



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 15 OF 2009

AVALINA HOLDINGS LIMITED..... PLAINTIFF

VERSUS

THOMAS LIVASIA WIJENJE.....DEFENDANT

J U D G M E N T

INTRODUCTION

1. The plaintiff is a limited liability company incorporated in the Republic of Kenya (Company). The defendant is the registered owner of **LR. No. 1936/3 (IR 9205)** which is about **300 acres** (suitland). The company entered into a sale agreement with the defendant in which the defendant agreed to sell **50 acres** out of the suitland to the plaintiff. The defendant later declined to survey the suitland and hive off the 50 acres which had been sold to the company. This is what prompted the company to file this suit against the defendant in which it seeks among other reliefs an order of specific performance of the contract.

PLAINTIFF'S CASE

2. The company stated its case through its chairman **PW1 Lawrence Asidaga Masavilu** who testified that on **4/8/1988** the company entered into a sale agreement with the defendant in which the defendant agreed to sell **50 acres** out the suitland at a consideration of **Kshs.750,000/=**. The parties agreed that **Kshs.500,000/=** was to be paid to the firm of Messers Munikah & Co. Advocates who were to remit it to Agricultural Finance Corporation (AFC) where the defendant had a loan account.

3. It was further agreed that **Kshs.200,000/=** was to be paid to one M.E. Kwalimwa who had leased the land which the company had bought from the defendant. The amount was meant to compensate him for the early exit from the land the company had purchased. The balance of the purchase price i.e. **Kshs.50,000/=** was paid to the AFC.

4. Consent of the Land Control Board was applied for and obtained. Despite consent to subdivide the suitland having been obtained, the defendant never moved to subdivide the same. The company engaged him in correspondence and when it became apparent that the defendant was not willing to subdivide the suitland and give the company title, the company moved and had a caveat registered against the title to protect its interest.

5. The defendant filed an originating summons in **Kitale HCCC No. 48 of 2004 (OS)** in which he sought orders of removal of the caveat. The defendant filed an application for removal of the caveat. This application was however dismissed with costs in a ruling delivered on 17/6/2004. The entire suit was

later dismissed for want of prosecution on 27/10/2008.

6. The company contends that it met its part of the agreement and that it is the defendant who has refused to meet his part of the agreement hence this suit.

DEFENDANT'S CASE

7. The defendant concedes that he indeed entered into an agreement with the company in which he sold 50 acres out of the suitland. He obtained consent to subdivide the suitland. He put the company in possession of the portion it purchased. The company took possession in **1989**. It remained in possession until **1992** when its officials left after the tribal clashes of that year.

8. The defendant denied that he is the one who violently chased away the officials of the company from the land. He contends that the suit is statute barred and ought to be dismissed with costs. He claims that he does not understand why the company registered a caveat against the suitland. That he tried to remove the caveat vide a case he filed at Bungoma High Court.

EVALUATION OF EVIDENCE AND ISSUES FOR DETERMINATION

9. There is no contention that there was an agreement between the defendant and the company. A sale agreement was produced as Plaintiff Exhibit 1. There is also no contention that the company cleared the purchase price. As per the agreement, Kshs.500,000/= was to be paid directly to AFC. AFC further received Kshs.50,000/= and issued a receipt for the same [Exhibit 3(b)]. AFC wrote a letter [Exhibit 3(a)] giving authority to M/s. Munikah & Co. Advocates to go ahead and sell 50 acres on behalf of their client. Kshs.200,000/= had been paid to M.E. Kwalimwa. Consent of the Land Control Board was applied for and a letter of consent [Exhibit 2] given.

10. I have gone through the pleadings, evidence adduced by the parties as well as the submissions by both parties. The parties herein had filed their respective issues but when the case was heard and submissions filed, the issues which emerge for determination are as follows:-

1. Whether the plaint filed in court is properly before the court.

2. Whether the suit is statute barred.

3. What is the appropriate order on costs?

Whether the plaint filed in court is properly before the court

11. Mr. Samba for the plaintiff submitted that the plaint was dated 3/2/2008 but the same was filed in court on 4/2/2009. It is Mr. Samba who raised this issue. It is true that the plaint is dated 3/12/2008 but the same was filed in court on 4/2/2009. I do not see anything wrong with this and Mr. Samba did not point out anything wrong with this. There is no requirement that a plaint must be filed in court on the same day it is dated. As long as there is payment of the requisite court fees and the plaint is duly stamped on the date it is received in court, it does not matter whether it was dated prior to the date of filing. I therefore find that the plaint is properly before the court.

Whether the suit is statute barred

12. Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya states that no action can be brought to recover land after 12 years from the date on which the cause of action accrued. Evidence on record is that the plaintiff was put in possession of its 50 acres in 1989. The plaintiff claims to have been in continuous occupation until 2004 when the defendant violently evicted its officials. The defendant on the other hand claims that the plaintiff's officials moved out of the land in 1992 following tribal clashes. Be that as it may the fact remains that this suit was filed in the year 2009. This is about 20 years from the time of purchase or when the company was put in possession.

13. The plaintiff is relying on **Section 39 of the Limitation of Actions Act** which states as follows:-

39 (1) “A period of limitation does not run if – there is a contract not to plead limitation; or

(b) that the person attempting to plead limitation is estopped from doing so.

