



Maralink Tours & Photography Co. Ltd v Dawagi Investments Limited (Originating Summons 17 of 2021) [2022] KEELC 3392 (KLR) (11 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ORIGINATING SUMMONS 17 OF 2021**

**MAO ODENY, J
MAY 11, 2022**

BETWEEN

MARALINK TOURS & PHOTOGRAPHY CO. LTD APPLICANT

AND

DAWAGI INVESTMENTS LIMITED RESPONDENT

RULING

1. The applicant instituted this suit by way of Originating Summons dated August 20, 2021 seeking the following orders:
 1. The respondent be ordered to refund the applicant the sum of Kshs. 2,600,000/- being the deposit paid for the sale agreement dated April 21, 2021 together with interest of Kshs. 98,723/- as at July 30, 2021.
 2. The respondent be ordered to pay the applicant interest on the sum of Kshs. 455,000 being legal fees incurred as a result of the Agreement for sale.
 3. The respondent be ordered to pay the applicant interest on 1 and 2 above at the rate of 15% per annum from the date of termination until full and final payment.
 4. That costs of this Application be borne by the respondent.

Applicant's Case

3. The Originating Summons is supported by the grounds and the affidavit of Antony Nzioka, the applicant's director, sworn on August 20, 2021. The applicant deposed that on April 21, 2021, the parties herein entered into an agreement for sale of land Kilifi/Chembe Kibabamshe/366 at a consideration of Kshs. 26,000,000/-.



4. It was a term of the agreement that the applicant would pay a deposit of 10% being KShs. 2,600,000/- which was paid and the balance was to be cleared within 45 days from the date of signing the agreement. That before the said date the Respondent requested for an extension on the grounds that they had been sued by another company, Mayungu Real Estate Limited over the same land in ELC No. 20 of 2021. The applicant further deponed that the respondent had warranted in the agreement for sale that the suit land was free from any encumbrances

Respondent's Case

5. In response, the respondent filed a Preliminary Objection dated October 14, 2021 premised on the ground that the supporting affidavit was fatally defective for lack of authority to swear the same as envisaged under Order 11 rule 2 of the [Civil Procedure Rules, 2010](#). In addition, the Respondent filed a Replying Affidavit sworn on October 15, 2021 by Anthony Safari Kitsao, its director.
6. The respondent confirmed that there was an agreement for sale of the suit land but stated that at the time the parties entered into the agreement, there was no claim from any 3rd party. The respondent further stated that the interest sought by the applicant was contrary to clause 1.1(f) of the sale agreement and that the applicant consented to the 90 days extension when it learnt of the suit filed by Mayungu Real Estate Limited.

Parties agreed to canvas both the Preliminary Objection and originating Summons by way of written submissions.

Applicant's Submissions

7. Counsel for the applicant submitted on the preliminary objection and stated the requirement of authority to plead on behalf of a company was a mere technicality which can be cured by the provisions of article 159(2)(d) as read with sections 1A and 1B of the [Civil Procedure Act](#).

Counsel submitted that as long as the authority is filed before the suit is heard and determined the suit should not be struck out on such technicalities Counsel relied on the cases of [Leo Investments Limited v Trident Insurance Co. Limited](#); [Republic v Registrar General & 13 others](#) [2005] eKLR; [Raila Odinga v IEBC & others](#) [2013] eKLR and [Kenya Agricultural Research Institute v Farah Ali, Chairman Isabakia Self Help Group & another](#) NKR HCCC No. 23 of 2011 to support the applicant's case that lack of filing an authority is not fatal as long as the same is filed before the case is heard and determined.

8. On the issue of whether there is material breach of the sale agreement by the respondent, counsel submitted that the applicant's claim is for a refund of the 10% deposit paid to the respondent's account, its Advocate's fees and interest on the two, all arising from the respondent's breach of the warranties and undertakings willingly made to the Applicant at the time of signing the sale Agreement dated April 21, 2021.
9. Mr Okwach relied on the definition of breach of contract in the Black's Law Dictionary, 9th Edition, page 213, and submitted that the Respondent was guilty of non-disclosure of important information such as gazettment that the suit land belonged to individuals referred to as the Shahs.

Counsel further submitted that the respondent in response to the Mayungu's Claim against them in *Mayungu Real Estate Limited v Dawagi Investment Limited* Elc No 20 Of 2021, attached many documents detailing the history of the parcel of land and amongst the documents attached was a letter dated July 27, 2017, addressed to the National Land Commission objecting to the gazettment of Kilifi/chembe Kibabamshe/366 belonged to the 'Shahs'.



10. Mr Okwach therefore submitted that the letter was a confirmation that the Respondents knew of the challenges to the title but chose to withhold this pertinent information with the view to deceive the Applicant into entering into the sale Agreement.

It was counsel's submission that the respondent was sued vide Malindi Case 20 of 2021; *Mayungu Real Estate Limited v Dawagi Investments Limited* 2021, which was filed on the March 29, 2021 where the court issued interim injunctive orders on the March 30, 2021. Counsel submitted that this shows that the respondent was already aware of the case and that there were injunctive orders which stopped any transaction on the suit property, thereby rendering the completion of the sale Agreement impossible. That the non-disclosure was in breach of the warranties guaranteed under clause 20 f of the sale agreement.

