



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO.2 OF 2015

LOVE ISLAND BEACH

RESORT LIMITED..... PLAINTIFF

VRS

ACTA HOLDING LIMITED.....1ST DEFENDANT

KIDZIDZI PROPERTIES LIMITED2ND DEFENDANT

AND

ISAAC RODROT.....INTENDED INTERESTED PARTY

RULING

This ruling is in respect of three applications. The first application is dated 7/1/2015. The application is by the plaintiff seeking to restrain the defendants from transferring, alienating or in any way interfering with the suit property, plot number Kilifi/Jimba/1126 pending the hearing and final determination of this suit. The second application is dated 26/2/2015. It is by Isaac Rodrot who is seeking leave to join these proceedings as an interested party. The third application is dated 10/2/2015 by the defendants. It seeks to have this suit to be stayed or be referred to arbitration. It also seeks to have this suit struck out as it discloses no reasonable cause of action.

The first application is supported by the affidavit of Isaac Rodrot sworn on 7/1/2015. The second application is supported by the affidavit of the same person sworn on 26/2/2015. The plaintiff also filed a further affidavit sworn by Isaac Rodrot on 13/2/2015. The third application is supported by two affidavits. One was sworn by Bhupendra Meghji Shah (*hereinafter referred to as Mr. Shah*) and the second one by Emmanuel Charo Tinga (*hereinafter referred to as Mr. Tinga*). The defendants also filed a replying affidavit sworn by Mr. Shah on 21/1/2015 and a further affidavit of the same person sworn on 11/3/2015. There is also a replying affidavit by Mr. Shah sworn on 11/3/2015 in reply to the application dated 26/2/2015.

Mr. Masika appeared for the plaintiff as well as the intended interested party while Mr. Chaenza appeared for the defendants. Mr. Chaenza submitted that the defendants' application dated 10/2/2015 seeks to have the suit struck out as it discloses no cause of action. In the alternative, the suit be referred to arbitration as the contract between the parties contains an arbitration clause. It is admitted by the defendants that the plaintiff company has only two directors. The suit was filed without the concurrence of both shareholders. The second shareholder did not sign the annexed Board of Directors' resolution authorising the filing of the suit. The resolution must be under the seal of the company and his client Mr. Tinga was never called for a meeting yet he is the 2nd shareholder and director.

Mr. Chaenza further submitted that clause 12 of the agreement provide that in case of dispute then the mater be referred to arbitration.

Mr. Masika opposed the application, counsel relied on the several affidavits referred to herein. Counsel submitted that the application to have the matter referred to arbitration was filed one month after the defendant entered appearance. Mr. Tinga authorised the filing of this suit ad authorised Isaac to swear the affidavits. Under the plaintiff Company's Articles and Memorandum of association, Isaac has to endorse all the resolutions and Mr. Tinga had no authority to swear an affidavit. Mr. Tinga should have applied to be enjoined as a party. Counsel further maintains that the defendants have not shown any willingness to have the matter referred to arbitration. The plaintiff is seeking the balance of sale proceeds and the plaint clearly shows that there is cause of action. The defendants' have title to the land and are developing it. They have applied for the change of user yet they have not paid the balance of the purchase price. Mr. Masika is of the view that there is no major dispute to be referred to arbitration. The defendants have had a chance to mediate the dispute.

Turning to his two applications, Mr. Masika contends that there is need to preserve the property until the dispute is resolved. There is a sale agreement signed on 23/11/2011 for the suit land, Kilifi/Jimba/1156. The purchase price was Ksh.125 million. The property was transferred to the defendants. Although the vendor was the plaintiff company, the two directors agreed to have the sale proceeds paid to them directly as individuals. Isaac was to get Ksh.77 million while Mr. Tinga was to get the balance amounting to ksh.48 million. Mr. Tinga was duly paid all his money and has no interest in the matter. Isaac has not been paid his balance. That is why Isaac has applied to be enjoined as an interested party so that he can recover his money. Isaac as an individual is not a party to the arbitration agreement. The defendants are in occupation and are enjoying the property. There is no breach of contract.

Mr. Masika further maintains that there was Malindi High Court Civil Case No.107 of 2005 and Judicial Review Number 12 of 2011 in respect to the suit property. Both suits were withdrawn. The transaction was completed. There is a suit that was filed in 2014 which is pending. The original sale agreement was varied by mutual consent of all the parties. The variation was in writing. There is no adverse order against the property.

Mr. Chaenza opposed both applications and relied on the various affidavits by the defendants and Mr. Tinga referred to hereinabove. It is his position that the plaintiff has not satisfied the conditions for granting injunctions. The plaintiff breached the sale agreement. The agreement stipulated that before the full purchase price was paid, the plaintiff was to ensure that beacons were fixed and that no court cases existed in relation to the property. The plaintiff knew that there were suits existing over the property. There is a plaint filed on 23/9/2014. Initially there were two suits filed in 2005 and 2007 respectively. Counsel submitted that there is a balance of Ksh.17.5 million and the defendants have retained it so that they can mitigate their losses. There is no intention on the part of the defendants to sell the property. Over Ksh.108 million was paid. The defendants are capable of paying the balance: The two directors are fighting and they cannot refund the money. Mr. Chaenzo confirmed that the agreement was varied but only to the extent that completion documents would be provided before the complete purchase price was paid. The defendants froze the payment when they realized that there were problems once the court case is finalised, the balance will be released. The interests of Isaac can be taken care of by the company. The plaintiff has no *prima facie* case with a probability of success.

