



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 203 OF 2009

THOMAS GATURA GATHU..... PLAINTIFF

VERSUS

JORETH LIMITED... 1ST DEFENDANT

KENNETH MBOGO MARARO..... 2ND DEFENDANT

KAMIRI THUO 3RD DEFENDANT

RULING

On 4th May 2009 the Plaintiff filed a suit against the 1st, 2nd and 3rd Defendant and by the plaint sought the following orders against the defendants:-

- (a) An order of specific performance against the 1st defendant.
- b. An order compelling the 1st defendant to effect registration of the transfer in favour of the plaintiff.
- (c) A permanent injunction against the defendants jointly and severally restraining them, their agents and or servants from entering or trespassing onto or wasting, alienating, selling, interfering and/or destroying the suit premises **L.R. NO.13330/275**.
- (d)An order compelling the 2nd and 3rd Defendants to remove their building material from the same to its original condition.
- e. That the 2nd and 3rd defendants do meet the costs of restoring the aforesaid property to its original form.
- f. Costs of the suit.

By their filed defences none of the defendants pleaded a counter claim. The 1st defendant on its part denied it had executed a sale agreement with the plaintiff while the 2nd and 3rd defendants claimed to have purchased the suit property from **Thome Farmers NO.5 Limited** who were not a party to the suit.

On 24th July 2013 the Advocates for the plaintiff and the Advocates for the 1st Defendant filed a signed

consent order dated 28th February 2013 that was worded as follows:-

By CONSENT the suit herein as between the plaintiff and the 1st Defendant be marked as settled in the following terms:-

1. That the plaintiff is the bonafide purchaser for value of the suit premises herein namely **L.R. NO. 13330/275 from the 1st Defendant.**
2. That the injunction entered herein on the 5th day of February 2010 be and is hereby vacated.
3. That the 1st Defendant do forthwith effect registration of the transfer in the plaintiff's favour as proprietor of **L.R. NO. 13330/275.**
4. That each party to this consent bear their own costs of the suit.

Dated at Nairobi this 28th day of February 2013.

Signed

Advocates for the Plaintiff

Signed

Advocates for the 1st Defendant

On 18/3/2014 the matter was listed before me for mention for approval of the consent but as the 2nd and 3rd Defendants had not been served the court directed that they be served. The matter was again fixed for mention on 26/3/2014 when the court directed the 2nd and 3rd defendants to file an affidavit in case they were objecting to the consent order to enable the court ascertain the basis of their objection.

Mr. Kenneth Mbogo Mararo the 2nd Defendant herein has sworn an affidavit dated 4th April 2014 in which he sets out the basis of his and the 3rd defendants objection to the adoption of the consent. The 2nd and 3rd Defendants contend that the validity of the sale agreement between the plaintiff and the 1st defendant is an issue as the court held in its ruling of 5th February 2010 and needs to be determined at the hearing. The 2nd and 3rd Defendants state they have an interest in the suit property and should the consent be approved by the court it would amount to having the issues determined without them being heard. The 2nd and 3rd Defendants further contend that the plaintiff and the 1st defendant cannot properly consent on issues that the 2nd and 3rd defendant have an interest in their determination without their consent.

The 2nd and 3rd Defendants contend that the effect of the consent if adopted would be to have the plaintiff registered as the proprietor of the suit property without their consent which would prejudice their interest in the case and occasion a miscarriage of justice. The 2nd and 3rd defendant aver that the plaintiff and the 1st defendant through the consent want to take a shortcut in having the issues in the suit that affect the said defendants determined in their absence and to their prejudice.

On the basis of the pleadings before the court it is only the plaintiff who has made a claim for specific performance of the contract entered into with the 1st Defendant and has further sought an order directing the 1st Defendant to effect registration of the transfer in favour of the plaintiff. As against the 2nd and 3rd Defendants the plaintiff sought an order for them to remove building materials they had placed on the suit property and to restore the property to its original condition. The 2nd and 3rd Defendants claim, if any, would only be against **Thome Farmers NO.5 Ltd** through whom they claim having transacted and paid a total of Kshs.340,000/- towards the purchase of what they state was the suit property. The documents tendered by the parties show that the 1st Defendant is the registered owner of the head title **L.R. NO.13330** measuring a total of **154.4 hectares** and it is against this title the subdivisions are registered to

produce sub titles for the buyers of the subdivisions. **L.R.NO.13330/275** claimed by the plaintiff is one such subdivision. As stated earlier in this ruling the 2nd and 3rd Defendants did not make any counterclaim either against the plaintiff or the 1st defendant and neither did they enjoin **Thome Farmers NO.5 Limited** as a party to the suit. As per the suit the 2nd and 3rd Defendants do not make any claim against anybody as relates the suit property.

The primary issue in this suit was whether the plaintiff and the 1st Defendant had a valid agreement for sale in regard to **L.R. NO.13330/275**, the suit property herein and if an order for specific performance of the contract is available to the plaintiff as against the 1st Defendant. As the pleadings stand the 2nd and 3rd Defendants had no dealings with the plaintiff or the 1st Defendant and neither have they made any claim against them in the present suit.

By the consent order dated 28th February 2013 the plaintiff and the 1st Defendant have resolved the issue relating to the agreement for the purchase of the suit property between themselves and the 1st Defendant as the registered owner of the suit property has agreed to give effect to the agreement by effecting the registration of the transfer in favour of the plaintiff. I have reviewed the terms of the proposed consent and I am satisfied the plaintiff and the 1st Defendant would be perfectly in order to enter the consent they propose to be adopted by the court. The consent in my view relates to issues that solely relate to the plaintiff and the 1st Defendant. It is the plaintiff who instituted this suit against all the defendants and he can in my view compromise and/or enter a consent with any of the defendants. I hold that the plaintiff would be properly entitled to settle and/or compromise his suit with and as against the 1st Defendant. In the premises I am satisfied the proposed consent as between the plaintiff and the 1st Defendant is in order and I accordingly approve the same for adoption by the court.

Just like the plaintiff can under **Order 25** of the Civil Procedure Rules choose to withdraw, discontinue and/or adjust a suit against all or any of the defendants it is my view that he can equally settle and/or compromise the suit with all or any of the defendants. Indeed if the plaintiff chose to withdraw the suit against the 2nd and 3rd Defendants he would be entitled to do so subject to an appropriate order for costs and where a suit has not been fixed for hearing as in the instant case the right to withdraw the suit is totally unfettered.

In the circumstances I approve the consent order filed as between the plaintiff and the 1st Defendant on 24th July 2013 and the terms of the said consent are hereby adopted as orders of the court.

Orders accordingly.

Ruling dated, signed and delivered at Nairobi this.....16th day of May 2014.

J.M. MUTUNGI

JUDGE

In presence of:

.....For the Plaintiff

.....For the Defendants

