REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC MISC. APPLICATION NO. E 015 OF 2021

WAUMINI SACCO SOCIETY LIMITED.....APPLICANT

VERSUS

USERNAME INVESTMENT LIMITED.....RESPONDENT

RULING

What is before Court for determination is the Applicant's Notice of Motion application dated the 1st March, 2021 brought pursuant to Article 40 and 159 of the Constitution; Section 1A and 1B of the Civil Procedure Act including Order 51 of the Civil Procedure Rules. The Applicant seeks the following orders:

1. That this Honourable Court be pleased to declare that this matter has been lawfully adjusted.

2. That the Honourable Court be pleased to adopt the agreement entered by the parties as the judgement.

3. That this Honourable Court be pleased to order that implementation and execution of the resulting decree thereof.

4. That the respondent bears the costs of this application.

The application is premised on the grounds on the face of it and the supporting affidavit of Peter I. Obbuyi, the Applicant's Chief Executive Officer where he deposes that there was an encroachment by the Respondent on land parcel number Donyo Sabuk/Koma Rock Block 1/560 hereinafter referred to as the 'suit land'. He explains that on behalf of the Applicant, it assigned KANTAFU Surveyors to confirm lines and boundary beacons of the suit land. He confirms that the report by the surveyor established that the Respondent erected a fence which encroached on the suit land. Further, the surveyor gave detailed findings and recommendations which it brought to the attention of the Respondent. He avers that it instructed their advocates to write to the Respondent as regards the findings and remedies of their surveyor. Further, through a letter dated the 9th September, 2020, the Respondent accepted responsibility and undertook to rectify the situation as per their proposals. He reiterates that the Respondent undertook to fulfill its obligations so as to restore the proper boundaries. He claims the Respondents by the time of filing this suit have not fulfilled their commitment as provided in their letter dated 9th September, 2020. He sought for the court to enforce the impugned Agreement.

In opposition to the application, the Respondent filed a replying affidavit sworn by REUBEN WAITHAKA KIMANI, its Chief Executive Officer, where he confirms that the Respondent purchased land parcel number Donyo Sabuk/Koma Rock Block 1/561 measuring approximately 20 acres from Rose Mumbua Wanza, and upon executing the Sale Agreement with the vendor, it took possession. He explains that it instructed Markland Surveyors to undertake a proposed subdivision of the said land so as to sell the resultant plots to its members. Further, that it is only when undertaking the proposed subdivision when he realized there was an overlap of boundaries with the suit land owned by Kenya National Traders and Farmers Union (KANTAFU). He claims to have contacted the vendor Rose Mumbua and KANTAFU, after which all parties visited the disputed site and agreed to commission a joint surveyor so as to determine the extent of the encroachment. Further, the joint survey report confirmed Donyo Sabuk/Koma

Rock Block 1/561 registered in the name of Rose Mumbua had encroached on the suit land. He disputes the survey report marked as annexure 'WSS – 1' and contends that it was agreed that the Respondent would remove part of its fence that had encroached on the suit land while the then registered proprietor of Donyo Sabuk/Koma Rock Block 1/561 would bear the costs of replacing the missing/damaged beacons as well as meet the reasonable costs of the Applicant then agreed at Kshs. 60,000/=. Further, all parties agreed to sign a Deed of Settlement but when the same was presented to the Applicant, it declined to sign and instead advised its lawyers to demand Kshs. 667,000/= which it deemed outrageous. He insists the Respondent is not liable as it did not encroach on the suit land but the mistake was made by the previous owner Rose Mumbua while pointing out the boundaries for Donyo Sabuk/Koma Rock Block 1/561. Further, he denies the averments that they reached an agreement on any issue. He reiterates that the Applicant was yet to take their offer to replace damaged beacons on their portion of land as the Applicant's surveyor is yet to contact their surveyor. Further, that the Respondent has not agreed to pay any sums contained in the letter dated 8th January, 2020 and hence there is no agreement for the Court to enforce.

