



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT NO. 64 OF 2006

PAOLA DA FANOPLAINTIFF

VERSUS

SALIM ABDALLA BAKSHWEINDEFENDANT

JUDGMENT

BACKGROUND

1. This dispute emanates from three sale agreements, allegedly made by the parties between November, 2004 and December, 2005. The agreements were in respect of two portions of land measuring 2610 and 1389 square metres respectively that were to be carved out of a land parcel no. 5593 Malindi, owned by the Defendant who was the Vendor. The plaintiff was the purchaser. The two portions were identified in the larger piece as portion A (measuring 2610 sqm) and portions B, C, and D (measuring 1389 sqm) and the agreed purchase price was shs. 2000,000 and 1300,000 respectively.
2. An indenture in favour of the plaintiff was prepared in December, 2004 respecting portion A. In turn, a sum of shs. 1m was paid by him to the Defendant by March 2005. Regarding portions B, C and D no part of the purchase price has been received by the defendant. And neither did the plaintiff receive title documents in respect of any of the portions by December, 2005, and todate.
3. The plaintiff therefore reported the matter to the Malindi District Criminal Investigation Officer (DCIO) who summoned the defendant to the police offices on 21st December, 2005. Although the precise events of that morning are disputed they culminated in the 3rd "agreement", by which the Defendant promised to complete the processing of title documents by end of January, 2006. He was also to receive a sum of shs.500,000/- on the next day, and the balance upon completion of the documentation process. However the plaintiff has taken possession of the suit property and developed a hotel on the portion A.

THE PLEADINGS

4. Through his amended plaint (it should be a further amended plaint) filed on 18th August, 2008 the plaintiff avers that the defendant reneged on the terms of the agreements not only through delayed subdivision and processing of title but also failure to deliver vacant possession and to facilitate the re-routing of electricity lines running across the portions. That as a result he has incurred losses. He claims shs. 288,964/- in respect of payment for rerouting of the power lines which he allegedly

eventually carried out, a sum of shs. 150,000/- paid to an architect to prepare building plans, general damages for breach of the contract and aggravated damages. His key prayers however, are for specific performance and an injunction against the defendant as per prayer i and iii which are in the following terms:

“(i) An order of specific performance that the defendant do the subdivision of the suit property and issuance of complete and separate deed plan and sign transfer in favor of the plaintiff and or alternatively the registrar of this court do sign all transfer and subdivisions documents in favor of the plaintiff

“(ii) A permanent injunction to restrain the defendant, his agent and/or respectively or anybody from transferring, alienating or interfering with the suit property in any manner.”

5. On 8th December, 2008 the defendant filed a Further Amended Defence and Counterclaim. Therein, the defendant basically admits his obligations in respect of the sale agreements but avers that the deed plans were delayed because of the consolidation necessitated by the second agreement. He however asserts that this was subject to the purchaser (plaintiff) discharging his respective obligation under the first two agreements, namely the payment of the purchase price in respect of the four portions. He further asserts that he gave vacant possession over plot A to the plaintiff who has developed the same. He denies liability for special or general damages and has repudiated the 3rd agreement dated 21st December, 2005.
6. He has also counterclaimed against the plaintiff for breach of contract. He seeks damages for false imprisonment and defamation of character with regard to the events of 21st December, 2005 and for the breach of contract on the part of the Plaintiff. He also seeks a declaration that the agreements of 8th March, 2008 (wrongly indicated as 2008) cannot be enforced against him, and further that the agreement of 21st December, 2005 (erroneously indicated as 2008) is invalid on the ground that it was executed under duress.

THE EVIDENCE

7. In the course of the trial, both parties testified and called witnesses. Their evidential case tied in closely with the pleaded case. And as the pleadings herein were amended several times, are fairly detailed, and in fact lumpy, I do not find it necessary to recount the evidence in its entirety. I have considered the evidence and submissions. In my view, a summary of the evidence by way of admitted and disputed facts suffices.

ADMITTED FACTS

8. The admitted facts of this case are fairly straight forward. Three agreements were executed by the parties in respect of the land parcels A, B,C, D in the period starting November, 2004 and ending in December, 2005. A sum of shs. Im was paid by the plaintiff to the defendant concerning portion A whose total purchase price is shs. 2M, but with regard to parcels B, C, D no payments have been received by the Defendant. The plaintiff has taken possession and developed portion A and is the beneficiary of an indenture executed by the defendant in December, 2004 in that regard. However, the plaintiff is yet to receive deed plans and title documents in respect of all the portions.

THE DISPUTED FACTS

9. During the hearing the defendant confirmed that the deed plans are all ready but he is unwilling to proceed any further. He accuses the plaintiff of breaching their agreement by not paying the full purchase price. That the 3rd agreements was procured through duress and is repudiated. He blamed the plaintiff for his false imprisonment and defamation of his character. For his part the plaintiff blames the defendant for breaching the agreements between the parties by his failure to

process title documents, give vacant possession and to move the power lines in accordance with the agreements.

