



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL CASE NO. 92 OF 2013

KATANA MRANJA ANGORE.....PLAINTIFF

=VERSUS=

EZEKIEL K. MASHA.....DEFENDANT

RULING

1. The Application before me is dated 5th June, 2013. In the Application, the Plaintiff is seeking for the following orders:
 - a. **An interim ex-parte injunction do issue, initially for 14 days, and thereafter as may be extended by court, with or without concurrency of the parties, to bar the Defendant by himself or through his agents, servants, employees or workmen or otherwise howsoever, from entering upon, or remaining at, or otherwise harvesting therefrom cash crops or other crops for sale or personal use, and or working on and/or wasting the land known as Ngomeni Squatters Settlement Scheme/961 in any manner whatsoever, initially for 14 days and thereafter until the hearing of this application inter partes, and ultimate determination of the suit;**
 - b. **In the alternative, the court does an order for preservation of the cash and other crops on Ngomeni Squatters Settlement Scheme/961 so as to maintain the status quo ante, by preventing the Defendant from entering or continuing to enter upon or otherwise harvesting and wasting or alienating the cash and other crops on Ngomeni Squatters pending the hearing and determination of this suit.**
 - c. **Directions as to service of ex-parte order and the other pleadings filed alongside this application on the Defendant; and on subsequent inter partes hearing are given;**
 - d. **The costs of this application are provided for.**
2. The Application is supported by numerous grounds and the Supporting Affidavit of the Plaintiff.
3. According to the grounds on the face of the Application, the plaintiff is the registered owner of the land known as Ngomeni Squatters Settlement Scheme 1961; that the agreement for sale of the said land entered into by the Plaintiff and the Defendant and evidenced by the written paper dated 22nd August 2004 is null and void by operation of law and that there is no agreement for sale of land between the parties capable of performance and the Defendant should give up possession of the land to the Plaintiff.
4. According to the Applicant's deposition, the Applicant attempted to sell the suit property to the Defendant for an agreed consideration of Kshs.120,000. The Defendant paid him in cash Kshs.60,000/- and further settled a debt he owed a third party in the sum of Khss.20,000/- leaving a balance of 40,000/- unpaid.

5. The Applicant has deponed that the sum of Kshs.40,000 remained un paid and as a result of the breach, neither the Defendant nor the Plaintiff applied and obtained the requisite letters of consent from the Land Control Board for the area where the land was situated. Consequently, the sale of the land is null and void for all purposes.
6. The Applicant further deponed that he is aggrieved that the Respondent has been harvesting his cash and other crops on the suit land even when any act in furtherance of the void and null agreement is a criminal offence.
7. The Applicant finally deponed that he has offered to refund the money paid to him after it became apparent that the Defendant could not complete the agreement but the Defendant has threatened him with physical force and violent resistance every time he has gone to harvest his crops; that he has always made not less than Kshs.10,000 a month from the sale of coconuts and other cash crops from the land and that that the Defendant should be restrained from harvesting the said crops to obviate his unjust enrichment at his expense and prevent the irreparable loss that he is suffering.
8. The Respondent filed his Replying Affidavit on 20th June 2013 and deponed that he has paid the Applicant full purchase price for the suit property totaling to Kshs.175,000, which is more than the agreed purchase price.
9. The Respondent further deponed that the Applicant was on a mission to fraudulently obtain money from him which is a criminal offence under the Penal Code and that he intends to counter-claim for specific performance of the admitted sale contract.
10. It was the Respondent's deposition that the orders of injunction are issued to preserve the subject from wastage or alienation but that the Applicant has not portrayed that such a risk exists.
11. The Respondent finally deponed that he assumed possession of the subject land immediately upon entering into the sale agreement in the year 2004 and that he has undertaken tremendous developments including clearing the bush, breaking the virgin ground for cultivation, planting cash crops, trees and perennial crops and consequently he is the one who ought to be protected by an injunction order against the Applicant.
12. The Respondent further states that the crops the Plaintiff/Applicant alleges that he is harvesting are actually the yield of his hard labour and that there is no justification of being barred from harvesting where he has sowed; that the Applicant has waited until the crops are ready for harvesting to move the court and ask that he be enjoined from harvesting his crops. According to the Respondent, such an act will be prejudicial to him and will not be in the best interest of justice.
13. Mr. Kimani, counsel for the Applicant and Mr. Ogeto, counsel for the Respondent appeared before me on 20th June, 2013 and made oral submissions.
14. Mr. Kimani, counsel for the Applicant submitted that the purported Sale Agreement that was entered into between the Applicant and the Respondent does not satisfy the Contract Act, cap 23 and specifically section 3 thereof.
15. Counsel submitted that the land in question is agricultural land. Consequently, it was submitted, parties had until 22nd February, 2005 to formally seek consent from the Land Control Board pursuant to section 6 (1) of the Land Control Act, Cap 302 which they did not. This, according to counsel, rendered the contract void of all purposes.
16. In the absence of the Board's Consent, counsel submitted that the Defendant's only recourse is for a refund of the money paid and that he cannot insist on taking possession and retaining possession of the land.
17. On the issue of whether the Respondent should be allowed to harvest his crops on the suit property, counsel submitted that any furtherance step of the illegal contract by the Respondent on the suit property attracts criminal sanctions and that considering that the Applicant has the title to the land, he has established a prima facie case for an injunction to issue.
18. On his part, Mr. Ogeto, counsel for the Respondent submitted that the Plaintiff/Applicant has admitted that there is a contract for sale of land between himself and the Respondent.
19. Counsel submitted that the Respondent bought the suit property with all the developments that were thereon in the year 2004 and that his client has been in occupation since then.
20. The Respondent's counsel submitted that the Respondent was under the impression that the suit property had been registered in his name but realised later on that the title deed was in the name of the Plaintiff/Applicant when it was issued in 2007; that it was the Plaintiff who was supposed to take the Defendant to the Land Control Board to obtain the consent which he has failed to do.
21. Counsel further submitted that the Applicant's actions are fraudulent because he obtained the title

