



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 810 OF 2012

MUKEI MBOLONZI.....PLAINTIFF

VERSUS

SAMUEL MWANGI MWAURA.....1ST DEFENDANT

AGNES WAMBUI KIRITU.....2ND DEFENDANT

ALICE WANGUI MWANIKI.....3RD DEFENDANT

RULING

Introduction

The Plaintiff filed a Notice of Motion dated 6th November 2012 seeking a temporary injunction to restrain the Defendants from interfering with the her quiet user and enjoyment of the parcel of land known as plot No. 11 being a subdivision of LR No. 7958/12 situate at Kahawa, off Mirema Drive in Nairobi, and from trespassing, surveying, demarcating or in any other way from issuing or dealing with the process of issuing titles to the subdivision scheme of LR No. 7958/12.

The Plaintiff claimed that she is the owner of the said plot No. 11 as a result of the sale of the plot to her by the 2nd and 3rd Defendants in year 2009 for Kshs.2.6 million which she paid. However, that the 2nd and 3rd Defendants have refused to prepare a sale agreement in her favour and to issue her with a title deed. Further, that the 1st Defendant, who scouted for and found the plot for the Plaintiff now claims to be a co-owner, and is conniving with the 2nd and 3rd Defendants to convert and or claim ownership of the said plot for no consideration.

The Preliminary Objection

The 2nd and 3rd Defendants subsequently filed a Notice of Preliminary Objection dated 21st November 2012 on the grounds that the entire suit offends mandatory provisions of the Land Act and particularly section 38(1) of the Land Act . The 2nd and 3rd Defendants' counsel filed written submissions dated 17th October 2013 wherein he contended that since the suit is based upon a contract for the disposition of an interest of land, section 38(1) which is coached in mandatory term has to be complied with.

He submitted that the Plaintiff attached to her pleading two contracts dated 6th August 2009 and 13th October 2009. Further, that the contract dated 6th August 2009 was entered into by the 1st Defendant as

the buyer, and the 2nd and 3rd Defendants as the sellers, and that their signatures are not attested to by any witness. The submissions of the 2nd and 3rd Defendants are that the contracts attached by the Plaintiff dated 6th August 2009 and 13th October, 2009 have not met the threshold envisioned in section 38(1) of the Land Act.

The Plaintiff's counsel in reply submissions dated 25th October 2013 argued that the preliminary objection has no merit and should be dismissed because of the 2nd and 3rd Defendants do not deny in their defence filed on 10th December 2012 that they received money from the sale of the suit premises. Further, that the Plaintiff filed this suit to enforce the agreement as the 1st Defendant is holding the suit premises in trust for her. It was her contention that bearing this in mind, and this being a court of equity, it would be patently unjust to strike out the her suit, which should be let to proceed to trial so that all relevant issues can be canvassed and the case heard on its merits.

The Plaintiff also relied on Article 159 (2) (d) of the Constitution of Kenya to argue that procedural technicalities as to whether an agreement has been attested or not are to be ignored, otherwise courts would compromise substantive justice at the altar of procedure. Further, that the decision as to whether to admit the agreement of 6th August 2009 as evidence even though it has not been attested is entirely that of the trial court.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided are firstly, whether the 2nd and 3rd Defendants' preliminary objection raises a pure point of law, and if so, whether it has merit and should be upheld. The law on the circumstances when a preliminary objection may be raised was settled by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

A preliminary objection cannot therefore be raised if any fact requires to be ascertained, and the effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

The 2nd and 3rd Defendants relied in this respect on section 38 of the Land Act which provides as follows:

(1) 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 founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

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

(2) Subsection (1) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.

It is not disputed that the contract dated 6th August 2009 was entered into between the 1st Defendant on one part and the 2nd and 3rd Defendants on the other part. The Plaintiff is therefore not a party to the said agreement and cannot bring a suit on it. However, the contract dated 13th October 2009 is shown as having been entered into with the 2nd and 3rd Defendants as the vendors and the Plaintiff and 1st Defendant as the purchasers. There is thus an agreement in writing in relation to the suit property in existence to which a Plaintiff is a party. In addition, while it appears that the said contract was not attested, the legal effect of such lack of attestation is to be determined by this Court, which is given discretion in this regard to give orders in the terms of section 38(2) of the Land Act, and to allow the Plaintiff to amend her pleadings if necessary.

This Court accordingly finds for the above reasons that the 2nd and 3rd Defendants' Preliminary Objection dated 21st November 2012 does not raise a pure point of law, and therefore has no merit. The 2nd and 3rd Defendants shall meet the costs of the said Preliminary Objection.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____8th____ day of ____December____, 2014.

P. NYAMWEYA

JUDGE