



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Suit 72 of 2006

LUIGI BONTEMPIPLAINTIFF

VERSUS

FANTINI MARIODEFENDANT

J U D G M E N T

Luigi Bontempi (the plaintiff) has filed this suit against Fantini Mario (the defendant).

It is the plaintiff's case that on 20th day of April 1997, he and the defendant entered into a written agreement wherein the plaintiff was to build two (2) villas for the defendant on Plot No. 7861 Malindi within Mtangani area. It was an express and/or implied term of the contract that the plaintiff shall be paid Ksh. 3,500,000/- by the defendant for the construction of the said villas – the sum was to be inclusive of material and labour to be provided by the plaintiff. The defendant paid cash Ks. 500,000/- leaving a balance of Ksh. 3,000,000/-. It was further expressly agreed that upon completion of the construction, the defendant was to pay the plaintiff the balance of the agreed cost within 2 (two) months of such completion. The construction was completed in June 2000 and the defendant was notified and a subsequent demand made for the balance of Ksh. 3,000,000/-. At the time of constructing, it is the plaintiff's contention that defendant handed over to him, a copy of transfer documents by the previous owners to the defendant, which the plaintiff was to hold as an assurance that he would meet his contractual obligation. However despite the construction having been completed, defendant failed to make good the outstanding balance.

The plaintiff now prays that judgement be entered in his favour for:

- (a) A declaration that the defendant is in breach of the agreement dated 20th April 1997,
- (b) A declaration that in consequence of the breach of contract, the plaintiff is entitled to sell plot Nos. 7861 and 7916 Mtangani area in Malindi to recover the balance of the contractual sum.
- (c) In the alternative and without prejudice to (b) above, Plot No. 7861 and 7961 be transferred to plaintiff in settlement of the debt.
- (d) An order directing the deputy Registrar of the High Court to transfer the subject Plot Nos. 7861 and 7916 Mtangani area Malindi, in favour of the plaintiff, his agents or purchaser as the court may direct.

The defendant failed to enter appearance or file defence and an interlocutory judgement was entered for the plaintiff on 16-8-06 and the matter listed for formal proof.

At the hearing plaintiff produced the agreement as exh. 1 which confirmed the terms thereto. Clause 3 of the agreement provided this:-

“It is also agreed mutually and without any encumbrances whatsoever that Mr. Fantini Mario, will pay Luigi Bontempi all his money within two months after the completion of the building, failure to which he will sell and/or offer to Mr. Luigi Bontempi both his two plots. That is Plot No. 7861 and number 7916 Malindi so that he pays Luigi Bontempi his money for bringing the material and his labour charge.”

It is on the basis of the above clause that the plaintiff seeks the orders to be made in his favour.

A demand letter Exhibit 2 demonstrates that demand was made by the plaintiff for the outstanding balance and there is no evidence that the same was ever paid.

The document relating to the two plots ie exh. 3 which is an indenture made between the vendors and the purchaser (who is the defendant herein). The indenture conferred on defendant all the right title and interest on the two parcels.

Plaintiff informed the court that currently the houses are in a dilapidated state as the windows and makuti were stolen.

From the foregoing and from what plaintiff’s counsel submits, I find that the plaintiff has formally proved his claim. Indeed the agreement is self explanatory and there is nothing to suggest that defendant met the terms of the agreement – he is therefore in breach of the said agreement.

(b) In consequence of that breach, the plaintiff is entitled to receive the balance of the contractual sum. Even if he was to sell the plots, he would have to have ownership of the same and so I order that Plot No. 7861 and 7916 be transferred to the plaintiff in settlement of the debt.

(C) The Deputy Registrar High Court Malindi do execute transfer documents of plot no. 7861 and 7916, Mtangani area Malindi, in favour of the plaintiff.

(d) costs of the suit to the plaintiff

Delivered and dated this 23 day of Feb 2008 at Malindi.

H. A. Omondi

JUDGE