11. Counsel for the applicant submitted that the information would amount to latent defects which only the respondent could disclose and relied on the case of *Ngere Tea Factory Company Ltd v Alice Wambui Ndome* [2018] eKLR to explain the effect of latent defects on land. That due to the respondent's inability to complete the sale, the applicant was therefore entitled to a refund of the deposit as it was held in the cases of *Millicent Perpetua Atieno v Louis Onyango Otieno* [2013] eKLR; and *Ayub Ndungu v Marion Waitibera Gacheru* [2006] eKLR.
12. Counsel further cited the cases of *Kenya Limited v Joseph Ojiem* NBI HCCC No. 1243 of 1999; *National Bank of Kenya Limited v Pipeplastic Samkolit K Limited & another* Civil Appeal No. 95 of 1999 [2001] KLR 112 [2002] EA 503; and *Aiman v Muchoki* [1984] KLR 353 and urged the court to find that the applicant is entitled to a refund and damages for breach of contract.

Respondent's Submissions

13. Counsel for the respondent did not file submissions in respect of the preliminary objection but reiterated the contents of its Replying Affidavit. It was counsel's submission that prior to the purchase of the property, counsel for the applicant undertook due diligence and ensured that the Respondent's title was genuine. That upon being satisfied that the Respondent's title was genuine, the Respondent executed the Sale Agreement.
14. Mr. Mwadilo submitted that the respondent informed the applicant of the Mayungu case when they were served with the summons. It was counsel's further submission that the respondent was not in breach of the Agreement, as the same only ought to be rescinded as per under clause 9.2 where the Applicant is only entitled to the deposit of the purchase price already paid and interest of 10% as the Central Bank rate is 7% p.a.

Analysis And Determination

15. The issues for determination are as to whether the preliminary objection by the respondent on the lack of filing an authority to swear an affidavit by the applicant has merit, and whether the respondent was in breach of the sale agreement dated April 21, 2021.
16. The court will therefore dispose off the preliminary objection before dealing with the issue as to whether the respondent was in breach of the agreement or not.

In the case of *Dewdrop Enterprises Limited v Wambugu Wambui Angeline t/a A W Kinuthia & Co Advocates* [2012] eKLR the court held as follows

In my considered view, the points raised by the respondent herein are not in accord with the decision in *Mukisa's Case* in that the said points do not raise pure points of law as envisaged in that case. Furthermore, Order 19 Rule 7 of the *Civil Procedure Rules* provides that-



The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

17. It is therefore my humble opinion that the Respondent has raised issues of a procedural technicality, but the perceived irregularity is curable and it is not fatal. The parties have come to court for substantive and not technical justice. The authority to swear an affidavit can be produced and the court may exercise its discretion and ask the Plaintiff to produce such authority.”

18. Similarly in the case of *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* [2015] eKLR, where the Court of Appeal held that:-

In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized.”

19. It is trite law that corporate bodies must authorize the filing and swearing of affidavits and this has to be done by persons who are conversant with the affairs and issues of the corporate body. It has also been held by the courts that lack of such authority is not fatal so long as the authority is filed before the hearing and determination of the case.

Further in the case of *Eye Company (K) Limited v Erastus Rotich t/a Vision Express* [2021] eKLR where the court held that:

In view of the above, it is clear that it was sufficient for the authorized person to depose that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority.”

20. Counsel for the applicant submitted that the anomaly was cured by the Applicant’s further affidavit sworn on October 22, 2021 which annexed the duly signed authority to plead as annexure ANN1.

In the case of *Leo Investments Limited v Trident Insurance Co. Limited* (*supra*) Odunga J held that such an irregularity was not fatal as long the same is filed before the suit is fixed for hearing. The court held as follows:

Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of Kimaru, J in *Republic v Registrar General and 13 Others* Misc Application No 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit.”

21. I also subscribe to the school of thought that such an irregularity is not fatal so long as an authority is filed before the hearing and determination of the suit. I therefore find that the preliminary objection lacks merit and is therefore dismissed with costs to the applicant.

22. On the issue as to whether the respondent is in breach of the sale agreement, it is not in dispute that the two parties entered into a sale agreement dated April 21, 2021 for the sale of parcel of land known as Kilifi/Chembe Kibabamshe/366 at a consideration of Kshs. 26,000,000/-. It was a term of



the agreement that the applicant would pay 10% of the purchase price of Kshs 2.6 Million which was duly paid and the balance was to be paid within a period of 45 days.

The agreement stipulated warranties and undertakings at paragraph 20 of the agreement and more specifically at 20 (f) which states that

this property is not on a buffer zone, road reserve or public land or riparian land and its ownership thereof is not subject to any challenge whatsoever from the Government of Kenya, any county, local authority or any third party whatsoever”

Paragraph 20 (h) further states that

The vendor is not engaged in or threatened by any litigation, arbitration or administrative proceedings relating to the property.”

23. The case that was filed against the respondent vide Malindi ELC No 20 of 2021 which is the cause of the breach of the agreement as the implementation cannot proceed due to a court injunction which had been filed before the parties entered into this agreement. It follows that the respondent was aware that there would be an impediment in the completion of the transaction.

24. Further the letter dated July 27, 2017 by the respondent addressed to the National Land Commission objecting to the Gazettement of Kilifi/chembe Kibabamshe/366 belonged to the ‘Shahs’ is also an indication that the respondent was aware that the suit land had ownership issues which he did not disclose.

The respondent in their submissions also stated that the agreement ought to be rescinded under clause 9.2 of the agreement and that the Applicant is only entitled to the deposit of the purchase price already paid and interest of 10% as the Central Bank rate is 7% p.a.

25. The agreement is clear on what should happen when there is breach and the court cannot rewrite contracts as was held in the case of *Trollope Colls Ltd v North West Metropolitan Regional Hospital Board (1973) 1 WLR 601* at 609:

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.”

26. I find that the agreement stipulated the remedies upon breach of any of the terms by either party hence the applicant is entitled to a refund of Kshs 2.6 Million, Kshs 455,000/ being legal fees incurred as a result of the sale agreement together with interest at the agreed 10% which is 3% above the Central Bank rates and costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the [Civil Procedure Rules](#).

