



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 76 OF 2013

EMILY HAWATU KALIVOO.....PLAINTIFF

=VERSUS=

JOSHUA KATANA KIPONDA.....1ST DEFENDANT

KILIFI BAPTIST ASSOCIATION.....2ND DEFENDANT

R U L I N G

1. The Application before me is the one dated 24th May 2013 filed on the same date by the 1st Defendant. The Application is brought pursuant to the Provisions of Section 1A, 1B, 3A of the Civil Procedure Act and Order 51 Rule 1 and Order 2 Rule 3 of the Civil Procedure Rules, 2010.
2. The Application is seeking for the following reliefs:

THAT the Plaintiff filed herein on the 9th of May, 2013 be struck out upon payment to the Plaintiff of Kshs. 50,000/-

3. The Application is premised on the grounds that the transaction sought to be enforced under the agreement as set out in the Plaintiff is a dealing with agricultural land within the meaning of the Land Control Act; that the parties to the agreement did not apply for and obtain within 6 months of making of the agreement the requisite letters of consent from the Land Control Board for the area where the land is situated.
4. The other grounds raised in the Application are that the transaction between the Plaintiff and the Defendant is null and void by reason of the mandatory provisions of the Land Control Act; that the Plaintiff has rejected a refund of the deposit paid and that the Plaintiff never took possession of the land.
5. The Plaintiff's advocate filed a Replying Affidavit on 4th June 2013 and deponed that the suit property is not agricultural land within the meaning of the Land Control Act and therefore the consent of the Land Control Board was not required in the transaction in respect to the suit property.
6. The Plaintiff's Advocate further deponed that it was incumbent upon the Applicant to obtain the Land Control Board consent, a measure he did not undertake with a view of defrauding the Plaintiff; that the Plaintiff rejected the attempt by the 1st Defendant to refund the purchase price because the said attempt was made on the same day the Plaintiff's Application for injunctive orders came up for hearing.

7. The Plaintiff's advocate further deponed that the Plaintiff is in possession of the suit land; that the court should be guided by the principles of justice and equity in accordance with Article 159 of the Constitution and that any law that is inconsistent with the Constitution should be ignored and that the 1st Defendant's actions of selling the suit property twice is fraudulent in nature.
8. The Plaintiff's advocate finally deponed that the agreement between the Plaintiff and the 1st Defendant is capable of being enforced and that the matter cannot be determined through summary procedure.
9. The parties agreed to dispose of the Application by way of written submissions. The 1st Defendant's/Applicant's advocate filed his submissions and authorities on 10th June 2013 while the Plaintiff's/Respondent's Advocate filed his submissions on 9th July 2013.
10. I have considered the written submissions.
11. From the parties' written submissions, the parties are in agreement that an agreement for the sale of agricultural land is null and void unless the consent of the land control board of the area that the land falls is obtained.
12. Indeed, the Application for the consent of the land control board for the transfer of agricultural land must be made within six months of the agreement for sale of land.
13. However, the issue as to whether the suit property is agricultural land as defined by section 2 of the Land Control Act, Cap 302 can only be ascertained either from the pleadings or the evidence.
14. The Plaintiff's advocate has submitted that there is nothing so obvious in the pleadings that brings the suit land within the purview of the Land Control Act. The suit land, it was submitted, is one acre and planting a tree or two is in itself not enough to justify the conclusion that it is agricultural land.
15. The Plaintiff's advocate further submitted that even if it is found that the suit property is agricultural land, her Complaint cannot be struck out because she has pleaded in the alternative for the market value of the one acre in the event that an order for specific performance is not granted by the court.
16. The Plaintiff deponed at paragraph 4, 5 and 6 of the Complaint that on 5th August 2009, she entered into an agreement with the 1st Defendant for the purchase of one acre of his land parcel number Gede/Mida/Majaoni/787 for Kshs.50,000; that she took possession of the said portion and that she started using the land by cultivating it and planting food crops such as maize and other "permanent crops" such as cashew nuts. One of the prayers in the Complaint is as follows:

"One acre of land to be parceled out of land parcel number Gede/Mida/Majaoni/787 or its value in money in compensation."

17. Although the Plaintiff averred that she has been using the suit property by cultivating it, she has not expressly admitted that the suit property is agricultural land.
18. This court cannot, on the material placed before it, make a determination of whether the suit property is indeed agricultural land as defined by the Land Control Act for the purpose of ascertaining whether the Plaintiff should have obtained the consent of the Board within six months from the date the agreement was entered into or not.
19. The Plaintiff is also claiming in the alternative for the market value of the suit property and not just the Kshs.50,000 that the 1st Defendant is willing to refund.
20. Consequently, the issue as to whether the suit property is agricultural land or not and in the event the court holds that it is agricultural land, whether the money to be refunded to the Plaintiff is the market value of the property or the Kshs.50,000 that the Plaintiff paid in 2009 are serious triable issues which can only be determined after the hearing of the suit.
21. Consequently, I do not agree with the 1st Defendant's assertion that the Plaintiff's suit should be struck out for want of the consent of the land control board in respect to the agreement for sale of land that was entered into between the Plaintiff and the 1st Defendant.
22. In the circumstances, and for the reasons I have given above, I dismiss the Defendant's Application dated 24th May 2013 with costs.

Dated and Delivered in Malindi this 20th day of **September**, 2013

O. A. Angote

Judge