ANALYSIS

10. Although the background to this dispute is easily stated, the existence of 3 interlocking agreements complicates the picture. In my considered view, the first question to be determined is the legal validity of the 3 agreements and next, the true purport of the valid agreements as well as the intention of the parties. Finally the court must determine which party is in breach and whether such breach occasioned loss to the innocent party. Regarding the counterclaim, the court must determine whether the defendant was defamed and held in unlawful detention at the instigation of the plaintiff. Ultimately the court must determine whether reliefs sought are available to the respective parties.

AGREEMENT EXECUTED ON 21ST DECEMBER, 2005

11. Starting with the last “agreement” dated 21st December, 2005, it is admitted that the same was executed at the Malindi police offices where the defendant had been summoned by the DCIO. There is unchallenged evidence that the summons came as a consequence of a report – whatever its precise nature - by the plaintiff regarding the previous agreements between him and the defendant (dated 19th November, 2004 and 8th March, 2005). The defendant's evidence concerning the experience of his stay at the police offices was not challenged in any serious way. He was held at mercy of police of the Plaintiff, he asserted, and was harassed.

12. The plaintiff said he had been previously unable to nail down the defendant, in particular to get him accept the cheque for shs. 500,000 for portion B,C,D. It appears believable that the signing of the final “agreement” that came out of the events of 21st December, 2005 was less than voluntary on the part of the defendant. The circumstances suggest he may have been pressured through threats of incarceration. This was a civil dispute between the parties and a day previously, a demand notice had been sent to the defendant through the plaintiff's advocate. It is not clear why the plaintiff decided to involve the police even before the period given in the demand notice lapsed; or, why he did not bring appropriate proceedings through his advocate.

13. As a court of law, I take a dim view of such an apparent short circuit of due process. The police station is not the ideal place for parties to execute agreements of disposition in immovable property in absence of their counsel. Such agreements stand a high risk of repudiation and the practice must be discouraged. For the foregoing reasons, I am not prepared to accept that the final “agreement” dated 21st December, 2005 was freely entered into by the defendant.

14. An agreement is voidable if it is executed by a party under duress:—***“Violence to the person, and threats of such violence have long been recognized as illegitimate forms of such violence have long been recognized as illegitimate forms of pressure. The law therefore allows a party to avoid any promise extorted from him by terror or violence, whether on the part of the person to whom the promise is made or that of his agent. Contracts made under such circumstances are said to be made under duress.....At common law duress consisted of actual or threatened violence or imprisonment”.*** *CHITTY ON CONTRACTS 28TH EDN. Sweet O Maxwell §7-007.”*

15. Besides, even if the agreement were validly entered into, it is merely a restatement of previous obligations in the two earlier agreements between the parties. The only improvement concerned the extension of time for compliance to January, 2006 on the part of the defendant. As well, he agreed to receive the sum of shs. 500,000 (I presume the deposit for portion B,C,D) on the next day, which receipt, according to the plaintiff he had previously rejected.

AGREEMENT EXECUTED ON 8TH MARCH 2008

16. Now turning to the second “agreement”, the same is dated 8th March, 2005. It is titled

AGREEMENT FOR SALE. The plaintiff said he authored the agreement. This is the agreement respecting the additional portions B,C,D measuring 1389 square meters but which also makes reference to the agreement dated 19th November, 2004 (for portion A of 2610 square metres). I consider it useful to reproduce the five terms thereof fully:

**“1. The two parties made on 19th November, 2004 the agreement for a portion parcel of the land portion number 5593 Malindi situated in the Municipal Council of Malindi within Malindi District of the Republic of Kenya of sq. 2610.
2. Now the vendor HEREBY AGREES to sell to the purchaser HEREBY AGREES to purchase other 3 portions of land which the letters B-C-D for a total of 1389 sqm, annexed schedule bordered green signed by the two contractors
3. The vendor will sell this land portions after that he will be made the subdivision and completed and separate deed plan and made the 3 portions one with the portion marked A of the sketch plan of plot number 5593.
4. The price of these 3 portions of land is agree in Ksh. 1300,000 (one million three hundred thousand) that will be paid for shs. 500,000 on April, 2005 at balance at the moment that all the land will be sold at his name.5.All the other terms of the sale are the one of the November 19th 2004 agreement” IN WITNESS WHEREOF this agreement has been duly executed by the parties here to the day and year first herein before written” (sic)**