- in his name and he has refused to obtain the consent of the Board; that the orders that the Applicant is seeking are for eviction of the Respondent in which case the matter should proceed for trial.
22. Counsel finally submitted that the Respondent should not be enjoined from harvesting his crops and that in 2004, the suit property had not been registered and therefore the Land Control Board Act is not applicable.
23. The Respondent has not disputed the fact that the suit property is agricultural land. Indeed, both parties are in agreement that the suit property has coconut trees, amongst other crops.
24. The Applicant has annexed on the supporting affidavit an agreement dated 22nd August 2004 between the Plaintiff and the Defendant.
25. The Agreement is scanty in details. It does not indicate the item that the Respondent was purchasing from the Applicant though the parties' signatures have been witnessed.
26. However, from the pleadings, both parties have admitted that the agreement dated 22nd August 2004 was in respect to the suit property. If that is the case, then the same would pass for being a contract for sale of land pursuant to the provisions of section 3 (3) of the Law of Contract Act. All that a party has to show is that there was an agreement for the sale of land which was signed by all parties thereto and the signature of each party signing has been attested by a witness.
27. Mr. Ogeto, counsel for the Respondent submitted that the suit property was not registered in 2004 and therefore the same was not subject to the Land Control Act, cap 302.
28. The Land Control Act was enacted with the aim of regulating, by means of public control, the manner in which agricultural land is supposed to be dealt with by the owners.
29. Part III of the Act provides for the control of dealings in agricultural land. A controlled transaction is defined under this part as

“The sale, transfer, lease, mortgage, exchange, partition or other disposals of or dealing with any agricultural land which is situated within a land control area.”

30. From the above definition of what a controlled transaction is, it is clear that the Act is concerned with dealings or disposals of any agricultural land, which will include unregistered land.
31. The transactions which are exempted from control are listed under section 6 (3) of the Act and include:

(a) A transmission of land by virtue of the will or intestacy of a deceased person, unless the transmission would result in the division of the land into two or more parcels to be held under a separate title; or

(b) A transaction to which the Government or the Settlement Fund Trustees or a County Council is a party.

