



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 10 of 2012

NICOLETTA LATTERI

FRANCESCO MONDANI.....PLAINTIFFS

V

MELINA INVESTMENT LTD

GIUSEPPINO VALSESIA

PAOLA SASSO

ROBERTO SASSO.....DEFENDANTS

RULING

1. What is before the Court is the Plaintiffs' Application dated 8th February 2012 and filed on the same day. The Application seeks for the following orders:

- a) **THAT pending the hearing and determination of this suit the Honourable court be pleased to issue an order for warrant of arrest before judgment against the 2nd, 3rd, and 4th defendants to furnish security for 181,000 Euros for their appearance.**
- b) **THAT pending the hearing and determination of this suit, the Honourable court be pleased to issue an order of injunction directed against the defendants jointly and severally either by itself, themselves, servants, agents, heirs, assigns, employees, proxies, kinsmen or anyone claiming interest under them from offering for sale or selling the whole or part of CHEMBE/KIBABAMSHE/402 or shares in the 1st defendant or changing the name of the 1st defendant.**
- c) **THAT pending the hearing and determination of this suit, the Honourable court be pleased to issue an order against the defendants jointly and severally or anyone claiming under them from evicting the plaintiff from her possession and enjoyment of subplot 402/18 situated within CHEMBE/KIBABAMSHE/402 or any part thereof.**
- d) **THAT costs of this application be provided for.**

2. The Application is premised on 12 grounds which have been replicated in the Supporting Affidavit of the 1st Plaintiff.

3. The 1st Plaintiff, on her own behalf and on behalf of her husband, the 2nd Plaintiff has deponed that in April 2011, the 2nd, 3rd and 4th Defendants (the defendants) approached them with a business proposal of putting up tourist residential settlement for sale in Kenya, and more specifically on parcel of land **Chembe/Kibabamshe/402** situated in Mayungu in Watamu, Malindi.
4. The 1st Plaintiff has further deponed that she, together with the 2nd Plaintiff were shown the proposed site plan and drawings and the Defendants led her to believe that they (the Defendants) had obtained all the approvals from the relevant agencies.
5. As a result of the representations by the Defendants, the 1st Plaintiff has deponed that her, together with the 2nd Plaintiff decided to enter into an agreement to purchase plot number 402/18 which was to be hived from Chembe/Kibabamshe/402 at 140,000 Euros. A down payment of 120,000 Euros was made by the Plaintiffs in accordance with the agreement.
6. According to the 1st Plaintiff, she, together with the 2nd Plaintiff took possession of the property which was partially developed and she spent over 61,000 Euros to develop the property further. This, the 1st Plaintiff has deponed, was done by herself despite the fact that the property was to be fully complete thus spending 181,000 Euros.
7. The 1st Plaintiff has further deponed that since they signed the documents, they have been demanding for the legal documents from the Defendants to no avail; that they have now discovered that the Government of Kenya has placed a restriction on the property and that the developments on the suit property do not have approvals and for that reason, the Defendants are not capable of passing a god title to them.
8. The 1st Plaintiff has further deponed that the developments on the suit property are illegal and the same are likely to be demolished, that the 1st Defendant is in the process of changing its name so as to hide its identity and the 2nd, 3rd and 4th Defendants being Italians, they should deposit security in court for their appearance in view of the fact that they may leave the jurisdiction of the court.
9. The 1st Plaintiff has finally deponed that the Defendants' actions are criminal and consequently a warrant of arrest before Judgement should issue so as to secure the payment of 181,000 Euros which she has spent as a result of the misrepresentations by the Defendants.
10. The Plaintiffs filed two Further Affidavits, one sworn on 8th May, 2012 and the other one sworn on 22nd May, 2012 whose salient issues were that the pre-sale contract is *null* and *void ab initio* because of the restriction on the parcel of land; that the embargo by the Government on the land was lifted on 9th February, 2012 and therefore no transactions could have been undertaken during the period of the embargo; that the Municipal Council of Malindi has denied approving the development plan submitted by the Defendants and that the contract is full of *mala fides* and hence cannot have the force of law.
11. The 2nd Defendant, on his own behalf and on behalf of the 1st, 3rd and 4th Defendants swore a Replying Affidavit on 12th April, 2012.
12. The 2nd Defendant deponed that the 1st Defendant is the registered lease hold proprietor of Chembe/Kibabamshe/402 together with all the buildings and improvements thereon.
13. According to the 2nd Defendant, the 1st Defendant submitted to the Municipal Council of Malindi development plans which were approved on 5th February 2008; that the 1st Defendant entered into a pre-sale contract dated 10th March 2011 with the Plaintiffs to sale to them one of the houses on the suit property.

