

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL CASE 189 OF 2011

ALI ABDALLA KAWINGA.....1ST
PLAINTIFF

MARY SALAMA DECHE.....2ND
PLAINTIFF

VERSUS

MARY NYAMVULA MWAVITA.....1ST
DEFENDANT

JOHN MUGAMBI ANAMPIU.....2ND
DEFENDANT

RULING

1. Before me is the Plaintiff's Notice of Motion filed on 16/12/11 seeking to restrain the Defendants from inter alia, further developing, utilizing or alienating land parcel No. LR KILIFI/KIJIPWA/934 pending the hearing of this suit. The application is supported by the affidavit of the 1st plaintiff.

2. In short the plaintiffs assert that in 2008 they purchased the said land parcel from the 1st Defendant and paid the agreed purchase price of Kshs.200,000/-. That in January 2011 the 1st Defendant purported to rescind the agreement and later transferred the suit property to the 2nd Defendant who is the present registered owner. The 2nd Defendant confirms the latter but asserts through his replying affidavit that he purchased the suit property from one SYLVIA FURAH KATUNDA and takes issue with the Plaintiff's agreement which he says was in respect of plot 555 and not number 934.

3. The parties agreed to dispose of the application through written submission, which I have perused alongside the affidavits of the parties applying the principles of **Giella VS Cassman Brown & Co. Ltd** to the facts of this case.

4. Regarding the issue of a prima facie case, the weakest link in the applicant's case was that the agreement with the 1st Defendant was in respect of plot 555, which it turns out is a bigger plot out of which plot 934 which the Plaintiffs` lay a claim to was carved out of. There is obvious dispute as to whether subdivision was part of terms of the agreement with the Plaintiff and which portion was to go to them thereafter.

5. Secondly the breach complained of has already happened. Indeed the suit property is now registered in the name of the 2nd Defendant, who on the face of it was an innocent purchaser for value of Plot Number 934 and NOT 555. The Court would not be able to stop from happening, that which has already happened. I note too that over 2 years had lapsed since the original contract between the plaintiff and the 1st Defendant. It is not clear whether the agreement was given the necessary consents or why this delay occurred. Indeed the applicants received the notice of intention foresaid about a year before they came to court.

6. On the question of damages, the value of the plot is certainly quantifiable and damages would be an adequate remedy, there being no evidence that the Plaintiffs ever took possession of the suit property or

invested in it.

7. The Plaintiff's application has come too late and on the material before me cannot be granted. The same is dismissed with costs.

Delivered and signed in the presence of Mr Otara holding brief for Mr Kagwi for 1st and 2nd defendant, Plaintiff absent on 27th July, 2012. Court clerk – Evans

C. W. Meoli
JUDGE