



REPUBLIC OF KENYA

High Court at Malindi

Civil Suit 58 of 2012

1. FABIO LUCHETTI

2. ALLESANDRO LUCHETTI.....PLAINTIFFS

=VERSUS=

MARIA ZACCAGNINO.....DEFENDANT

RULING

1. The Application before me is dated 7th December 2012 seeking for the following reliefs.

a) **THAT pending the hearing and determination of the suit herein, the Defendant either by herself, her servants, agents and assigns be and are hereby restrained from prohibiting the 1st and 2nd Plaintiffs from accessing into and out of or from inhibiting the Plaintiffs' use and enjoyment of proprietary rights jointly acquired under Agreement of Sale dated 24th August 2009 by the Plaintiffs and the Defendant as purchasers thereof of identifiable portion of land measuring 4 acres comprised in Kilifi/Jimba/1250 which is situated in Watamu Township of Malindi District in Kilifi County.**

b) **THAT the Defendant be directed to produce for the inspection of this Honourable Court all singular copies of Original Documents pertaining to the conveyance and transfer and registration of the 4 Acre property purchased jointly by both Plaintiffs and the Defendant vide Agreement of Sale dated 24th August 2009.**

c) **THAT cost be provided for.**

2. The application is premised on six grounds and is supported by the Affidavit of the 1st Plaintiff. The main deposition of the 1st Plaintiff, who has sworn the affidavit on his own behalf and on behalf of the 2nd plaintiff is that by an Agreement of Sale dated 24th August 2009, the Defendant and the Plaintiffs purchased land known as Kilifi/Jimba/1250 for Kshs.1,196,000.

3. After the purchase of the suit property the 2nd Plaintiff has deponed that the Defendant took possession of the original Sale Agreement as well as the Title Deed.

4. In the meantime, the Defendant, who is the Mother to the Plaintiffs separated with the Plaintiffs' father and the Plaintiffs fell out with the Defendant too.

5. The Plaintiffs have further deponed that the Defendant declined to allow them access to the property and that she has continued to believe that she can unlawfully continue to deprive them their of rights to the property; that since purchasing the property, they have not enjoyed the usage of the property despite the fact that the Agreement of Sale aforesaid granted each of them as purchasers immediate possession for use and development as they pleased.
6. The Defendant filed her Replying Affidavit on 8th March 2013 and disputed the Plaintiffs' version of events.
7. The Defendant deponed that prior to the separation with her husband, who is the Plaintiffs' father, she, together with her husband invested jointly in various portions of land in Watamu, Malindi. One of the portion that they invested in is the suit property.
8. The Defendant has further stated that the initial arrangement was to purchase the suit property with one Mohamed Habib Shani who pulled out of the deal after a deposit of Kshs. 800,000 had been paid to the purchaser. After the said Shani pulled out, she refunded him his money and included the Plaintiffs in the agreement in consideration of love and affection.
9. The Defendant has deponed that she employed the services of a contractor who cleared the land, developed a well and a wall around the suit property at a cost of Euro 78,000 whereafter she, together with her husband, developed the land at a further cost of Euros 42,000. The Plaintiffs did not make any contribution towards the construction of the wall and the development of the suit property.
10. The Defendant has averred that she subsequently furnished the house and acquired farm animals, purchased the feed for all the animals and paid the staff member who was responsible for the husbandry of the animals.
11. The Defendant finally deponed that the Plaintiffs have unreasonably interfered with her personal life; that it was a term of the settlement between her husband and herself that she becomes the owner of all the matrimonial property situated in Kenya; that the Plaintiffs are not entitled to benefit from the said agreement; that the Plaintiffs do not have a cause of action against her and that the Plaintiffs have not shown the irreparable damage that they will suffer which the Defendant will not be able to pay by way of damages.
12. The Plaintiffs filed a further affidavit on 22nd March, 2012 which I have considered.
13. The Plaintiffs' and the Defendant's advocates filed their written submissions on 16th April, 2013 and 23rd April, 2013 respectively.
14. The Plaintiffs' Advocate submitted the Plaintiffs are entitled to access, use and enjoyment of the subject property but the Defendant has declined to allow the Plaintiffs to access the suit property; that the Defendant has had possession of the original documents pertaining to the conveyance but she has refused to update or present to the Plaintiffs with any information concerning the transfer and registration of the same.
15. Counsel finally submitted that in exercising its discretion under the Civil Procedure Act or in determining whether or not to grant the injunction sought, the court is enjoined to consider what has become to be known as the principle of proportionality under the overriding objective. The advocate relied on the case of **SULEIMAN VS AMBOSELI RESORT LIMITED (2004) KLR 589; MRAO LIMITED VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) KLR 125** and **WATTS VS NDUAT (HCK) (1993) KLR 515** which I have considered.
16. The Plaintiffs' advocate submitted that at an interlocutory stage, the court is not required to make any conclusive findings though it is not excluded from expressing a prima facie view on the matter.

