



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. SUIT NO.156 OF 2015

VIMEMAG ENTERPRISES LTD.....PLAINTIFF

VERSUS

AIRPORT VIEW HOUSING LTD.....1ST DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

THE CABINET SECRETARY LAND HOUSING

&

URBAN DEVELOPMENT.....5TH DEFENDANT

RULING

The 1st Defendant raised the preliminary objection that this suit is incompetent and ought to be struck out on the grounds that there is no contract between the Plaintiff and the 1st Defendant in respect of which the Plaintiff could possibly found a cause of action. The 1st Defendant argues that the court has no jurisdiction to entertain this claim pursuant to Section 3 (3) of the Law of Contract Act and Section 38 (1) of the Land Act which set out the conditions for bringing a suit based on a contract for the disposition of interest in land.

The 1st Defendant contends that the documents attached to the supporting affidavit were not executed and do not therefore amount to a contract for disposition of an interest in land.

Parties filed submissions. The Plaintiff submits that the preliminary objection is premature and an abuse of the court process. The Plaintiff avers that the 1st Defendant does not deny offering L.R. No. 209/12848 to the Plaintiff for purchase for the agreed consideration of Kshs. 140 million. The Plaintiff maintains that it complied with Section 38 of Land Act. In any case, it argues that the sale agreement provided for confidentiality and undertaking to safeguard the sale agreement. The Plaintiff argues that the sale agreement was executed on 1/10/2014. It urges the court to dismiss the preliminary objection as having no merit.

The 1st Defendant’s position is that the sale agreement was not executed and no seal was affixed on it. The 1st Defendant contends that it is not enough that the agreement met the contractual requirements for

offer and consideration; if the other requirements under Section 38 of the Land Act and Section of the Law of Contract Act are not met, the court lacks jurisdiction. The 1st Defendant relied on the case of **David Muigai Nganga V. Embakasi Ranching Ltd and Another** (2015) eKLR in which the Hon. Justice J. L. Onguto stated that Section 38 was obligatory and that when it comes to dispositions on interest in land, it must be in writing and signed by both parties. The Judge stated that non-compliance with Section 3 of the Law of Contract Act and Section 38 of the Land Act meant that the contract cannot be enforced against the party who has not signed the agreement. The same finding was made in the case of **Daniel Mwangi and 6 others V. Sayani Investment Limited and 3 Others [2015] eKLR**.

The 1st Defendant points out that the draft agreement produced by the Plaintiff shows that the contract was to be entered into between Harbans Singh Amrit, Kamal Prakash Amrit and Mandip Sigh Amrit together with Winnie Otieno Ochieng and Byron Ochieng Okello. The 1st Defendant is not a party to that agreement. The 1st Defendant argues that there is no privity of contract between the Plaintiff and the 1st Defendant.

The 1st Defendant further argues that the purported agreement is an agreement for the sale of shares in the 1st Defendant and not the sale of the suit property.

The court has looked at the documents filed in support of the application for injunction. The sale agreement dated 2014 shows that it is an agreement for sale of shares between Harbans Singh Amrit, Kamal Prakash Amrit and Mandip Sigh Amrit as vendors; and Winnie Atieno Ochieng and Byron Ochieng Okello as purchasers of shares in Airport View Housing Limited which is the 1st Defendant. The agreement is not executed. The court has also looked at the amended plaint. Initially the Plaintiff sought ascertainment of the true owner of L.R. No. 209/12848 situated on Langata Road, Nairobi. The plaint was amended on 3/3/2015 to add two additional prayers one of which seeks to restrain the Defendants from trespassing, alienating or otherwise dealing with the suit property while the other seeks an order of specific performance to compel the 1st Defendant to specifically perform the agreement for the sale of shares in the 1st Defendant to the Plaintiff.

Section 38 (1) of the Land Act stipulates that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing and signed by all the parties.

The court has considered the matter and agrees with the 1st Defendant that the Plaintiff has not complied with Section 38 of the Land Act since the sale agreement relied on by the Plaintiff was not executed. In addition, it relates to sale of shares and not land. The court upholds the preliminary objection and strikes out the suit with costs to the 1st and 2nd Defendant.

Dated and delivered at Nairobi on this 29th day of November 2017.

K. BOR

JUDGE

Delivered in open court in the presence of: -

No appearance for the Plaintiff

Mr. Njoroge for the 1st Defendant

Ms. Maura for the 2nd Defendant

Mr. V. Owuor- Court Assistant

