REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC NO. 1538 OF 2014

NYERI TEACHERS INVESTMETN COMPANY LIMTED.....PLAINTIFF

-VERSUS-

SOLIO RANCH LIMITED.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

RULING

1. The Plaintiff filed this suit on 11th December, 2014 seeking a permanent injunction to restrain the Defendants and their servants from alienating or disposing of the suit property namely plot No. A10 also known as Land Reference No. 1157/39 to any other person save the Plaintiff. The Plaintiff also sought as the second substantive prayer an order of specific performance directed at the 1st Defendant to compel the said Defendant to sign all documents and do all acts for the purposes of completing the contract between the plaintiff and the 1st Defendant for the sale by the said Defendant and the purchase by the Plaintiff of the suit property. The Plaintiff finally prayed for general damages, costs and interest.

2. Alongside the Plaint, the Plaintiff also filed a Notice of Motion which sought orders of a negative temporary injunction pending the hearing and determination of the suit. The Notice of Motion had its foundation on the grounds stated on the face of the motion itself as well as on the Supporting Affidavit of John Manyatta Wanjau sworn on 10th December, 2014. The rather prolific affidavit was to the effect that the 1st Defendant agreed to sell to the Plaintiff the suit property measuring approximately 200 acres at a cost of Kshs. 60,000,000/= on 12th September, 2013. A sale agreement was thereafter negotiated but was never signed.

3. Frustrated, the Plaintiff lodged a caution for registration against the suit property's title. The caution was registered on 24th October, 2014 as entry No. IR 113227/2. On 28th November, 2014, the 1st Defendant's Advocates wrote to the Plaintiff's Advocate demanding removal of the caution on the basis that no contract existed between the Plaintiff and the 1st Defendant. Despite the Plaintiffs assurances and reassurances of the Plaintiff's will and abilitty to continue and complete the transaction the 1st Defendant did not budge and an engrossment of the contract for execution by the Plaintiff was not delivered. That prompted the Plaintiff to move the court as outlined in paragraph 1 of this ruling.

4. Served with the suit papers, the 1st defendant simply filed a Notice of Preliminary objection to the entire suit. The Notice was to the effect that the suit offends the mandatory provisions of Section 3(3) of the Law of Contract Act (Cap 23) as well as the requirements of Sections 36 and 44 of the Land Registration Act. To the 1st Defendant the court did not have jurisdiction to entertain the suit.

5. At the hearing of the preliminary objection, the 1st Defendants counsel was emphatic that he court lacked jurisdiction as there was no contract signed by both parties as provided for under Section 3 of the Law of Contract Act. Counsel relied on the decision of **Silverbird Kenya Ltd –v- The Junction Ltd & 8 others Nbi ELC 365 of 2011** as well as the case of **Kikal Properties Development Ltd –v- Maloo & 8 others [1990-94] EA 281**.

6. Advocating for the Plaintiff, Mr. Nderitu held the view and submitted that the preliminary objection was not well founded as it required the calling of evidence. He further submitted that Section 3(3) of the Law of contract Act did not apply as all the Plaintiff was asking was that a party be compelled to enter into a contract. He relied on the case **of Kenya institute of Management –v- Kenya Re Insurance Corp [2008] eKLR**. Counsel also submitted that it would be too draconian to strike out the entire suit in the circumstances of this case.

7. Two questions which I have to answer are these. Do the objections raised by the 1st Defendant fit well with what constitutes a preliminary issue or preliminary objection? If so, is this court seized of the jurisdiction to adjudicate the issues raised by the Plaintiff's suit?

8. I would commence my determination by making a quick yet simple reference to what Law J.A. said nearly 50 years ago in the oft cited decision of **Mukisa Biscuits Manufacturing Co. Ltd –v- Westend Bakery Ltd [1969] EA 696**. He stated thus:

> *"so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".*

9. The answer to whether the point taken by the 1st Defendant in this case through the Notice of Preliminary objection filed on 18th December, 2014 is the equivalent of the Criminal law's demurrer is to be found in the above passage. It is indeed one of the examples which was given by Law J.A.; an issue as to jurisdiction. I would however perhaps add that the cubbyholes for issues which may be raised as preliminary objections were not intended to be confined to the examples given by Justice Law.