14. The 2nd Defendant has deponed that according to the pre-sale contract, the Plaintiffs' interest in the house was a sub-lease which was to be created and registered under the head lease of the 1st Defendant and not a sub-title; that the obligations of the Plaintiffs' and the 1st Defendant was to be governed by the pre-sale contract up to the completion of the purchase price.

15. The 2nd Defendant deponed that according to the pre-sale agreement, the Plaintiffs were to complete the payment of Euros 140,000 before they could be allowed to execute the sub-lease. The balance of 20,000 Euros was to be paid by the Plaintiffs before the end of 10th August 2011.

16. The 2nd Defendant has further deponed that the 1st Defendant allowed the Plaintiffs to take possession before completion of the purchase price; that the Plaintiffs have not paid 20,000 Euros to date and that the Plaintiffs made alterations to the suit property without the authority and permission of the 1st Defendant who is the head lessor.

17. On the issue of the embargo, the 2nd Defendant deponed that the official search does not show any encumbrances and the alleged embargo did not bar any dealings in land; that the government has now removed the embargo and that the rest of the tenants have executed the sub-leases which are being registered against the 1st Defendants title; that it is the Plaintiffs who should furnish security for the outstanding balance and not the Defendants as they have no other interest in the country.

18. The parties agreed to dispose of the Application by way of written submissions. Mr. Geoffrey Kilonzo, counsel for the Plaintiffs filed his written submissions on 10th July, 2012 while Mr. Maurice Kilonzo, counsel for the Defendants filed his submissions on 17th July, 2012.

19. I have considered the rival submissions and I notice that they have reinstated and amplified the facts of the case which I have summarised above.

20. According to the submissions filed by the Plaintiffs' advocate, the issue for determination by the court is whether the land that has an embargo or restriction can be sold and whether the concealment of that fact by the Defendants was fraudulent, and secondly whether an unapproved development is unlawful. Counsel did not rely on any authority.

21. The Defendants' advocate raised two main issues for determination in his submissions. Firstly, whether injunctive orders can issue where damages have been pleaded and ascertained and secondly, whether warrants of arrest for furnishing security should issue in the circumstances of this case.

22. On the first issue, the Defendants' counsel relied on the cases of Kituro & Another – Vs – Standard Chartered Bank & 2 Others (No.2) (2002) 1 K.L.R. 640; Ooko -Vs- Barclays Bank of Kenya Limited (2002) 2. K.L.R. 394; Aldofo Guzzini & Another -Vs- Emmanuel Charo Tinga Malindi H.C.C.C No. 107 of 2005; Nairobi Permanent Markets Society & Others -Vs- Salima Enterprises & Others (1995-1998) 1 EA 232 and Teresa Shitakha -Vs- Mary Mwamodo & 4 others (1992-1980) 1 KAR 967.

23. On the issue as to whether warrants of arrest should issue or not, the Defendants counsel relied on the cases of Fassola Giuseppe & Another -Vs- Dediriter Damiano & Another; Mombasa H.C.C.C No. 561 of 1994 and Comdel Commodities Limited -Vs- The Owners of Motor Vessels “Balder Chulcchirow” Mombasa H.C.C.C. No. 32 of 1993.

