



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.125 OF 2015

BOGANI PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

FREDRICK WAIREGI KARURI.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. This Ruling is in respect to the Plaintiff's Application dated 3rd July 2014, the Defendant's Application dated 28th July 2014 and the Defendant's Preliminary Objection dated 21st July 2014.
2. In its Application, the Plaintiff is seeking for a temporary injunction restraining the Defendant or its agents from dealing in any manner with the property known as Sub-division number 2643 (original number 1657/3) Section 111 Mainland North (the suit property) pending the hearing of the suit.
3. On the other hand, in the Application and Preliminary Objection the Defendant is seeking for the striking out of the Plaintiff because it is an abuse of the court process. The Defendant is also asking for the lifting of the caveat lodged on 24th January 2014 by the Plaintiff.

The Plaintiff's case:

4. The Application by the Plaintiff is premised on the ground that the Defendant agreed to sell to the Plaintiff the suit property as compensation of a previous sale agreement wherein the Defendant was unable to deliver vacant possession; that the Plaintiff has already paid Kshs.1,400,000 as part of the purchase price and that he is already and willing to pay the balance of Kshs.1,000,600 upon receipt of the completion document.
5. According to the Plaintiff's Supporting Affidavit, the Plaintiff entered into a sale agreement with the Defendant to purchase land known as CR. 41291; that the completion date of the aforesaid transaction was conditional on the dispute of HCCC No. 52 of 2008 between the Defendant and one Mary Nyaithira Kang'ethe and that the Defendant lost the said suit and could not deliver vacant possession.
6. The Plaintiff's director deponed that subsequently, the Defendant entered into another agreement with the Plaintiff wherein the Defendant agreed to transfer the suit property after sub-dividing it and that the Defendant proceeded to sub-divide the suit property and had it registered in his name.

The Defendant's case:

7. In his Application and Preliminary Objection, the Defendant has averred that the Plaintiff filed the Plaintiff without annexing the Resolution of the Board of Directors of the Company; that the Plaintiff did not authorise Mr. Christopher Mwaura Gathee to swear the Verifying Affidavit and that therefore the Plaintiff was not accompanied with a valid Verifying Affidavit.

8. The Defendant deponed that he never executed an application form for the issuance of the Land Control Board consent; that indeed no such consent has ever been obtained and that in the circumstances the suit cannot possibly succeed.

The Plaintiff's reply:

9. The Plaintiff's Director filed a reply in response to the Defendant's Application and deponed that the filing of the Plaintiff was sanctioned by a valid resolution of the Plaintiff; that the copy of the Special Resolution was inadvertently not included in the pleadings filed in court and that the Defendant is not likely to suffer any prejudice due to the fact that a special resolution of the Plaintiff's company was not included in the Plaintiff's initial pleadings.

10. The Plaintiff's director further deponed that the agreement of 4th October 2012 was voluntarily signed by the parties and that it was the duty of the Defendant, or the vendor, to obtain the Land Control Board Consent, which he did not and he cannot purport to place the blame on the Plaintiff.

The Plaintiff's Submissions:

11. The Plaintiff's advocate submitted that the Plaintiff has a case that is more than arguable with a probability of success because the parties voluntarily entered into an agreement for the sale of the suit property.

12. Counsel submitted that Order 4 Rule 1(4) does not require the filing of resolution together with the Plaintiff. Counsel relied on the case of **Purple Rose Trading Co. Ltd Vs Bhanoo Sha shilcent Jai, Nairobi Civil Case No. 700 of 2006 and Siokulei Tavita Ltd Vs Dr. Charles Walukwa ELC Case No. 971 of 2012** to buttress his argument.

13. The Plaintiff's counsel submitted that the lack of statutory consent by the Land Control Board does not invalidate a contract entered into by the parties. Counsel relied on the case of **Purple Rose trading Company Limited Vs Bhanoo Sha Shikent Jai, Civil case number 700 of 2006, Mushuga Vs Rulekenika (1974) EA 318 and Namuce Ltd vs Trister International Ltd Kampala High Court Misc. Application number 36 of 1994 (194) I KA LR 39 and West-lands Residential Resort Limited Vs Kewakanja Ltd & Others, Civil Appeal No.165 "A" of 2011.**

The Defendant's Submissions:

14. The Defendant's counsel submitted that a company can only sue in its own name with the sanction of its Board of Directors by a Board Resolution at the inception of the suit; that the deponent of the Verifying Affidavit did not have the requisite authority to swear it on behalf of the Plaintiff and that the suit was commenced without the requisite resolution. Counsel relied on the **cases of Kabundu Holdings Limited Vs Ali Mohammed, HCCC No. 116 of 2014, Bugerere Coffee Growers Ltd Vs Jse Baduka (1970) EA 147** among others to buttress his arguments.

