



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 146 OF 2014

1. MUKIKA CHAI DZOMBO

2. DANIEL LEWA NDZOMBO.....PLAINTIFFS/APPLICANTS

=VERSUS=

COAST DEVELOPMENT AUTHORITY.....DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. What is before the court is the Application dated 23rd July, 2014 seeking for the following orders:

- a. **That this Honourable Court be pleased to restrain, by way of an injunction, the Defendant, by itself, assigns, employees, agents, proxies and/or any other person working under its instructions from quarrying, excavating, subdividing, leasing, selling, alienating or otherwise disposing of any interest or in any other way interfering with all that property known as MWAPULA/MAGOGONI/1211 pending the hearing and determination of this suit.**
- b. **That the Respondents be condemned to pay the costs of this application.**

The Plaintiffs'/Applicants' case:

2. The Application is supported by the joint Affidavit of the Plaintiffs who have deponed that they entered into a sale agreement with the Defendant on 12th February 2012 for the sale of land known as Mwapulu Magogoni/430.

3. It is the Plaintiffs' deposition that it was a term of agreement that the Defendant would pay to them a deposit of Kshs.2,000,000 and the balance of Kshs.3,400,000 was to be paid by instalment of Kshs.500,000 quarterly until payment in full.

4. It is the Plaintiffs' case that they followed upon the sub-division of the suit property which resulted into parcels of land number Mwapulu/Magogoni 1210 and 1211; that the Plaintiffs surrendered the title in respect of plot number 1211 to the Defendant and that the Defendant has completely failed to pay the balance of the purchase price.

5. It is the Plaintiffs' deposition that the Defendant does not have a legal or contractual right over the suit

property having failed to pay the balance of the purchase price.

6. The Plaintiffs want this court to restrain the Defendant from carrying out quarrying, ballasting and excavation of limestone and other products from the suit property.

The Respondent's case:

7. The Defendant's Legal Service Manager deponed that after the Defendant purchased the suit property, there arose a dispute in which Mr. Jadva Shemji Kesrec Patel claimed that subdivision number 1211 was his; that the Defendant could not have paid the balance of the purchase price due to the said dispute and that the parties agreed that the subsequent instalments could only be paid after the dispute had been resolved.

8. In his supplementary Affidavit, the Defendant's Legal Service Manager deponed that the Defendant has paid the full purchase price with the last payment of Kshs.399,500 deposited on the Plaintiff's account on 19th September 2014 and another sum of Kshs.2,400,000 deposited on 27th August 2014.

9. The Defendant also annexed on its Affidavit an Affidavit by the area Chief, Mr. Sabastian Karisa Mwagona in which he deponed that he was called on the suit property on various occasions to settle a dispute that had cropped up between the Plaintiffs and their clan members.

10. It is the disposition of the Chief that the said clan members had denied the Defendant access and use of the land.

Submissions

11. The Plaintiffs' advocate submitted that while this suit was pending, the Defendant made a payment of Kshs.500,000 and 2, 400,000 into the Plaintiffs' account on 19th September 2014 and 27th August 2014, respectively; that the payment was made without the consent of the Plaintiffs and that the said amount should have been made to court.

12. Having not paid the balance of the purchase in time, the Plaintiffs had the right to rescind the contract; that the Defendant was served with a rescission notice and that the failure by the Defendant to pay the balance of the purchase price at the agreed time amounted to a clear breach of contract.

13. The Plaintiffs' counsel submitted that if the Defendant had faced any challenge to its occupation of the suit property as alleged, they should have raised the same in writing and filed a civil case and that the Plaintiffs have been in possession of the suit land.

14. Due to the quarrying of the land, the Plaintiffs' advocate submitted that the Plaintiffs will suffer irreparable injury if an injunction does not issue.

15. The Plaintiffs' advocate finally submitted that the Plaintiffs consider the contract of sale between them and the Defendant as duly rescinded and the Plaintiffs will deposit any monies paid by the Respondents with respect to the transaction in court pending the hearing and determination of the suit.

16. The Defendant's counsel submitted that it is the Defendant who is in occupation of the suit property; that the Respondent will suffer greater prejudice compared to the Applicants if removed from the suit property and that the Defendant has not breached its obligation to pay the purchase price.

17. Counsel submitted that there are no clear and special circumstances in this case to warrant the issuance of a mandatory injunction.

18. The Defendant's counsel submitted that rescission of a contract to sell land can only arise where the party in default has been notified of the default and given an opportunity to rectify the same; that the purported recession letter is not a proper recession letter as per the law but a notice to hand over

possession and vacate the suit property and that that is an issue to be addressed at the hearing.

Analysis and findings:

19. The suit by the Plaintiffs is seeking for rescission of the Agreement of sale dated 24th February 2012, for failure of consideration.

20. It is not in dispute that the Plaintiffs and the Defendant entered into an agreement of sale on 27th February 2012, in which the Plaintiffs agreed to sell the suit property for Kshs.5,400,000.