17. The Defendant's counsel submitted that the suggestion of conspiracy and or connivance to deny the plaintiffs their right in the land is a figment of the Plaintiffs' imagination. The Agreement, it was submitted, does not assign the duty to pursue the sub-division and eventual transfer of the suit property on the Defendant.
18. Counsel finally submitted that there is no dispute that the Plaintiffs did not make any contribution towards the acquisition of the property or the development; that the share of the value assignable to them or their contribution would be two thirds of the Kshs.873,000 paid by the defendant and her erstwhile husband, which claim is clear and ascertainable.
19. The court's discretion to grant an injunction at this stage is premised on the well-established principles; that is, an applicant must show a prima facie case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and when the court is in doubt, it will decide the application on a balance of convenience.
20. The Plaintiffs' claim is that the Defendant should be restrained from denying them from accessing into and out of the suit property and from enjoying the proprietary rights that they jointly acquired in the suit property. The plaintiffs have relied on an Agreement of sale dated 24th August 2009 which has been annexed on the supporting Affidavit to support their claim.
21. The Sale Agreement shows that the Defendant and the Plaintiffs, as purchasers, paid Kshs.873,000 towards the purchase of the suit property. The balance of Kshs.323,000 was to be paid upon the issuance of the title.
22. There is no document or averment by the plaintiffs to show that their contribution towards the purchase of the suit property was in monetary terms.
23. The Plaintiffs have not controverted the Defendant's deposition that they were included in the Sale Agreement as purchasers due to the love and affection that the Defendant had for them. According to the Plaintiffs deposition in the further affidavit, the inclusion of the Plaintiff in the Sale Agreement and the subsequent transaction respecting the same is legally binding.
24. My understanding of the above statement by the plaintiffs is that it does not matter whether they contributed to the purchase of the suit property financially or that they were included in the sale agreement by the Defendant because of the love and affection that she had for them.
25. On the issue of the Euro 78,000 that the Defendant alleged to have spent in putting up a wall and a well on the suit property, the Plaintiffs have responded by stating that the cost of the land was only Kshs.1,000,000 and the figure of Euro 78,000 lacks any probative value. According to them, the cost of the wall and the well cannot exceed the cost of the land. They however do not state whether they contributed financially towards the building of the wall on the 4.56 Ha suit property or what, in their estimation would be the monetary value of the wall.
26. The Plaintiffs, at paragraph 6 of their further affidavit, deponed that the institution of the suit was in essence to protect the domesticated animals from being sold off by the Defendant who also slaughters them for meat. The Plaintiffs however do not confirm if indeed they contributed in the purchase of the said animals or if they have been buying the feeds for the animals.
27. The Defendant deponed that she developed the suit property and bought the animals on the farm with her estranged husband, who has agreed in writing to let her own the said property.
28. From the above analysis, it is obvious that the Plaintiffs have not established, prima facie, that they financially contributed towards the purchase price of the suit property notwithstanding the fact that they have been referred as purchasers in the Sale Agreement. I agree with the Defendant that the Plaintiffs were included in the agreement of sale by herself due to the love and affection that she had for them. The Plaintiffs will, if they prove at the trial, be entitled to a third of the value of the undeveloped suit property.

29. The plaintiffs have also not shown that they contributed towards the development of the suit property which included the construction of the matrimonial home and the purchase of the farm animals. Consequently, they have no proprietary interest in the developments on the suit property which would have given them the right of ingress and egress. In the circumstances and for the reasons I have given, I find and hold that the plaintiffs have not established a prima facie case with chances of success.
30. The plaintiffs have also not shown the irreparable damage that they will suffer if they are not allowed in and out of the suit property. They have not shown that they have their residential houses on the suit property, or that the animals on the suit property belong to them.
31. I agree with the Defendant's Advocate's submissions that without contributing to any of the developments on the suit property, the share that the plaintiffs would be entitled to, upon proof at the trial, would be two thirds of either the Kshs.873,000 paid by the Defendant to the vendor or two thirds of the value of the property without developments. The sum payable is ascertainable. The plaintiffs will not suffer any irreparable damage that cannot be compensated by the Defendant by way of damages. The prayer for a mandatory injunction as framed in the application therefore fails.
32. The Plaintiffs have also prayed for the production for inspection by this court all copies of the original documents pertaining to the conveyance and transfer of the suit property.
33. This court cannot order the Defendant to produce documents at this stage. That is an exercise that will be conducted during the pre-trial conference as provided for under Order 11 of the Civil Procedure Rules and during discovery pursuant to the provisions of the Evidence Act, Cap 80.
34. In the circumstances, and for the reasons I have given above, I dismiss the Plaintiffs' Application dated 7th December 2012 with costs.

DATED AND DELIVERED AT MALINDI THIS 6TH DAY OF JUNE, 2013

O. A. Angote
Judge