15. The Defendant's counsel further submitted the suit property is agricultural land and is therefore subject to the Land Control Act which requires that the consent of the Kilifi Land Control Board should have been obtained. Consequently, it was submitted the agreement of sale became void for all purposes on 4th April 2013 for want of consent and the Plaintiff cannot claim for specific performance in respect of a dealing that is void. Counsel relied on the cases of **Simiyu Vs Watamamala (1985) KLR 852, BTB Insurance Agencies LTD Vs Nitin Shah & Others (2006)26, Misty Amar Singh Vs Kulubya (1963)**

EA 408 and Agnes Wambui Kihera Vs Bagila chonya Bashira (2014) e KLR.

Analysis and findings:

16. It is not in dispute that the Plaintiff entered into an agreement dated 4th October 2012 with the Defendant. In the agreement, the Defendant agreed to sell to the Plaintiff a portion of the suit property for Kshs.2,411,000. It is alleged that the Plaintiff has paid the Defendant Kshs.1,050,000 and is willing to pay the balance of the purchase price.
17. In the Plaint, the Plaintiff is seeking for specific performance and general damages for breach of contract.
18. While opposing the Application for an injunctive order, the Defendant has raised two issues for determination.
19. According to Defendant, the suit is a non-starter for want of a Board Resolution to institute the suit by the Plaintiff's company and secondly, that the suit cannot succeed for want of the consent of the Board of the Kilifi Land Control Board.
20. Although a resolution by the Plaintiff's Board of Directors was not filed when the Plaint was filed, the Plaintiff has annexed on its Replying Affidavit a Special Resolution under the Plaintiff's seal authorising the firm of Kimani Richu & Associates Advocates to institute this suit. The resolution by the Board of Directors of the Plaintiff also authorised Christopher Mwaura Gathee and Michael Mbugua Wanyoike to sign and execute all court documents for and on behalf of the company in their capacity as directors of the Plaintiff.
21. It is not mandatory, as was held in the case of Purple Rose Trading Company Limited Vs Bhanoo Shashi Kent Jai, Nairobi Civil Case Number 700 of 2006, that such a resolution should be filed alongside the Plaint. All that a party has to show is that indeed such a resolution existed before the suit was filed.
22. Once the resolution of the company is presented to the court, notwithstanding the stage of the proceedings the court should consider such a resolution as good enough to sustain a suit.
23. The objection by the Defendant that the suit is bad in law because of the resolution by the Plaintiff to institute the suit and to authorise Mr. Christopher M. Gathee to swear the verifying affidavit is therefore unmeritorious.
24. The Plaintiff has not denied that the suit property is agricultural land as defined by the Land Control Act.
25. According to the Plaintiff's director, it was the duty of the Defendant, as the vendor, to obtain the Land Control Board Consent for the transfer of the suit property, which was not done.
26. The provisions of Section 6 of the Land Control Act are clear that consent of the Board must be obtained within six (6) months of the execution of the sale agreement for controlled transactions, like the present one.
27. The Act further states that if the consent is not obtained within the said period, then a controlled transaction becomes void for all purposes (see **Simiyu Vs Watambamala (1985) KLR 852**). In **Kariuki Vs Kariuki (1983) KLR 225 at 227, Law J. A.** held as follows:

“When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked.”

28. The Act stipulates that an agreement for sale of Agricultural land is void after the expiry of six months if the parties do not obtain the consent of the relevant land control board. Consequently, this court cannot insist that the Defendant should transfer the land in question to the Plaintiff when the law stipulates that the Plaintiff is only entitled to a refund of the purchase price and not the land. (*see Section 7 of the Land Control Act*). That is what the Court of Appeal has restated in numerous decisions. In the case of **Agnes Wambui Kihara Vs bajila Chonya Bashora, (2014) e KLR**, I held as follows

“It does not matter that the Defendant changed his mind when he realised that he could not sell the suit property to a third party at a higher value. The bottom line is that the agreements that he Plaintiff is relying on for an order of specific performance are void in view of the provisions of section 6 of the Act. The remedy of specific performance presupposes the existence of a valid contract between the parties. A contract that is unenforceable because it has not complied with the provisions of the law cannot be enforced by way of specific performance”.

29. In view of the fact that the Plaintiff's main prayer is for an order of specific performance, which cannot, prima facie, be granted where an agreement of sale is void by operation of the law, I find and hold that the Plaintiff has not established a prima facie case with chances of success. The Plaintiff's claim can only be for a refund of the money paid.

30. In view of the fact that the Plaintiff may amend his pleadings to pray for a refund of money paid, I decline to strike out the Plaintiff's prayer as prayed in the Defendant's Application. I however allow the Defendant's Application dated 12th July 2014 in terms of prayer number 3 and dismiss the Plaintiff's Application dated 3rd July, 2014 with costs.

Dated and delivered in Malindi this 20th day of February, 2015.

O. A. Angote

Judge