Case Number:	ELC 200 of 2014
Date Delivered:	23 Apr 2015
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Ruling
Judge:	Onguto Joseph Louis Omondi
Citation:	Judah Mwongela Muasya v Paul Ngui Katilu & another [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment Entered for the Plaintiff.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 200 OF 2014

JUDAH MWONGELA MUASYA.....PLAINTIFF

VERSUS

PAUL NGUI KATILU.....1ST DEFENDANT

JAMES KATILU.....2ND DEFENDANT

RULING

Coming up for determination is an application by the Plaintiff dated 31st May 2014 seeking an order that Judgment be entered against the Defendants jointly and severally as prayed in the Plaint on account of admission by the Defendants in their respective Defences and Witness Statements. The application is premised on grounds outlined in the application and supported by an affidavit sworn by the Plaintiff wherein he deposes that on diverse dates from 2004 he purchased parcels of land aggregating to 4 acres (hereinafter the suit property) from the 1st Defendant totaling to Kshs. 1,050,000/- which he paid in full, receipt of which was acknowledged. The Plaintiff elaborated that the Defendants are siblings and that the suit property is part of Title No. Machakos/Kitanga/28 within Kitanga Settlement Scheme, registered in the name of the 2nd Defendant. Further, that the 1st Defendant purchased 7 ½ acres from the 2nd Defendant when after he sold 4 acres to him. After the purchase, the Plaintiff deposes that he took immediate possession and has carried out substantial developments thereon.

It is the Plaintiff's deposition that the 1st Defendant has since the purchase failed to transfer the suit property to him on grounds that it is the 2nd Defendant who has delayed the transfer process. He contends that the 2nd Defendant witnessed and had no objection to the sale transaction between him and the 1st Defendant. The Plaintiff referred to the Defendants' Statements of Defence and deposed that it was evident that the 1st Defendant admitted to the sale transaction and that the 2nd Defendant was not opposed to transferring the suit property to him. Therefore, on the clear admissions by both Defendants, it would be a total delay of justice to go through the rigors of a full trial to prove that which is not in dispute. The Plaintiff further deposed that the 1st Defendant's claim that the land, Title No. Machakos/Kitanga/28, is family land does not affect his rights over the property. It was his contention that the dispute between the Defendants was likely to adversely affect his right to title over the property. The Plaintiff maintained that the matter herein was fit for the court to grant judgment on admission and urged the court to allow the application.

In support of the application, the Plaintiff relied on the documents he filed alongside the Plaint on 9th February 2014 which include: Copies of Sale Agreements between the Defendants; Copies of Sale Agreements between the Plaintiff and 1st Defendant for the purchase of 3 acres, ½ acre and further ½ acre; Acknowledgement notes signed by the 1st Defendant accepting receipt of part payments of the purchase price; Copy of proceedings and award before Provincial Land Dispute Appeals Committee and

adopted as Judgment of the Court in Machakos CMCC No. 144 of 2008; an official search undertaken on 17th February 2014 indicating that the 2nd Defendant was issued with title to Machakos/Kitanga/28 on 19th January 2007 and a caution placed by the 1st Defendant and others on 28th August 2013; and a letter of demand from the Plaintiff's advocate addressed to the 1st Defendant dated 14th December 2013.

Response

This application was opposed by the 1st Defendant who swore a Replying Affidavit on 1st December 2014. He deposed that judgment on admission could not be entered in this case since not all averments in the Plaint had been admitted. Further, that summary judgment would defeat the alternative dispute resolution mechanisms adopted by the family members in resolving the dispute. The 1st Defendant admitted to disposing off the suit property to the Plaintiff but deposed that transfer thereof was subject to the resolution of a family dispute regarding ownership of the land. Additionally that resolution of the dispute would determine the location of his share and in turn be able to excise and transfer the Plaintiff's portion. On the foregoing, the 1st Defendant prayed that the Plaintiff's application be disallowed.