(2) For the purpose of subsection (1), “estopped” includes estopped by equitable or promissory estoppel”.

14. In the instant case, the plaintiff contends that the defendant besides the agreement, he had written a letter dated 18/1/1990 in which he undertook to complete the entire process of transfer. This letter was addressed to the plaintiff’s lawyer M/s. Munikah & Co. Advocates. This was in response to the advocate’s letter of 5/1/1990 which had raised concerns regarding delay in finalization of the matter.

15. The loan which the defendant had taken was cleared in 1997 as confirmed by letter dated 3/3/2004 from AFC to M/s. Munikah & Co. Advocates. In this letter AFC indicated that the title documents had been released to the defendant. This notwithstanding, the defendant was unwilling to transfer the 50 acres to the company.

16. In 2004, he filed a case against the plaintiff in which he sought to have the caveat removed. When his application was dismissed, he went and filed another case in Bungoma seeking withdrawal of the caveat. All this time, he never showed any willingness to transfer the 50 acres to the company. The principle of equitable estoppel is a bar to a party asserting a legal defence that is contrary to or inconsistent with his prior action or conduct.

17. The defendant had made the plaintiff rely on his word that he was going to transfer 50 acres to it. He went ahead to obtain consent of the Land Control Board. He kept on promising the plaintiff that the process will be carried out to completion. The plaintiff acted on his promise. He is therefore barred from pleading limitation on account of equitable estoppel.

18. Mr. Samba cited a High Court decision from **Milimani High Court in HCCC No. 1882 of 1999** between **Agricultural Finance Corporation & Another –vs- Kenya Alliance Insurance Company Ltd & Another** in which Justice Ringera as he then was struck out the plaint after a preliminary objection was raised. The reasoning of the judge was that the plaintiffs had not pleaded estoppel in their reply to defence. A reading of the judges reasoning shows that he struck out the plaint because there was no plea of estoppel in the reply to the defence and that the issue had not even been raised in the issues filed in the case. As the case had not gone to full trial where the plaintiff would have given evidence on estoppel, he had no choice other than strike out the suit on a preliminary point of law. This is unlike in this case where the plaintiff raised the issue of limitation in their filed issues and even adduced evidence on the issue by producing a letter in which the defendant had clearly stated that he was to complete the transaction.

19. All the five essential elements of the doctrine of equitable estoppel are present in the defendant’s conduct. First there was a false representation or concealment of material facts. Secondly the representation was known to be false by the defendant. Thirdly, the representation was believed to be true by the plaintiff. Fourthly, the defendant intended that this promise in the letter of 18/1/1990 will be acted on. Fifthly, the plaintiff acted on the representation to its detriment.

20. It will be inequitable to allow the defendant to raise the defence of limitation. He is barred by the principle of equitable estoppel. It is clear that he never intended to transfer the suitland to the company. I find that he is estopped from pleading limitation.

21. The plaintiff has demonstrated that it met its part of the bargain. It is the defendant who is refusing to perform his part. In the case of **Sagoo –vs- Dourado [1983] KLR 365** it was held that in contracts of all types, time will not be considered of the essence unless:-

i. The parties expressly stipulate that conditions as to time must be strictly complied.

ii. The nature and the subject matter of the contract or the surrounding circumstances show that time should be considered of essence, and/or

iii. A party who has been subjected to unreasonable delay gives notice to the party in default making time of essence.

22. In the instant case the defendant is the one who was to ensure that subdivision is done and title given to the plaintiff. The defendant has not done anything to facilitate completion of the agreement. From the agreement signed, time was not of essence. It was upon the defendant to meet his part of the bargain. He did not and he has not. This is a proper case where an order of specific performance should be given.

23. The plaintiff had pleaded particulars of loss and damage in the body of the plaint but it did not pray for those damages in the prayers. Even if those damages were to be prayed for, the same would not have been granted as there was no evidence led in support of the same. The plaintiff claimed Kshs.133,765/= paid to M/s. Munikah & Co. Advocates to defend it in the originating summons filed by the defendant. The plaintiff also claimed Kshs.40,000/= paid to M/s. Kidiavai & Co. Advocates to defend it in the originating summons. This was a special claim which ought to have been pleaded and proved in evidence. There was no evidence adduced on the same. This is the case with a claim for loss of user. There was no evidence led on the same.

DECISION

24. Most of the prayers in the plaint ought to have been addressed at interlocutory stage. The prayers are as contained in prayers (v1) to (x). I find that the plaintiff has proved his case on a balance of probability. I grant the following reliefs:-

a. An order of specific performance directing the defendant to survey the suitland as per the proposed subdivision plan LR. No. 1936/3 wherein the 50 acres is identified as 1936/3/B.

b. An order that the plaintiff is at liberty to survey the suitland, in default of the defendant complying.

c. An order directing the Deputy Registrar to execute all instruments necessary to effect the transfer of 50 acres of the plaintiff in case the defendant refuses to comply.

d. Costs of this suit to be paid by the defendant.

Dated, signed and delivered at Kitale on this 31st day of August, 2016.

E. OBAGA

JUDGE

In the presence of Mr. Wanyama for Plaintiff.

Court Assistant - Isabellah.

E. OBAGA

JUDGE

31/8/2016