17. The “agreement” is signed by both parties as purchaser and vendor respectively. The plaintiff asserts that the defendant is in breach of this agreement, but the defendant says it should not be enforced against him because, the plaintiff did not pay the shs. 500,000/- deposit in April, 2005. The plaintiff admits as much as the earliest date he appears to have tendered this sum, through his worker Judith Adhiambo (PW2) was on 5th September, 2005. Some days before or on this date the defendant accepted the late payment regarding the first agreement. He then went ahead to record the further agreement (2nd) whose third clause suggests subdivision of portion 5593 to accommodate the proposed amalgamation of portions A with B,C, D by the vendor. The defendant says that even though his initial deed plans for portion A were ready by December, 2004, the new agreement meant going back to the drawing board.
- 18.. These matters notwithstanding, the germane issue here though is legal. The second agreement was the first sale agreement respecting land portions B,C,D and amalgamation thereof with portion A, the subject of the first agreement. Besides the poor grammar and drafting of the second agreement, the apparent clear intentions, it falls foul of Section 3(3) of the Law of Contract Act. It states as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless -

a) the contract upon which the suit is founded -

i. is in writing

ii. is signed by all the parties thereto; and

b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneer's Act, nor shall anything in it affect, the creation of a resulting, implied or constructive trust.”

In short the second agreement was not attested as required by the Law of Contract Act. It is unenforceable for the purposes of the law and nothing further need be said about it (see Chitty on Contract Supra, paragraph 4-036.)

AGREEMENT EXECUTED ON 19TH NOVEMBER, 2004

19. This leaves us with the 1st agreement executed by the parties on 19th November, 2004. The subject matter of the said first agreement is portion A measuring 2610 square meters. By March, 2005 the sum of shs. 1m had been paid to the defendant by the plaintiff. Before the six months' completion period could lapse, the parties purported to enter into a new agreement (second agreement) which modified a part of the first agreement especially clause 7. The question now is whether the plaintiff complied with clause 7 of the first agreement and delivered to the plaintiff the deed plan for portion A within six months of November, 2004, that is in or before May, 2005. Clearly, he did not. His reason; a new agreement (unenforceable) requiring amalgamation of plot A with new portions B, C, D to be acquired by the plaintiff (the clearest reading of clause 3 of the second agreement).
20. Secondly under clause 4 of the second agreement, a sum of shs. 500,000/- was to be paid by the plaintiff in April, 2005 for plots B, C, D. Admittedly this sum was first offered in September, 2005. Hence the parties were caught in a hamstring because of the nature of terms of the two agreements. The parties painted themselves in a corner by purporting, without legal counsel to execute the second agreement on top of the first. In my considered opinion the unenforceable second agreement virtually impeded the performance of the first agreement so far as processing of the deed plans was concerned. Both parties are responsible for the debacle.
21. The question of vacant possession is at once admitted and denied by the plaintiff. He admits he has been able to take possession and to develop the land portion A. The photos and evidence tendered by the plaintiff's worker Judith Tsuma (PW3) are not convincing proof of the existence of squatters on land Portion A at the time of the agreement or in September, 2005. During his testimony, the plaintiff was questioned by the court on this aspect. He stated:
- “Upon execution of the agreement, I took possession i.e the land parcel became mine and I visited the land in May, 2005 – but I did not find the squatters. Okay by May, 2005 I knew there were squatters on the land.”***
22. PW3 took her photographs showing alleged cultivation by squatters in September, 2005. The plaintiff in re-examination said there were no squatters at the time of the sale agreement, and that he only saw them when he commenced construction. This evidence is rather prevaricating. It may well be, as the defendant asserts that there were no squatters, at the material time and the defendant cannot be held responsible for any persons who appeared subsequent to the purchase to lay “squatter” claims over the property. Significantly, the contracts paying off the alleged squatters are dated November, 2006.
23. Regarding the rerouting of the power lines as provided under clause 10 of the first agreement, the obligation lay first with the defendant, and alternatively with the plaintiff. The plaintiff was entitled to deduct any cost he incurred in this regard from the purchase price. In his protest letter of 30th August, 2005 to the defendant he refers to the rerouting of the lines, which had by then apparently not been carried out by the defendant.
24. The plaintiff told the court that he eventually carried out the exercise at a cost of shs. 288,964. However, the evidence of payment he has tendered before this court is difficult to reconcile. The quotation for re-routing of electricity lines from KPLC dated 2nd March, 2006 bears customer application No.722222005100001/MMK and is in respect of Plot no. 5592/4 Barani. The quoted price is shs. 246,321 inclusive of VAT. It is addressed to Kenya Two Thousand Enterprises Ltd (the plaintiff's company). The alleged payment receipt refers to a quotation of 9th May, 2007 upon customer application no. T22222007020001 and refers to “Electricity supply to your premises on plot no. 5593/1A BARANI”

It reads:

“We thank you for your application dated 9th February 2007 for a supply of electricity to the

**above plot and have the pleasure of advising you that a single/three phase, KVA service line can be installed as required..(sic)
The cost is given as shs. 288,964 inclusive of VAT. This is the sum in the payment receipt on the document which shows payment as made on 21st May 2007”**

Clearly this payment is not related to the re-routing quotation of 2nd March, 2006. Special damages must be specifically pleaded and proved. This one is not proved.