Submissions

The application was further canvassed by way of written submissions. Mativo & Co. Advocates for the Plaintiff filed submissions dated 16th December 2014 wherein counsel submitted that the Plaintiff had established that both Defendants do not dispute the sale transaction and neither are they opposed to the transfer of the 4 acre portion to the Plaintiff. Therefore that in view of the admissions made in their Statements of Defence, it would be in the interest of justice the application be allowed as prayed. In support of the submission, counsel referred to the provisions of **Order 13 Rule 2 of the Civil Procedure Rules** which gives the Court discretion to enter judgment where there has been admission of facts. Counsel relied on the case of **Jondu Enterprises v Royal Garments Industries EPZ Nairobi HCCC No. 29 of 2014** where the Court in citing several authorities re-stated that,

"to succeed on the application, the admission by the defendant must be unequivocal. It must be plain and obvious. A judgment on admission is within the discretion of the court: it is not a matter of right. While the discretion is unfettered,it must be exercised judicially.The admission can be in a pleading, correspondence or other document. What is paramount is that the admission has be to be unequivocal and clear. It cannot apply where there are serious questions of law or fact to be argued."

Counsel also relied on the case of **Choitram v Nazari (1984) KLR 327** cited in Court of Appeal decision of **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania Nairobi C.A. No. 252 of 2008** that:

"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt...."

Makundi & Co. Advocates for the 1st Defendant filed submissions dated 16th December 2014. Counsel recapped the 1st Defendant's depositions that there was condition precedent in the sale agreement that transfer of the property would be subject to resolution of the dispute as to ownership of land. Further that the Plaintiff's portion would only be excised from the 1st Defendant's share once the dispute has been resolved. It was also submitted that the Plaintiff had been given vacant possession and was in occupation of the portion, but that in view of the dispute over ownership, it would not be prudent for summary judgment to be entered.

Determination

The discretion of the court to enter judgment on admission is given under **Order 13 Rule 2 Civil Procedure Rules** which reads:

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just

The uncontested facts of the case are that the property known as Machakos/Kitanga/28 within Kitanga Settlement Scheme is registered in the name of the 2nd Defendant. The 1st Defendant purchased 7 ½ acres therefrom and sold 4 acres to the Plaintiff. The 2nd Defendant in paragraph 1o of his Defence admits to have been privy to the transaction between the Plaintiff and the 1st Defendant and that he even witnessed one of the agreements. The 1st Defendant in his Defence admitted that the Plaintiff did indeed purchased 4 acres from him but that the transfer was subject to the resolution of a family dispute wherein he claims that the 2nd Defendant holds the entire property in trust for the family is not the owner thereof as purported. The 1st Defendant further averred that the Plaintiff's portion could only be excised after a determination is made of where his portion lies. It is these averments that the Plaintiff contends is likely to adversely affect his proprietary interest.

From the foregoing, the only issues that the court is tasked to determine are whether the Plaintiff purchased specific and/or identifiable portions of the property and secondly whether the dispute between the Defendants affects the transfer in his favour. I have carefully read through the agreements between the Defendants and the Plaintiff and the 1st Defendant availed by the Plaintiff. It is discernable that the 2nd Defendant described the exact portion that he wished to sell to the 1st Defendant in the agreements, as follows:

Agreement dated 2/1/1982

"*The exact place I had pointed out to him is where I have settled (together with him), its at the end of my land about 88.8 acres and I will shift and move a bit down and settle in the middle of my land and leave the portion where we have settled for him*"(sic).

Agreement dated 18/2/1984

"*Today, I James Katilu, I have agreed with Paul Katilu that I will add another portion of land over and above the portion I sold to him earlier.....*"

Agreement dated 19/9/1987

"*Today, I James Katilu, I have received Kshs. 5,000/- being for the portion I sold to my younger brother, 5 acres, the second portion, the first one we have not taken measurements, once we measure five acres, we shall add to the first portion. The two portions will remain at the sides, after measuring the portion for the shop, whatever remains, we shall discuss with my brother regarding the purchase price*" (sic).

Agreement dated 20/10/1994

"*Release of 10 ¼ acres are not completed. 7 ¼ acres had been fully paid for we have cleared today so that we abandon 3 acres out of the 10 ¼*" (sic).

Agreement dated 30/19/2001

"*Today we have witnessed together with the Divisional Chairman Mr. Makau Mulandi the marking of the boundary for the 5 acres which James Katilu sold to Paul Katilu and the following elders planted sisal for them :-.....*"(sic).

