



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC NO. 12 OF 2010

LUIGI FREGUGLIA.....PLAINTIFF

=VERSUS=

TESSARO GIOVANNI.....DEFENDANT

J U D G M E N T

Introduction:

1. In his Complaint dated 10th February, 2010, the Plaintiff has averred that at all material times, he was the registered proprietor of land known as portion number 962 Watamu having acquired it from Mr. Federigo Violi.
2. The Plaintiff has averred that at the time he purchased the suit property, the Defendant was a tenant of Mr. Violi; that it later emerged that at some stage, Mr. Violi intended to sell an apartment erected on the suit property to the Defendant and that by consent, the Plaintiff, on behalf of Mr. Violi, paid the Defendant by way of a cheque Euro 12,000 being the compensation the Defendant had suffered occasioned by the sale of the land to the Plaintiff.
3. It is the Plaintiff's case that when the Defendant went to Italy, he altered the cheque and the same was rejected by the bank. The Plaintiff has averred that he later on learnt that Mr. Violi had not offered to the Defendant the apartment for sale and wants the Defendant evicted from the suit property.
4. In his Defence, the Defendant deposed that he is the owner of the apartment situated on the suit property.

The Plaintiff's case:

5. The Plaintiff, PW1, informed the court that he is the registered proprietor of land situated in Watamu and known as portion No. 962 Watamu; that he purchased the land from Mr. Violi on 26th June, 2008; that the Defendant was Mr. Violi's tenant and that as at the time he was purchasing the suit property, he knew that the Defendant was Mr. Violi's tenant.
6. PW1 informed the court that while attempting to evict the tenants who were on the suit property, the Defendant showed him an agreement dated 8th August, 2008 made between him and Mr. Violi showing

that he had purchased an apartment from Mr. Violi for a sum of Kshs.500,000.

7. Since he wanted the Defendant out of the property, it was the evidence of PW1 that he entered into an agreement with him in which he agreed to compensate him on behalf of Mr. Violi by paying him Euros 12,000.

8. However, it was the evidence of PW1 that the Defendant altered the cheque and the same was rejected by the bank. That is when the Defendant sued him in Civil Suit No. 339 of 2009.

9. PW1 informed the court that it was only after the Defendant produced the agreement of sale between him (the Defendant) and Mr. Violi that he realised that the documents that the Defendant was relying on were forgeries; that when he spoke to Mr. Violi on phone, Mr. Violi denied entering into an agreement with the Defendant in the year 2007 and that Mr. Violi denied ever signing any agreement of sale with the Defendant.

10. It was the evidence of PW1 that the signatories on the purported two agreements between Mr. Violi and the Defendant are different; that he subsequently rescinded the agreement he had entered into with the Defendant and that because the building on the suit property had been condemned by the then Municipal Council of Malindi, the Defendant vacated the land.

11. In cross-examination, the Plaintiff stated that at the time of the purchase, the Defendant was not in the apartment although he showed up later.

12. According to the Plaintiff, the Defendant had paid to Mr. Violi a deposit of 2,000 Euros and he agreed to pay him 12,000 Euros for the furniture that was in the apartment and for him to leave the house.

13. However, when the cheque for 12,000 Euros bounced, PW1 informed the court that he allowed the Defendant to collect his furniture from the house.

14. It was the evidence of PW1 that he refused to replace the cheque for 12,000 Euros when he realised that the Defendant was relying on forged agreements of sale.

15. PW1 informed the court that the house that was standing on the suit property was condemned by the then Municipal Council of Malindi and has since been pulled down.

16. PW1 stated that he has since sold the land to a third party.

17. PW2 informed the court that he was the lawful Attorney of Mr. Violi.

18. According to PW2, Mr. Violi was the registered owner of the suit property before he sold it to the Plaintiff.

19. PW2 informed the court that when the Defendant produced the agreements dated 8th August, 2006 and 15th October, 2006 purportedly signed by Mr. Violi, Mr. Violi informed him that he never signed the two agreements.

20. According to PW2, Mr. Violi was in Italy when he is purported to have signed the two agreements in Kenya.

21. PW2 stated that the Defendant was Mr. Violi's tenant and he used to pay Mr. Violi the rent.

22. It was the evidence of PW2 that the Plaintiff met Mr. Violi in Italy and paid him the purchase price, whereafter PW2 was allowed, on behalf of Mr. Violi, to sign the Transfer document in respect to the suit property.

23. In cross-examination, PW2 stated that he was Mr. Violi's employee and that he is the one who signed

the Transfer because he had been given the power of attorney by Mr. Violi.

24. It was the evidence of PW2 that Mr. Violi left the country in the year 2007 and could not have signed the two agreements that the Defendant was relying on.

The Defendant's case:

25. The Defendant's advocate closed the Defence case without calling any witness.

26. The parties filed brief submissions which I have considered.

Analysis and findings:

27. The Plaintiff is seeking for vacant possession of portion number 962 Watamu on the ground that he is the registered owner.

28. PW1 informed the court that he purchased the suit property from Mr. Violi on 26th June, 2008.

29. PW1 produced the Transfer document that was signed by Mr. Violi's Attorney, PW2, and the Certificate of Title showing that he was registered as the proprietor of the suit premises on 26th June, 2008.

30. Although the Plaintiff was meant to believe that the Defendant had an interest in the suit property, it was his evidence that he later on discovered that the documents that the Defendant was relying on to claim an interest in the suit property were forgeries.

31. The evidence before me shows that the Plaintiff is the registered proprietor of the suit property.

32. The Defence did not adduce any evidence to show that the suit property was transferred to the Plaintiff by mistake, misrepresentation or fraud.

33. Indeed, the Defendant has not sought in his Defence for an order cancelling the registration of the suit property in favour of the Plaintiff.

34. In the absence of evidence to show that the Defendant had acquired an interest in the suit property before it was transferred to the Plaintiff, and considering that the Plaintiff has produced the Certificate of Title showing that the suit property was transferred to him by Mr. Violi on 26th June, 2008, I find that the Plaintiff has proved his case on a balance of probabilities.

35. The Plaintiff did not however prove that he is entitled to mesne profits and more so considering that the Defendant is not occupying the suit property.

36. In the circumstances, and for the reasons I have given above, I allow the Plaintiff's Plaint dated 10th February, 2010 in the following terms:-

(a) The Defendant be and is hereby ordered to give vacant possession of plot number 962 Watamu.

(b) The Defendant to pay the costs of the suit.

Dated, signed and delivered in Malindi this 13th day of May, 2016.

O. A. Angote

Judge