The Applicant filed a further affidavit sworn by its Chief Executive Officer Peter I. Obbuyi where it insists the Respondent acknowledged an overlap of the boundaries. Further, that in accepting liability, the Respondent on 9th September, 2020 wrote to their advocate directing them to call an appointed surveyor with further directions, which culminated in their engaging their surveyor. He disputes annexure 'RWK 3', which is an alleged Deed of Settlement.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 1st March, 2021 including the respective affidavits and rivalling submissions, the only issue for determination is whether this Court should declare that this matter has been lawfully adjusted and adopt the said agreement entered by the parties as the judgement of this Court.

The Applicant in its submissions reiterated its averments in the instant application including affidavits and insists the Respondent has failed to honour its contractual obligations. Further, that their surveyor did not act to have this agreement enforced. To buttress its averments, it relied on the following decisions: **Kenya Anti – Corruption Commission Vs Gilbert Mwangi Njuguna & Wilson Gachanja (2018) eKLR and South Nyanza Sugar Co. Ltd Vs Elija Jodwar Machori (2020) eKLR.**

The Respondent in its submissions contended that there is no valid contract between the parties herein to be enforced. It insists since it declined the Applicant's offer of Kshs. 670,000/= and made a counter offer of Kshs. 60,000/= towards the surveyor. Further, that the Applicant is barred from seeking to compel it to perform the offer which ceased to exist. It claims that correspondence from its advocates were marked 'without prejudice' and is hence inadmissible in this instance. It reiterates that the manner in which the Applicant has commenced this action is not known in law. Further, the Applicant was not entitled to the orders sought. To support its arguments, it relied on the decisions of **Caleb Onyango Adongo V Bernard Ouma Ogur (2020) eKLR** and **Rush & Tompkins Ltd V Greater London Council (1982) 2 ALLER 737.**

In this instance, the Applicant has sought for the court to declare that this matter has been lawfully adjusted and adopt the agreement entered by the parties as the judgement. In its supporting affidavit, it explained that it was entitled to fees amounting to Kshs. 670,000 being costs incurred as a result of the Applicant's encroachment on the suit land. The fulcrum of this dispute revolves around a boundary dispute wherein the Applicant contends that the Respondent encroached on its land. The Respondent on the other hand admits it encroached on the suit land but insists it is the vendor Rose Mumbua who had pointed out the boundaries to it. Further, that the said vendor admitted to this mistake.

In the case of **Joseph Kibowen Chemjor vs William C. Kisera [2013] eKLR**, Justice Munyao Sila observed as follows;

'I am alive to the provisions of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be "pleadings", goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of "suit by a letter" which Mr. Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose

of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party. If I am to allow the current "pleadings" to stand, I do not see how this matter will be determined without prejudice being caused to the defendant. Even if no prejudice will be caused to the defendant I would rather strike out this application at this stage, which will only invite minimal cost, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.'

While in the case of **Kawamambanjo Limited v Chase Bank (Kenya) Limited & another [2014] eKLR,** the Court held that:

'**The above notwithstanding, the court noted that in Halsbury's Laws of England Vol 17 paragraph 213, it had been stated that:-**

"the contents of a communication made "without prejudice" are admissible when there has been a <u>binding agreement</u> (emphasis court) **between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible…"**

See also the decision in **<u>Lochab Transport Ltd vs Kenya Arab Orient Insurance Ltd [1986] eKLR.</u>**

From perusal of the pleadings including annexures herein, I note the action was commenced vide a miscellaneous cause yet the issues in dispute are in the form of special damages which need to be proved vide viva voce evidence. Further, there is no valid contract that was signed between the Applicant and the Respondent which is sought to be enforced and the correspondence from the Respondent's advocates were marked 'without prejudice'. Based on the facts before me, while associating myself with the decisions cited above, I find that since there was no valid signed contract between the Applicant and the Respondent, the letters dated 31st January, 2020 and 9th September, 2020 respectively which were marked 'without prejudice could hence not be relied upon. Further, since the issues raised herein are substantive and require viva voce evidence to be adduced before the dispute can be determined on merit, I opine that this suit ought to have been commenced by way of a Plaint and not a miscellaneous cause.

In the circumstance, *I find that this miscellaneous cause as it stands is incompetent and will proceed to strike it out and direct the Applicant to file a substantive suit.*

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF APRIL, 2022

CHRISTINE OCHIENG

<u>JUDGE</u>