



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 25 OF 2012

FATUMA ABDALLA AHMED.....PLAINTIFF

=VERSUS=

KAHIRO KIMANI..... DEFENDANT

J U D G M E N T

Introduction:

1. The Defendant has been defined in the Plaint as an advocate of the High Court of Kenya working under the name of M/s Kimani Kahiro & Associates Advocates.
2. In the Plaint, the Plaintiff has averred that she is the legal and beneficial owner of land known as plot number 303 Lamu measuring approximately 112 acres.
3. The Plaintiff has averred that the Defendant acted for her as an advocate in an agreement for sale dated 16th December 2009 in which the Plaintiff agreed to sale the suit property to Regina Coeli Trading Co. Ltd for Kshs.10,000,000.
4. According to the Plaint, the Plaintiff complied with the agreement for sale by handing over to the Defendant the original title documents to effect the registration of the transfer in favour of the purchaser or its nominee, expecting the balance of the purchase price of Kshs.9,000,000 within 7 days upon the registration of the transfer.
5. The Plaintiff has averred that without lawful authority, the Defendant transferred the suit property to himself and refused to pay the balance of the purchase price.
6. The Plaintiff is seeking for a declaration that the Transfer of the suit property in favour of the Defendant is null and void.
7. In his Defence and counterclaim, the defendant averred that in breach of the sale agreement, the Plaintiff has not replaced the beacons and or erected the perimeter fence and hence the balance of the purchase price is not payable.
8. The Defendant denied in the defence that he owes the Plaintiff Kshs.9,000,000; that the only payable

sum to the Plaintiff is Kshs.2,000,000 and that the said sum can only be paid subject to the conditions set out in the agreement.

9. According to the Defendant, Regina Coeli Trading Company Ltd is the Defendant's trust Company whose two directors and shareholders are the Defendant's employees and that the transfer of the suit property was made to the Defendant as the nominee of the company.

10. In the counterclaim, the Defendant averred that due to the Plaintiff's breach of the agreement, the Defendant has suffered substantial loss and damages amounting to Kshs.10,000,000.

11. The Defendant is also praying in the counterclaim loss of bargain amounting to Kshs.168,000,000 and punitive and aggravated damages.

12. The Plaintiff proceeded with her case on 25th November 2014 in the absence of the Defendant and his advocate.

The Plaintiff's case:

13. The Plaintiff, PW1, informed the court that she entered into an agreement of sale with Regina Coeli Trading Company Limited for the sale of her land (the suit property) for Kshs.10,000,000 whereafter the Defendant paid her a deposit of Kshs1,000,000.00.

14. According to PW1, the balance of the purchase price was to be paid within 3 months which the Defendant or Regina Coeli Trading Company Limited never did.

15. It was the evidence of PW1 that he made a report to the police about the failure by the Defendant to remit to her the balance of the purchase price. That is when the Defendant made a further payment of Kshs.2,000,000 to the Plaintiff leaving a balance of Kshs.7,000,000.

16. It was the evidence of PW1 that even after the Defendant transferred the suit property to himself, he never paid to her the balance of the purchase price. PW1 produced the documents in support of her case as PEXB 1-6.

Submissions:

17. The Plaintiff's advocate submitted that the Defendant acted for both the Plaintiff and Regina Coeli Trading Company in the transaction. Counsel submitted that the Defendant abused his position as the advocate for the parties in the transaction and purported to transfer the suit property to himself.

18. The Plaintiff's counsel finally submitted that the transfer of the suit property to the Defendant was null and void.

Analysis and findings:

19. It is not in dispute from the pleadings and the evidence before me that the Plaintiff entered into an agreement for sale of the suit property on 16th December 2009 with Regina Coeli Trading Company Limited.

20. According to the definition of the expression "purchaser" in the agreement, it was to include its successor, assignee and nominees.

21. In the Defence, the Defendant who was the advocate for both the Plaintiff and Regina Coeli Trading Company, has stated that the directors and shareholders of Regina Coeli Trading Company Ltd are his employees.

22. No evidence has been placed before me to show that the Plaintiff was in breach of the sale agreement

considering that she released to the Defendant all the requisite documents to have him register the property in favour of Regina Coeli Trading Company Limited and refused to pay the balance of the purchase price within seven (7) days.

23. There is also no evidence before me that Regina Coeli Trading Company Limited passed any resolution nominating the Defendant as a nominee in the transaction. Consequently, I am in agreement with the Plaintiff's advocate's submissions that the transfer of the suit property to the Defendant was null and void. I say so because there was no privity of contract between the Plaintiff and the Defendant to entitle the Defendant to register the suit property in his name.

24. The said transfer is also a nullity because the Defendant, or Regina Coeli Trading Co. Ltd has declined to pay to the Plaintiff the balance of the purchase price even after registering the title in favour of the Defendant.

25. In the circumstances, I find that the Plaintiff has proved her case on a balance of probabilities. The Defendant did not prove his counterclaim.

26. For the reasons given above, I allow the Plaintiff's Plaint dated 27th February 2012 with costs and dismiss the Defendant's counterclaim dated 16th May 2012 with costs.

Dated and delivered in Malindi this **12th** day of **June**, 2015.

O. A. Angote

Judge