32. Section 6 (1) of the Act provides that any transaction in agricultural land is void for all purposes unless the Land Control Board for the land area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act. The consent must be made within six months of the making of the agreement between the parties.
33. According to Section 7, if the consent is not sought and obtained, then any money or other valuable consideration paid in the course of a controlled transaction is recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.
34. Section 22 on the other hand provides that where a controlled transaction is avoided by section 6, any person who pays or receives money, or enters into or remains in possession in furtherance of the avoided transaction shall be guilty of an offence.
35. There is a long chain of decisions by the High Court and the Court of Appeal where it has been held that where no consent of the Land Control Board had been made and obtained, the sale of agricultural land becomes void.
36. In the cases of **Rioki Estate Co. (1970) Ltd Vs Kinuthia Njoroge (1977) KLR 146; Gabriel Makokha Wamalwa vs Sylvester Nyongesa Danati, Civil Appeal no. 6 of 1996, Githinji and another vs Munene Irangi, Nyeri Civil Appeal No. 131 of 1987**, the sale of agricultural land was set aside because the consent of the relevant land control board was never obtained.

37. In Malindi HCCC NO. 118 of 2012, I held as follows;

“The provisions of section 6 (1) is mandatory in nature, and this court, like all other courts are bound by it. This section has been a subject of many legal disputes owing to the fact that many people dealing in agricultural land have negligently or ignorantly failed to seek the consent of the board thus rendering the transaction void for all intents and purposes.”

38. In the same matter, I quoted the court of Appeal's decision in **Onyango and Another vs Laywayi (1986) KLR 513 – 516** which defined the phrase “ void for all purpose” as follows:

“An agreement that is held to be void for all purposes could not be the basis for a reference to a panel of elders. If a transaction is void for all purposes, nothing of it is left that could constitute a case of a civil nature. No complaints of any nature remain to be resolved after a transaction related to agricultural land is held to be void. For that reason, the appellant's case that there was an issue of trespass which could be referred to elders is unsuitable. The words “void for all purposes” must be interpreted to mean what they say.”

39. The Court of Appeal has even gone further to state that a party cannot be said to have been fraudulent in his dealings if he relies on the provisions of section 6 of the Act to avoid the agreement. Indeed, I lamented in my Ruling in Malindi HCCC No. 118 of 2012 that considering the history of the requirements of section 6 of the Act, and the way it has been used by sellers to avoid their obligations, the Act should have been repealed by now. Unfortunately, the Act has not been repealed and the courts have no choice but to enforce it.

40. In view of the fact that neither the Plaintiff nor the Defendant applied and obtained the consent of the Land Control Board in respect to the sale of the suit property, the transaction that was entered into by the parties for the sale of the suit property became void, and the Respondent's continued possession of the land was wrongful and criminal after six months from the date when the parties entered into an agreement for sale of the land.

41. It was submitted on behalf of the Respondent that the Respondent should be allowed to continue being in possession of the suit property and to harvest his crops.

42. It is however not clear from the Respondent's pleadings the kind of crops that he has planted on the suit property. From the material placed before the court, it is not obvious as to the trees and crops that were on the land before the Respondent purchased the land and what he has planted since then.

43. In any event, such an order will be *contra-statute*, in view of the provisions of section 22 of the Land Control Act, Cap 302 which criminalizes the continued possession of land where the consent of the board has not been obtained within the requisite time. That is the position that the Court of Appeal took in the case of **Rioki Estate Co. (1970) Ltd vs Kithuthia Njoroge (1977) KLR 146** where it was held as follows:

“It is common ground that the lease under which the Respondent was granted entry to the premises is void. I think it follows that from the moment the appellant demanded vacant possession, the respondent was not entitled to remain in possession and his continued possession of the premises was therefore wrongful.... The latter section (section 22 of the Land Control Act) makes it an offence to pay or receive money or to enter or remain in possession in furtherance of a void transaction punishable with a fine or imprisonment....”

44. In view of the provisions of section 6(1), section 7 and section 22 of the Land Control Act, cap 302, and the circumstances of this case which I have highlighted in detail above, I find and hold that the Plaintiff/Applicant has established a prima facie case with chances of success.

45. The continued usage of the land by the Defendant/Respondent under a void agreement, other than it being a criminal offence, will lead to the Applicant suffering damage that may not be compensated by way of damages.

46. I therefore allow the Plaintiff's/Applicant's Application dated 5th June, 2013 in terms of prayers

(b) and (e).

Dated and Delivered in Malindi this 25th day of July, 2013

O. A. Angote

Judge