



**Safe Haven Limited v Luigi (Environment & Land Case 79 of 2017)
[2022] KEELC 4808 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4808 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 79 OF 2017**

**JO OLOLA, J
SEPTEMBER 22, 2022**

BETWEEN

SAFE HAVEN LIMITED PLAINTIFF

AND

BONTEMPI LUIGI DEFENDANT

JUDGMENT

1. By the plaint dated and filed herein on April 7, 2017, Safe Haven Limited (the plaintiff) prays for judgment against the defendant for specific performance of an agreement dated September 19, 2013 and for a declaration that it is a bonafide purchaser for value without notice of the parcel of land known as Title No LT 21 Folio 820A File No 7031 subdivision No 5650 situated in Malindi.
2. Those prayers arise from the plaintiff's contention that by an agreement in writing dated September 19, 2013, the defendant agreed to sell to it the said parcel of land at a consideration of Kshs 11,500,000/-. The Plaintiff avers that it duly paid the agreed consideration but before it could pay stamp duty for the transfer of the suit property it came to learn of a restriction placed on the suit land against its alienation.
3. The plaintiff further avers that it had been enjoined in Land Case No 82 of 2014 wherein the defendant is a party but it was given leave by the court to withdraw from the suit and to file this present suit.
4. Bontempi Luigi (the defendant) is however opposed to the orders sought by the plaintiff. In his statement of defence and counterclaim dated and filed herein on June 29, 2018 the defendant avers that the purported agreement if any was a personal arrangement and that the plaintiff is not privy to the same and lacks the locus standi to file this suit.
5. The defendant denies that the plaintiff paid the said consideration for the purchase of the land and invites the plaintiff to strict proof. He further denies that there was any restriction placed on the suit land restricting its alienation.



6. By way of his counterclaim the defendant claims general damages against the plaintiff for breach of both the written and oral arrangements made between them and prays for:
 - (a) General damages;
 - (b) Costs;
 - (c) Interests on (a) and (b) and
 - (d) Any other or further relief that the court may deem just and fit to grant.

THE PLAINTIFF'S CASE

7. The plaintiff called one witness who testified in support of its case at the trial.
8. PW1 Radhka Thayyil Muralee is the Chief Executive Officer and founder of the plaintiff company. PW1 told the court that sometime in August 2013 she was introduced to a lady called Rosa by one of the parents at his school in Nairobi. Rosa advised PW1 to open an international school in Malindi.
9. PW1 testified that going by that advice, she travelled to Malindi in September, 2013 where she was shown a parcel of land belonging to the defendant. Following their discussions at the defendant's house, the two agreed on a purchase price of Kshs 11.5 Million and they did a sale agreement to that effect whereupon the plaintiff paid a 10% deposit through an RTGS transfer. PW1 told the court it was agreed she was to apply for a loan to offset the balance.
10. PW1 further testified that on October 29, 2013, they did a search on the land which revealed that it belonged to the defendant. In December 2013, the defendant told PW1 he needed some money and PW1 deposited some Kshs 300,000/- in his account. On February 13, 2014 the parties went to the Land Control Board in Malindi and obtained consent to transfer. PW1 told the court that thereafter the defendant's lawyer took them to his office where they handed over everything to facilitate the transfer.
11. PW1 testified that the land was valued at Kshs 13 Million on February 24, 2014. The plaintiff then prepared a banker's cheque of Kshs 520,150/- for payment of stamp duty but everything went quiet thereafter. It was then that the plaintiff came to learn that there was a caveat placed on the suit land. The plaintiff did a search and learnt that the caveat had been placed on May 6, 2014. A case thereafter came up wherein the defendant was sued over the land with the plaintiff named as the 2nd defendant in ELC case No 83 of 2014.
12. PW1 told the court that the plaintiff had in the meantime applied for and obtained a loan of Kshs 10,500,000/- from Credit Bank on February 13, 2014. PW1 told the court the defendant and the plaintiff in the said Environment and Land Court Case No 82 of 2014 are friends and that he suspected the case was filed in collusion to stop him from getting the land.

THE DEFENCE CASE

13. The original defendant – Bontempi Luigi passed away on July 17, 2018 and was thereafter substituted by his daughter and legal representative Ornella Bontempi. The defence did not however call any witness in support of their case at the trial.

ANALYSIS AND DETERMINATION

14. I have carefully perused and considered the pleadings herein, the testimony of the plaintiff's sole witness as well as the evidence adduced at the trial. I have similarly perused and considered the submissions



filed herein by the learned counsel for the plaintiff. I was unable to find any submissions filed on behalf of the defendant.