24. My task, at this juncture, is to determine whether the Plaintiffs have established a *prima facie* case with a probability of success to warrant the grant of a temporary injunction pending the hearing and determination of the suit.

25. A *prima facie* case was defined in the case of **Mrao Ltd. Vs. First American Bank of Kenya & 20 others (2003) KLR 123** as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

26. I will also determine whether, even if such a case exists, the Plaintiffs have shown that they will suffer loss that is incapable of compensation by an award of damages. If in doubt about the two principles, I will decide the application on a balance of convenience. These are the well-known principles in the **Giella Vs Cassman Brown (1973) EA 358** case.

27. It is not in dispute that the Plaintiffs entered into a pre-sale contract with the 1st Defendant on 10th May 2011. According to the said pre-sale contract, which has been annexed on the Replying Affidavit, the 1st Defendant promised to sale to the Plaintiffs “the sub-lease for the remaining period” as shown in the property edged in orange. The condominium units were identified in yellow.

28. It is also not in dispute that the Plaintiff paid to the 1st Defendant 120,000 Euros for the property known as 402/18 in Chembe Kibabamshe leaving a balance of 20,000 Euros. The balance was to be paid on or before 10th August 2011.

29. According to the Plaintiffs, the said balance of 20,000 Euros has not been paid by the Plaintiffs because of two reasons, firstly because the site plans and the drawings of the house they bought were never approved by the Municipal Council of Malindi and secondly that the land in question has had a problem and the Government of Kenya has placed a restriction and or an embargo on it.

30. The 1st Defendant has annexed on its Replying Affidavit a Certificate of Lease for Chembe/Kibabamshe/402 showing that it is the registered owner of the land. The lease is for 99 years with effect from 1st March 1999 and the same was issued to the Defendant on 6th September 2006.

31. I have perused the Certificate of Lease and more specifically the encumbrance section. The property is not encumbered either by the government, a financial institution or an individual. The only encumbrance that the government can place on a property registered under the Registered Land Act, Cap. 300, as in this case, is a restriction pursuant to the provision of section 136. Section 136 of the Registered Land Act, Cap. 300 (now repealed) mandates the Registrar to make an order on the register, otherwise known as a restriction, for the prevention of any fraud or improper dealing or for any other sufficient cause shown. Section 136 of the repealed Act has been replicated in section 79 of the Land Registration Act, No. 3 of 2012.

32. The concept of an embargo been placed on a parcel of land registered under the Registered Land Act by the government, which this court has been informed was placed on the suit property is an alien concept not known in law. In the absence of a duly registered restriction, the Plaintiffs cannot claim that the property was encumbered.

33. The Plaintiffs have further stated that the developments on the suit premises were never approved by the relevant agencies and thus rendering the pre-sale contract *null* and *void ab initio*.

34. The 1st Defendant has annexed on the Replying Affidavit form P.P. A 2 from the Municipal Council of Malindi signed by the Town Engineer and dated 5th February, 2008. The said form shows the approval by the council for the construction of residential buildings on plot number 402, situated in Chembe/Kibabamshe.

35. It is therefore not true for the Plaintiffs to state that the developments on the suit property were not approved by the Municipal Council of Malindi and can be demolished at any time. The letter from the Municipal Council of Malindi dated 3rd February 2013 denying that the council did not approve the development plan submitted by the 1st defendant and which has been annexed on the Plaintiffs’ Further

Supporting Affidavit is a contradiction to the letter dated 5th February, 2008. That contradiction can only be interpreted in favour of the 1st Defendant because the 1st Defendant must have relied on the letter dated 5th February 2008, to commence the construction of the residential buildings on the suit property.

36. It cannot be true, as argued by the Plaintiffs and as stated in the letter dated 9th February 2012 by the Municipal Council of Malindi that the council gave the 1st Defendant the approval “for the purpose of getting NEMA approval, and not approval for the construction.” Form P.P. A 2 dated 5th February 2008 and addressed to the 1st Defendant is clear that the Council had permitted the 1st Defendant to commence construction on the suit property.