Agreement dated 11/10/2004

"Today I James Katilu ID No. 6133180, I have measured five acres of land (5 acres) for my young brother Paul Katilu ID No. 1277797. Its less (22x210ft) from land plot No. 28, Kitanga Settlement Scheme.

Note: According to the sisal that were planted, we noted that the land is less by (27x210ft)" (sic).

Agreement dated 10/7/2004 between the Plaintiff and 1st Defendant

"*Today, Saturday 10/7/2004 I Paul Ngui Katilu of ID No. 1277797 I have sold to Judah Mwongela Muasya ID No. 3463490 my piece of land measuring 3 acres situated within the Plot No. 28, Kitanga Settlement Scheme.....We have planted sisal on the said land, but we did not measure the size of the land, we shall take measurements on 31/07/2004 after full payment*" (sic)

From the foregoing, it is my finding that the 1st Defendant purchased an identifiable portion from the 2nd Defendant and in turn sold off 4 acres thereof to the Plaintiff. Thus the 1st Defendant's claim that the Plaintiff's portion could only be hived off once a resolution is made and his portion identified collapses.

On the second issue as to whether the Plaintiff should await the resolution of the dispute between the Defendants, the 1st Defendant averred that there are issues between the 2nd Defendant and his brothers including himself in regards to ownership of the entire property. In his response to the application, the 1st Defendant deposed that the family had engaged in alternative dispute resolution mechanisms in a bid to resolve the dispute. The 2nd Defendant at Paragraph 13 of his Defence did admit that there has been dispute between him and the family members to which he averred that it had been heard in various forums including the Provincial Lands Tribunal Appeals Committee which made a determination in his favour and that no further appeal had been preferred by the 1st Defendant.

As to whether there is a dispute between the Defendants and other family members over the entire property is not an issue for determination before this court. It is not in dispute that there was a sale transaction between the Plaintiff and the 1st Defendant and that purchase price had been paid in full. This court has made a finding that the Plaintiff purchased an identifiable portion from the entire property from the 1st Defendant and therefore a transfer of the 4 acre portion to the Plaintiff would not in any way interfere with the resolution of the dispute between the family members.

The Court of Appeal in the case of **Agricultural Finance Corporation Vs Kenya National Assurance Company Ltd, Civil Appeal No. 271 of 1996** held:

"Order 12, Rule 6 (*now Order 13 Rule 2*) empowers the court to pass judgment and decree in respect to admitted claims pending disposal of disputed claims in a suit. Final judgment ought not to be passed on admission unless they are clear, unambiguous and unconditional. A

judgment on admission is not a matter of right; rather it is a matter of discretion of the court and where a Defendant has raised objections which go to the root of the case, it would not proper to exercise this discretion."

It is my view that this is a matter that the court can exercise its discretion in allowing the application as the 1st Defendant has raised objections that do not go to the root of the case. From the defence it can be said that it is plain and obvious that he same raises no triable issue. There is no serious question of fact or law to be tried.

The Plaintiff prays for an order extending the time within which the parties can appear before the Land Control Board for the sub-division and transfer of the 4 acre portion.

The court has discretion to extend time under Section 8(1) of the Land Control Act where it considers that there is sufficient reason to do so.

8. Application for consent

(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

It is undisputed that the Plaintiff paid the purchase price in full. None of the agreements signed by the parties dictates who was responsible for initiating the Board to obtain consent. The agreements did not also make reference to the Law Society Conditions of Sale which under **Clause 2(1) (c) (i)** obliges the vendor to obtain consent. However, the circumstances of the case are that whilst the transaction is not denied, the 1st Defendant declined to take further steps to effectuate sub-division and transfer of the 4 acre portion on the basis that there is a pending family dispute. This in my view is sufficient reason for the court to extend time for purposes of an application under the Land control Act. I would extend time and further direct that the application to the relevant local Land Control Board be lodged within the next three (3) months from the date of this order. The Plaintiff will have costs of the suit as well as of the application. Judgment is otherwise hereby entered for the Plaintiff as prayed for in the plaint save as herein before directed.

Orders accordingly.

Dated, signed and delivered at Nairobi this 23rd day of April, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

.....for the Plaintiff/Applicant

..... for the Defendants/Respondent