Defendant who was its principal.

7. Counsel submitted that the separate legal personality of a company can never be departed from except in instances where the statute provides for the lifting of the corporate veil; that the 1st Defendant does not have discernable interest in the suit land and that the suit does not disclose a reasonable cause of action as against the 1st Defendant.

8. The 1st Defendant's counsel relied on several authorities which I have considered.

9. The Plaintiffs' counsel submitted that the basis of the suit is that it is the 1st Defendant who entered into an agreement in 1976; that the 1st Defendant was the owner of the land whose portion was sold to her client and that the payments for the land were paid to the Applicants.

10. The Plaintiffs' counsel submitted that the 1st Defendant has been sued because he was the owner of the land at the material time and that the Applicant has not come to court with clean hands.

11. The only issue for determination is whether the suit as filed by the Plaintiffs discloses a reasonable cause of action as against the 1st Defendant.

12. The Plaintiffs are seeking for an order of the court declaring them as the owners of land known as L.R. NO. 7590/6 by way of adverse possession.

13. According to the 1st Plaintiff's Affidavit, their late father entered into an agreement of sale with the Defendants to purchase a portion of the suit land in 1976 and that the deceased was put into possession of the suit land after the said purchase.

14. It is the Plaintiffs' case that the deceased paid the entire purchase price and that they have lived on the land as a family since the same was purchased.

15. The Plaintiffs have annexed on their Affidavit the copy of the consent that was issued by the Masaku Donyo/Sabuk Land Control Board dated 10th August, 1981.

16. According to the said consent, it is the 1st Defendant/Applicant who sub-divided L.R. No. 7590/6 into two portions of 1019.51Ha and 88.52Ha.

17. The Plaintiffs have also exhibited acknowledgement slips showing that the 1st Defendant received the purchase price.

18. There are also emails that were exchanged between the 1st Defendant and the deceased in respect to the suit land.

19. From the Grant annexed on the Applicants' Application, John Norman Hopcraft sold to Game Ranching Limited several parcels of land, being L.R. Nos. 2317, 8230, 2316/2, 7590/4 and 7590/6. The Plaintiffs interest is in respect to L.R. No. 7590/6.

20. Considering that the Plaintiffs' claim is based on the ground that they were allowed on the suit land by the 1st Defendant upon purchasing it, and in view of the fact that a claim for adverse possession can only be allowed in a situation where the sale has aborted, or where the sale agreement has been vitiated, the claim by the Plaintiffs as against the 1st and 2nd Defendants is valid.

21. I say so because although the 2nd Defendant is a body corporate with a legal personality of its own, there is no evidence before me to show that it is the company which entered into the agreement of sale with the Plaintiffs' father in respect of the suit land.

22. It would appear from the acknowledgment slips and the emails that it was the 1st Defendant who sold to the deceased the suit premises and received the purchase price.

23. Having participated in the transaction, it will be premature for the court to ascertain at this stage if the 1st Defendant acted in his individual capacity or as a Director of the 2nd Defendant.

24. The Plaintiffs have also alleged in their Further Replying Affidavit that in 1976, the 1st Defendant was the registered proprietor of the suit land.

25. I have perused the Grant in respect of L.R. No. 7590 which shows that a Mr. John Norman Hopcraft was the registered owner of the land as at 4th May, 1964.

26. It will be therefore important, during the hearing of the suit, for the court to ascertain the relationship between Mr. John Norman Hopcraft and the 1st Defendant viz-a-viz the 2nd Defendant.

27. In the circumstances, the 1st Defendant is a necessary party in these proceedings.

28. For those reasons, I dismiss the 1st Defendant's Application dated 19th November, 2014 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2017.

O. A. ANGOTE

JUDGE