10. In the instant suit the 1st Defendant has raised an issue as to whether the court has jurisdiction. The facts are largely not in dispute.

11. There is no controversy that the parties never executed a formal contract and that is the basis of the 1st Defendant's objection to the suit. It is then a matter of juxta positioning the undisputed facts with the law and determining the second issue.

12. As to the first issue, I would not agree with counsel for the Plaintiff that the issue raised is not suitable for determination as a preliminary issue. The issues touch on the jurisdiction of the court and in that regard too, I would make a quick reference to the case of **the MV Lilian S [1989] KLR 1**, where at page 14, Nyarangi J.A stated as follows:

> *"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step where a court has no jurisdiction there would be no basis for a continuation of proceeding pending other evidence. A court down(s) tools in respect of the matter before it the moment it holds*

the opinion that it is without jurisdiction..... it is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before court".

13. In short, a question of jurisdiction once raised must be dealt with immediately. If raised as a preliminary issue it must be disposed of on the basis of whatever facts are then before the court and which facts must be deemed to be correct: per Newbold P in **Mukisa Biscuits (supra).** It would indeed serve little purpose to hear and determine the case only for it to turn out that there was no jurisdiction to so proceed in the first place. I consequently answer the question as to whether the points raised by the 1st defendant rank as preliminary issues to be determined *in limine*, in the affirmative.

14. I now move to the next question as to whether the court is seized of jurisdiction to adjudicate the issues before it. The 1st Defendants counsel placing reliance on the provisions of Section 3(3) of the Law of Contract Act (Cap 23) has submitted that the court must down its tools in the absence of formal written contract exercised by both parties. Section 3(3) of the Law of Contract Act states as follows:

"No suit shall be brought upon a contract for the disposition of an interest in land unless:-

a. The contract upon which the suit is found

i. Is in writing

ii. Is signed by all the parties thereto; and

b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

15. A similar provision was legislated in the year 2012 through the Land Act, 2012. Section 38 thereof is pari materia Section 3(3) of the Law of Contract Act. The preamble to the said Land Act states that it was to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws. That statute was as a result of a prolonged examination of the law relating to land and transactions of the interest under land. The statute is currently the substantive law with regard to land and land transactions. Breach consequently of the provisions of Section 3(3) of the said Contract Act must be deemed as a breach of the Land Act, the substantive statute.

16. With regard to these two provisions of statue law, it is relatively clear that it is possible to have contracts for the disposition of interest in land which do not comply with the provisions of the statute. It is possible that parties may orally contract. It is possible that the contract may take the form of a deed only signed by the vendor or the purchaser. It is possible that the contract may be signed by both parties but not witnessed or attested to. The junction where all parties go their way is that such contracts cannot be enforced, nay entertained by the courts. Where section 3 of the Law of Contract act has not been complied with then neither party may move the court for assistance. It is for that reason that the noncompliance with Section 3(3) of the Cap 23 has severally be invoked by parties to impugn the legality or validity of contracts for disposition of interest in land. When that happens, it's the jurisdiction of the court that is impugned and not the non-complaint contract. For this courts have been fairly consistent to rule that compliance with section 3(3) of the Law of Contract Act and now Section 38 of the Land Act is mandatory as that was the express intention of statute. Not to allow enforcement of what may case "incomplete" contracts was the intent of statute.

17. It is easy to understand the premise for this formality as to writing. Contracts for disposition of interest inland ought to be in writing because not only does statute say so and has said so since the 1677 Statute of Frauds but the formality as to writing serves three critical purposes. Firstly it is forensic in nature. It helps to provide simple yet conclusive evidence as to the fact of agreement. Secondly, it serves the evidentiary function by encouraging precision and recording the result for posterity. Writing helps to avoid disputes as to what interest, for example has been or is intended to be conveyed. Thirdly, writing

helps to perform the protective function in land transactions. The fact that an agreement has to be negotiated, drafted, read through approved and executed gives the parties the opportunity to think before absolutely committing themselves.