37. Indeed, one of the conditions in the form is to the effect that the construction should commence within six months of the letter and be completed within 24 months from the date of the approval. The Council is therefore estopped from denying at this late stage that it allowed the 1st Defendant to commence construction of the residential buildings on the suit property.

38. In view of my observations above, I find, *prima facie*, that on the material placed before this court, the 1st Defendant has always had a good title to pass to the Plaintiffs who signed the pre-sale contract with it. The 1st Defendant has also shown that it obtained the approval from the Municipal Council of Malindi to construct buildings on the suit property. The Plaintiffs have therefore not established a *prima facie* case with a probability of success.

39. Even if the Plaintiffs had established a *prima facie* case, for them to be entitled to injunctive orders, they must show that they will suffer irreparable loss which cannot be compensated by way of damages.

40. At paragraph 14 of the Plaintiffs, the Plaintiffs have averred that the Defendants fraudulently held themselves out like they had a good title and as a result defrauded the Plaintiffs huge sums of money. The Plaintiffs have particularised the fraud that was purportedly committed by the Defendants.

41. The Plaintiffs have also particularised the loss that they have suffered amounting to 181,000 Euros. This is the amount which has been prayed for by the Plaintiffs in the Plaintiffs.

42. Consequently, and as correctly submitted by the Defendants’ advocate, the Plaintiffs have by their own pleadings shown that the loss they have suffered so far can be compensated by an award of damages to the tune of 181,000 Euros after the trial.

43. On this ground alone, and pursuant to the well-established principles in **Giella -Vs- Cassman Brown (1973) EA 353**, this court cannot grant the injunctive orders prayed in the Plaintiffs’ Application. I therefore dismiss the Plaintiffs’ prayers for injunction.

44. The Plaintiffs have also prayed that pending the hearing of the suit, an order of warrant of arrest before Judgement should issue against the 2nd, 3rd and 4th Defendants because they are in the process of leaving the jurisdiction of this court in order to frustrate any Judgement that may be passed against them.

45. The Plaintiffs relied on the minutes of the 1st Defendant dated 10th March 2011 to show that the 1st Defendant intend to change its name so that it will not be easy to identify it in future.

46. The 1st Defendant has countered this argument by deponing that it is not selling any of its interests in shares in the property and that the plot in question is sufficient security.

47. For a party to obtain an order for arrest and attachment before Judgement pursuant to Order 39 of the Civil Procedure Rules, he must satisfy the court by way of affidavit that:

a) The defendant has absconded or left the local limits of the jurisdiction of the court: or

b) is about to abscond or leave the local limits of the jurisdiction of the court; or

c) has disposed of or removed from local limits of the jurisdiction of the court his property or any part thereof; or

d) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

48. It is not in dispute that the 1st Defendant is a company registered in Kenya. It is also not in dispute that the 1st Defendant is the registered owner of **Chembe/Kibabamshe/402** whereupon it has constructed houses.

49. Other than the sale of sub-leases, which the 1st defendant is entitled to do, the Plaintiffs have not shown that the 1st Defendant is disposing of its property or shares so as to remove them from the jurisdiction of this court.

50. The Plaintiffs have also not shown that the 1st defendant is in financial problems and that it has been unable to settle its financial obligations and liabilities.

51. The Plaintiffs have further not shown by way of affidavit that the 1st Defendant's directors have put in motion the legal processes of winding up the company with a view of absconding or leaving the local limits of the jurisdiction of the court. No evidence has been placed before the court to warrant the grant of the prayer for arrest and attachment before Judgement.

52. In the circumstances, and for the reasons I have given above, I dismiss the Plaintiffs' Application dated 8th February 2012 with costs. This Ruling shall apply in H.C.C.C No. 11 of 2012.

Dated and delivered at Malindi this **16th** day of **May**, 2013.

O. A. Angote

Judge