



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 11 OF 2012

TITUS KITILI MBATHI.....PLAINTIFF

VERSUS

HISSELLS MULATYA KALEVE.....DEFENDANT

RULING

1. This Ruling is in respect to the Defendant's Preliminary Objection dated 17th February, 2012.
2. In the Notice of Preliminary Objection, the Defendant has averred that the suit is misconceived and violates the express provisions of Section 3(3) of the Law of Contract Act.
3. The Preliminary Objection proceeded by way of written submissions.
4. The Defendant's counsel submitted that no evidence can be adduced in support of Clause 8 of the Plaintiff because there was no contract to sell or purchase the land as required by the law and that Section 3(3) of the Law of Contract expressly states that no suit shall be brought upon a contract for the disposition of land unless the contract is in writing, signed by the parties thereto and witnessed.
5. Counsel submitted that paragraph 5 of the Plaintiff alludes to an oral contract between the parties and that the suit should be struck out. Counsel relied on several authorities which I have considered.
6. On the other hand, the Plaintiff's counsel submitted that an interrogation of facts has to be done to establish whether or not the suit violates the provisions of Section 3(3) of the Law of Contract Act; that the facts and issues raised in the Preliminary Objection need to be canvassed and determined in the usual manner and that the Preliminary Objection is improper.
7. According to the Plaintiff's counsel, the Plaintiff's claim is not based on a sale or purchase of the suit land; that the claim is for compensation of the developments made on the land and that the claim is that of licensor/licencee.
8. Counsel relied on authorities which I have considered.
9. In the Plaintiff dated 29th December, 2011, the Plaintiff averred that the Defendant is the owner of land known as L.R. No. Makueni/Masongaleni/93; that in September, 2009, the Defendant agreed to sell to the Plaintiff the suit land and that the Defendant induced the Plaintiff to make developments before the said sale.
10. The Plaintiff pleaded in the Plaintiff that on the Defendant's representations, he developed the land by

clearing it, ploughing, plaintiff seedlings, weeding, making bench terraces, fencing, buying anti termite chemicals, planting eucalyptus trees and employing security all totaling to Kshs. 23,873,230.

11. It is the Plaintiff's case that the bulk of the developments consists of 25,160 eucalyptus trees planted on the suit land.

12. According to the Plaintiff, in November, 2010, the Defendant reneged on the representations that he had previously made to sell the land at Kshs. 1,000,000 and demanded that he pays him Kshs. 5,000,000 which offer he rejected.

13. The Plaintiff's claim is for reimbursement of the developments made on the suit land in the sum of Kshs. 23,873,230 as at September, 2011 under the doctrine of restitution.

14. In the Defence, the Defendant denied ever agreeing to sell the suit land to the Plaintiff and that the Plaintiff is a trespasser on his land.

15. From the Plaintiff, it is obvious that the Plaintiff is not laying any claim on the suit land.

16. The only issue that the court will determine at trial is if indeed the Defendant, either by implication or directly, allowed the Plaintiff to develop the suit property, and if so, whether a relationship of licensor/licencee was ever created between the parties.

17. The Black's Law Dictionary defines a licence as a privilege to do a particular act or series of acts on land without possessing any estate or interest thereon. That is the Plaintiff's claim in this matter.

18. Section 3(3) of the Law of Contract Act only deals with contracts for the disposition of land and not in a situation where one claims that he is entitled to the developments he has made on the land alone.

19. In the circumstances, and considering that the issue of the precise agreement, if at all, that the parties entered into cannot be ascertained at this stage, I find and hold that the Notice of Preliminary Objection dated 17th February, 2012 is unmeritorious.

20. For those reasons, the Notice of Preliminary Objection dated 17th February, 2012 is dismissed with costs.

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

O.A. ANGOTE

JUDGE