18. Due to the import of this requirement which dates back to 1677 when the Statute of Frauds was promulgated in England, I would also not hesitate to uphold the requirement that Section 3(3) of the Law of contract Act be strictly complied with. For that, any contract that does not meet the statutory threshold ought not be enforced by the court.

19. There is no doubt in my mind that courts should zealously guard and uphold the right of every man to appear before the court for determination and enforcement of this legal rights: see **Lee –v- Showmens Guild of Great Britain [1952] 2QB 329** but it must be noted that the court's authority is to be strictly exercised within the ambit of the law. Courts in other words have judicial authority and jurisdiction to determine disputes but such authority and jurisdiction may be limited by the very interment that confers it. Jurisdiction could also be limited by an Act of Parliament: see **Davis –v- Mistry [1973] EA 453**. A good example is the Arbitration Act, 1995. Another example is the one Law of Contract Act. The latter statute is clear that the court has no power to adjudicate disputes over disposition of interest in land when section 3(3) has not been complied with.

20. I have no doubt in my mind that the parties to the suit appreciate that position of the law. Controversy however emerges when the Plaintiff states that it is not seeking to enforce a contract but rather seeks to compel the completion of an agreement.

21. I have closely perused the statement of claim and at this stage that is all that is expected of me rather than look into and interrogate the evidence: see **Crescent contraction Co. Ltd –v- Delphs Bank [2007] 2 EA 119**. The Plaintiff avers that there is in existence a contract to enter into an agreement. The Plaintiff blames the 1st Defendant for meticulously and maliciously failing to execute a Sale Agreement. For this the Plaintiff claims damages. Yet too the Plaintiff seeks specific performance and an injunctive relief. The order for specific performance is sought to ultimately ensure that there is fruition in the contract to sell the suit property to the Plaintiff. The order for injunction is also to ensure that the suit property is not sold or transferred to any other person other than the Plaintiff. These two core reliefs do not point to simple reliefs for execution of a contract. Rather they seek to enforce the agreement by the 1st Defendant to sell the suit property to the Plaintiff. On that score the Plaintiffs suit ought to fail as jurisdiction with section 3(3) of the Law of contract Actby the parties.

22. Mr. Muthui, for the 1st defendant asked me to strike out the suit. Mr. Nderitu urged me to exercise restraint. I would agree with Mr. Nderitu that restraint ought to always be exercised prior to striking out. Indeed, as was stated in the case of **Nitin Properties Ltd –v- Kalsi & another [1995] 2 EA 257, 259**

> *"A plaint can be struck out only if the claim is incontestably or hopelessly bad"*

23. I do not hold the view that the whole of the Plaintiffs claim is incontestably and hopelessly bad. It is only in so far as the Plaintiff seeks to enforce the disposition of the suit property. Bearing in mind the principle that the court of justice should aim at sustaining rather than determining a suit by summary dismissal: see **D.T. Dobie (K) & Co. ltd –v- Muchiga [1982] KLR 1**, I would not strike out the plaint. I would follow the Court of Appeal's approach in **Nitin Properties Ltd –v- Kalsi & Another (supra)** where the court directed the Plaintiff to withdraw the offending portions of the plaint by way of amendment. I would do so and give the Plaintiff herein 21 days to amend its plaint.

24. My decision not to strike out the Plaint in its entirety is also based on the fact that it would not be appropriate to strike out the claim entirely noting that the plaintiff seeks damages and further that as it were the 1st defendant continues to hold on to the amount of Kshs. 6,000,000/= paid to it by the Plaintiff and which amount the Plaintiff is perfectly entitled to claim by way of restitution. It would also amount to a mere pyrrhic victory if the plaint was struck out today only for the Plaintiff to file another suit tomorrow. As it were, the Plaintiff may very well do so if the suit is struck out in its entirety. It is clear though that the Plaintiff my not seek to enforce the sale of the suit property to it and must withdraw such

claims within the next twenty one (21) days by way of amendments.

25. Orders accordingly.

26. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 16th day of March, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

Mr. Nderitu for the Plaintiff/Applicant

Ms. Ecolono h/b for Mr. Muthui for the 1st Defendant/Respondent