15. The plaintiff company prays for an order of specific performance to issue against the defendant requiring the defendant to abide by the terms of an agreement executed between the parties on September 19, 2013. The plaintiff also prays for a declaration that it is a bonafide purchaser for value without notice of the suit property being sub-division No 5650 situated at Malindi.
16. It is the plaintiff's case that by the said agreement, the defendant agreed to sell to it the said parcel of land at a consideration of Kshs 11,500,000/-. The Plaintiff told the court it did pay the said consideration but before it could pay for stamp duty to effect the transfer it came to learn of a restriction placed on the suit land against its alienation. The plaintiff asserts that the said restriction was placed by the third party acting in collusion with the defendant in order to stop its acquisition of the land and hence the prayer for specific performance of the Agreement.
17. By a statement of defence and counterclaim dated and filed herein on June 29, 2018, the original defendant – Bontempi Luigi (now deceased) asserted that the agreement was a personal arrangement and that the plaintiff was not privy to the same and hence lacked the capacity to seek for its enforcement. The defendant further denied that the plaintiff paid the agreed consideration and/or that there was any restriction placed on the suit land barring its alienation.
18. On the contrary, the defendant accused the plaintiff of breaching both the written and oral arrangements made between the parties and sought orders by way of his counterclaim against the plaintiff for general damages for the breach.
19. In support of its case, the plaintiff called its director and founder Mrs Radhika Thayyil Muralee (PW1) who testified as its sole witness. PW1 told the court the plaintiff is the proprietor of Nairobi International Schools and that sometime in the year 2013 it resolved to start a branch of the Schools in Malindi.
20. PW1 testified that they then began searching for land in Malindi and that the defendant who was introduced to her by a friend offered to sell the suit property for that purpose. Subsequently the parties entered into the sale agreement dated September 19, 2013 wherein the parcel of land measuring 1.503 Ha. was put up for sale at Kshs 11,500,000/-.
21. A perusal of the agreement produced as an exhibit herein reveals that on the date of the Agreement a deposit of Kshs 1,150,000/- being 10% of the purchase price was paid to the defendant. While the agreement was indeed personally executed between PW1 and the original defendant Luigi Bontempi, it was apparent that PW1 executed the agreement on behalf of the plaintiff herein. That much can be discerned from the fact that it is the plaintiff company that applied on February 14, 2014 for a loan facility of Kshs 10,000,000/- from Credit Bank Limited to offset the balance of the purchase price. A perusal of the terms thereof reveals that the facility was secured by a legal charge over the suit property which was to be registered in the name of the plaintiff and two other directors of the plaintiff.
22. That position was equally clear from a perusal of the application for consent of the Land Control Board Malindi executed by the defendant which reveals the name of the proposed purchaser as the plaintiff company. Indeed the letter of consent given by the board and dated February 13, 2014 reveals that the defendant was granted consent to transfer the land to the plaintiff herein at a consideration of Kshs 11,500,000/-.
23. PW1 told the court in her testimony that while they had conducted a search at the time of the purchase which revealed a clean property registered in the name of the defendant, they came to learn just before they could pay for stamp duty to effect the transfer that a restriction had been placed on the land barring



its alienation. In support of that position, the plaintiff produced a copy of a certificate of postal search dated October 29, 2013. A perusal of the same reveals that there were no encumbrances registered on that land as at that date.

24. The second certificate of postal search exhibited by the plaintiff and dated October 27, 2014 reveals that a restriction was registered on the parcel of land on May 6, 2014, some three months after the defendant had received the purchase price and the Land Control Board had given authority for its alienation.
25. It was therefore curious that the defendant would deny in his pleadings herein that there was a restriction order registered on the property that had the consequence of derailing the plaintiff's take over of the suit land.
26. When Bontempi Luigi passed on on July 17, 2018, his daughter and legal representative Ornella Bontempi was substituted as the defendant. The new defendant did not however testify at the trial herein and the plaintiff's accusation that the restriction was registered in collusion with the defendant was never controverted.
27. As it were, an order of specific performance is based on the existence of a valid enforceable contract. The plaintiff herein has not only demonstrated that they had a valid contract for the purchase of the suit property but also that they paid the consideration required thereunder to the defendant. While the defendant contended that the plaintiff had breached the same, no such evidence of breach was placed before the court.
28. As the plaintiff told the court, they have since the purchase of the land been forced to service the loan at an interest rate of 22% per annum without benefitting from the suit property. The plaintiff has been unable to build the projected school and to benefit therefrom since the date of purchase. I did not in the circumstances consider that damages would be an adequate remedy to compensate the plaintiff.
29. I am in the premises persuaded that the plaintiff is entitled to the prayers sought in the plaint. I accordingly grant the prayers made in the plaint with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 22ND SEPTEMBER, 2022.

In the presence of:

No appearance for the Plaintiff

Mr. Mwadilo for the Defendant – present

Court assistant - Kendi

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J. O. Olola

JUDGE