- 25.Regarding the sum of shs. 130,000 allegedly paid to an architect for the preparation of building plans, it is remarkable that the agreement is dated 16th May, 2005 coinciding with the expected completion date of the first and second agreements. It is not even clear upon what plot the construction was anticipated. That is an important consideration because only portion A could be taken into account for purposes of this case. Besides, if it was intended for the original portion 'A' the plaintiff admits he already took possession and has fully developed the land. If the plans were in respect of plot A, the architect fees claim cannot stand. For plots B,C,D, the agreement is unenforceable.
- 26.Similarly, the claim for damages for increased construction costs incurred due to delayed transfer is far fetched in my view. The accountant allegedly compared materials invoices (not payments) of the actual construction of Pine Breeze Point between November, 2006 and 2008 with related material costs in the year 2005. The reason for the failure of this claim is in the documents themselves: the plaintiff does not have any transfer of the land in his name to date. The same situation prevailed in 2005 and in 2006 – 2008 when he carried out the construction. The delayed transfer cannot be the sole reason for his commencement of the construction in 2006. He had the indenture as early as December, 2004 and has since completed the construction without the benefit of the transfer documents. The damage appears remote.
27. In my considered view the most appropriate expert in the assessment of the rising cost of building materials would be a quantity surveyor and not a plain accountant's firm such as the one hired by the plaintiff (Kalama & Associates CPA(k). In addition, the documentation tendered in this regard tends to negate the plaintiff's earlier considered claim that he did not get vacant possession of the land from the plaintiff.
1. In his counterclaim the defendant raises a claim of lost opportunity to purchase another plot, which claim is predicated on the voided agreement of 8th March, 2005. This claim also appears remote,tendentious and exaggerated. How could the plaintiff's failure to pay the outstanding purchase price amounting to shs. 2.3m at most (for all plots) and caveats by the plaintiff cause the defendant a loss of 13,000,000/= ? It appears the parties sought to maximize and even exaggerate their claims hence the plethora of amendments of pleadings that characterizes the case.
- 29.Regarding the claim that the defendant was falsely detained, the restraining action was by the police not the plaintiff, even through the latter may have complained to them. The police/Attorney general are not parties in this suit. On the matter of the alleged defamation of the defendant, the plaintiff's evidence is that the very act of being summoned to the police station on the instigation of the plaintiff portrayed him as a criminal. Although the nature of plaintiff's report to the police was not specifically established, it is the police not the plaintiff who took the initiative of summoning the defendant.
- 30.One of the witnesses to these events who is also the son of the defendant (DW4) said police did not give reasons why they wanted the defendant to go to the station. If DW2 later heard other members of public speculating at Shukrani Cafe that the defendant had been arrested for “*conning a mzungu*”, it cannot be visited upon the plaintiff. Whether a summon by police necessarily means to observers that the person summoned is of unsavory character is a matter of conjecture.

There could be many varied reasons for such summons. If the defendant was defamed or suffered damage, and I do not agree he did, even though the events may have shaken him somewhat, the blame must fall squarely with the police for the manner in which they intervened in this dispute. And they are not parties herein.

RELIEFS

31. The claim for damages in the counterclaim has no merit and is dismissed. But the declaration sought in prayer 2 is allowed for reasons given earlier. What reliefs are available to the plaintiff. In my considered view, he is entitled to specific performance in respect of the First Agreement for several reasons. He is in possession and has developed the portion A, in addition to paying half the purchase price. As the defendant admits the relevant deed plans were ready since December, 2004, while the first agreement evinces a clear intention between the parties regarding the portion A. I would allow prayer i of the plaintiff's amended plaint only with respect to the 2610 sqm land portion no. A, the subject matter of the first agreement dated 19th November, 2004.
32. That renders prayer iii superfluous. These orders are subject to the plaintiff depositing into the court, the balance of the purchase price for portion A in the sum of shs. 1m, for onward transmission to the defendant, within a period of 30 (thirty) days of today's date, after which date the said sum will attract interest at court rates.

In light of the nature of the dispute, I order that each party bears its own costs. Judgment is entered accordingly.

Delivered and signed at Malindi this **15th** day of **April, 2013** in the presence of: Mr Shujaa holding brief for Mr Wambua Kilonzo for the Plaintiff. No appearance for the Defendant.

Court Clerk - Evans.

C. W. Meoli

JUDGE