The main issues for determination at this interlocutory stage are whether this should be dismissed, whether the interested party should be enjoined, whether the plaintiff has established a *prima facie* case with a probability of success and whether the dispute should be referred to arbitration.

Several facts are being admitted by both parties. These include the variation of the sale agreement whereby the payments were made to the individual directors. It is also clear from the pleadings that the two earlier cases namely HCCC 107/2005 and Judicial Review no.12 of 2011 were both withdrawn. It is also clear from the pleadings that there is no o0ther director or shareholder of the plaintiff company. It can also be inferred from the pleadings that Mr. Tinga got his share of the sale proceeds. The defendant are in occupation of the property, have successfully changed the user. There is a letter dated 21/5/2013

approving the change of user. There is also a letter dated 6/2/2012 from M/s Bengi Miriti & Associates Advocates indicating how the sale proceeds should be paid to the two individual directors. The land was transferred to the defendants on 19/1/2012. Paragraph 4 of the sale agreement dated 3rd November 2011 provided for the mode of completion. The plaintiff was required to provide several documents while the defendants were to provide a suitable undertaking or guarantee.

From the record, it is clear that the relevant documents were provided which facilitated the registration of the transfer in favour of the defendants. The defendants are complaining that no beacon certificate or scheme plan were provided which facilitated the registration of the transfer in favour of the defendants. The defendants are complaining that no beacon certificate or scheme plan were provided. By 20/1/2012 the registration in favour of the defendants was complete. The plaintiff has annexed an e-mail of 12/7/2014 and it is claimed that the defendants intend to sell the property.

With regard to the application by Isaac Rodrot to be enjoined in this suit, I do find that the application is merited as the defendants do confirm that the sale agreement was varied. He is individually entitled to be paid the balance of the purchase price. I have read the affidavit of Mr. Tinga of 13/2/2015 and he does not claim any part of the purchase price. To that extent, I do find that the application dated 26/2/2015 is merited and is hereby allowed. Mr. Isaac Rodrot shall be enjoined in this matter.

The defendants contend that the suit should be dismissed as it discloses no cause of action. Since it is conceded that there is a balance of Ksh.18.5 million still due and payable, I do find that there is a cause of action. Mr. Chaenza submitted that the defendants froze payment. Paragraph 4 of Mr. Shah's affidavit of 11/3/2015 confirm that there is money due to the plaintiff company. Paragraph 17 of the said affidavit states as follows:

“That for avoidance of doubt the defendants are ready to release to the plaintiff the amount due and owing in the sum of Kshs.17,900,000/= if the plaintiff fulfills to the later the terms of the agreement of sale dated 3rd November, 2011. How the plaintiff apportion the said monies amongst its directors is none of the defendants' concern.”

Given the pleadings and submissions herein, I do find that there is a cause of action by the plaintiff company as well as Rodrot against the defendants. I do also find that the enjoinder of Mr. Rodrot to this suit makes it difficult to have the matter referred to arbitration. The only dispute remaining is the payment of the acknowledged balance of the purchase price. That part of the dispute should not be the subject of arbitration. The application to have the dispute referred to arbitration was filed quite late and it appears to me to be an afterthought. The application dated 10/2/2015 lacks merit and is hereby dismissed.

The third application is the one seeking restraining orders against the defendants. It is not in dispute that over Ksh.107 million was paid to the vendor by the defendants. The remaining balance is about ksh.18.5 million. Since there is a balance due from the defendant, the contentions that the plaintiff has no *prima facie* case are misplaced. I do find that the plaintiffs have established a *prima facie* case with a probability of success. The balance that is due creates a good cause of action. The completion dated was way back in early 2012. by 20th January 2012, the property had already been transferred to the defendants. It is now over three years.

According to Mr. Chaenza, the two suits filed in 2005 and 2007 were withdrawn. However, there is a suit that was filed on 23/9/2014 relating to the suit land. I have read the pleadings in these suits and the contentions are that there is an overlap between the plaintiff's land in those suits and the current suit land. The suits that were withdrawn were filed by the same plaintiffs.

Given the circumstances of this case and taking into account the fact that the defendants paid over Ksh.107 million, I do find that the interests of justice would be served if the balance of the decretal sum is deposited in court. This will enable the defendants to utilise the property. Granting the plaintiff's orders in the manner they are sought might cause more damage to the defendants who are already in occupation.

In the end, I do make the following orders:

1. The application dated 10/2/2015 by the defendants is hereby dismissed.
2. The application dated 26/2/2015 by Isaac Rodrot is hereby allowed.
3. The application dated 7/1/2015 is granted in the following terms:
 - a. The defendants to deposit the admitted balance of Ksh.17.9 million in court within twenty one (21) days hereof.
 - b. In default of depositing the above amount, the application dated 7/1/2015 shall be granted as prayed.
 - c. The plaintiff to provide the beacon certificate and scheme plan within 21 days hereof.
- 4) Costs shall follow the outcome of the main suit.

Dated, signed and delivered at Malindi this 17th day of June, 2015.

SAID J. CHITEMBWE

JUDGE