21. It is also not in dispute that the Plaintiffs were paid Kshs.2,000,000 on the day the agreement was signed. The balance of Kshs.3,400,000 was to be paid in instalments of Kshs.500,000 on a quarterly basis.

22. The agreement allowed the Defendant to assume vacant possession from 27th February 2012.

23. The Defendant did not pay the balance of the purchase price as agreed. It is the Defendant's case that the balance was not paid because of the dispute that arose between the Plaintiffs and one Mr. Jard Shemji Kersen Patel together with the Plaintiffs' clan.

24. The Defendant did not tell the court the kind of dispute that arose between the Plaintiffs and Jarda Shamji. Indeed, no evidence was placed before the court to show which interest Mr. Jarda had in the suit property considering that the suit property is registered in the Plaintiffs' names.

25. Although the area Chief filed an Affidavit deponing to the fact that there was a dispute between the Plaintiffs and their clan members, the Defendant did not allude to the said dispute in his Replying Affidavit neither did it provide details of the dispute.

26. In any event, if the agreement of sale between the Plaintiffs and the Defendant was frustrated by third parties as alleged by the Defendant, then the Defendant had the option of either filing a suit to enforce the agreement or give a notice rescinding the said contract. The Defendant did not do any of the two.

27. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J.** held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”

28. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993, Lord Person in Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609**, held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

29. The importance of interpreting contracts strictly was further reiterated in the case of **Curtis Vs Chemical Cleaning & Dyeing Co. Ltd (1951), ALL ER 631** in which Lord Denning held as follows:

“If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation.”

30. The agreement between the Plaintiff and the Defendant provided that the first installment of Kshs.500,000 was to be paid after three months from the date the agreement was signed. The said installment should have been made on or before 27th May 2012.

31. However, by the time the suit and the Application was filed on 24th July 2014, the Defendant had neither paid the first installment of Kshs.500,000 nor the entire balance of the purchase price.

32. Having not paid the balance of the purchase price within the stipulated time, the Plaintiffs have, prima facie, shown that they are entitled to rescind the contract.

33. "Rescission" has been defined in the Black Law Dictionary 9th Edition as follows:

"A party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach. Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their pre-contractual position".

34. If the Plaintiffs' prayer to rescind the contract is allowed at the hearing of the main suit, the Plaintiffs would be entitled to get back the suit property. The issue of whether a valid notice was served on the Defendant or not can only be ventilated at the hearing of the suit. The Defendant has not denied that it is excavating the suit property for limestone. That will definitely change the nature of the suit property. In the case of **Kula Lungazi & Panda Mkauma Panda & another (2013) e KLR**, this court held as follows:

"It is common knowledge that quarrying wastes land and there will be no commodity known as land after the quarrying. The Plaintiffs will therefore not be able to recover any land in the event they succeed in their claim."

35. Having paid the balance of the purchase price after the filing of this suit, the Defendant acknowledged that it is, prima facie, in breach of the sale Agreement.

36. The mere fact that the Defendant is capable of paying damages for the breach cannot be a reason to disentitle the Plaintiffs the right to recover the suit property if it is proved that the Defendant is in breach of the agreement. In the case of **Mukika Chai Dzombo vs Coast Development Authority (2014) e KLR**, this court held as follows:

"Instead, the Defendant is asking for specific performance of the contract. It is trite law that an order of specific performance can only succeed where a party shows that he has complied with all the terms of the contract, which the Defendant has not done. Specific performance is an equitable remedy that compels a party to complete a contract according to the precise terms agreed upon so that under the circumstances, justice will be done between the parties."

37. The payment of the balance of the purchase price by the Defendant was to be done within a specific period of time. The issue as to whether this payment could be legally made outside the said period by the Defendant has not been demonstrated by the Defendant.

38. It is on those grounds that I find and hold that the Plaintiffs have established a prima facie case with chances of success. The fact that the Defendant is in possession of the suit property and is excavating for limestone or any other minerals clearly shows that the Plaintiffs will suffer irreparable damage that cannot be compensated by way of damages unless the order of injunction is granted. However, the Plaintiffs cannot keep the full purchase price and have the injunction at the same time.

39 For the foregoing reasons, I allow the Application dated 23rd July 2014 on the following terms:

- a. **A temporary injunction be and is hereby issued restraining the Defendant by itself, assigns, employees, agents, proxies and or any other person working under its instructions from quarrying, excavating, subdividing, leasing, selling, alienating, or otherwise disposing of any interest or in any other way interfering with all that property known as Mwapula/Magogoni/1211 pending the hearing and determination of this suit ON CONDITION THAT the 2nd Plaintiff deposits in court Kshs.2,400,000 that was paid to him after the filing of the suit.**

- b. **The Defendant to pay the costs of this Application.**

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

O.A.ANGOTE

JUDGE