



**Corsaro v Formica & another (Environment & Land Case 85 of 2005)
[2022] KEELC 13667 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13667 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 85 OF 2005
JO OLOLA, J
OCTOBER 19, 2022**

BETWEEN

SILVANA CORSARO PLAINTIFF

AND

LUIGI FORMICA 1ST DEFENDANT

SANSKIRT INVESTMENTS LIMITED 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated October 1, 2004 initially filed in Mombasa as HCC No 8 of 2004 as amended on March 22, 2005 Silvana Corsaro (hereinafter the Plaintiff) moved this Court for:
 - (a) A declaration that the purported transfer of the parcel of land known as Portion No 631 Malindi to the 2nd Defendant was fraudulent, illegal and incapable of passing title to the 2nd Defendant or any other person;
 - (b) Registration of a restriction against the property forbidding the registration of any further documents absolutely by the Defendants save for the purpose of reconveying the property back to the Plaintiff;
 - (c) An order nullifying the transfer and cancelling the registration of the 2nd Defendant and all leases that may have been registered thereunder;
 - (d) An order directing the registrar of titles coast to rectify the Register and reverse the entries in favour of the 2nd Defendant and Tamani Jua Properties Limited;
 - (e) Damages;
 - (f) Costs and interest;



2. Those prayers arise from the Plaintiff's contention that in or about the year 1990 while she was still married to the 1st Defendant herein, she did purchase one-half undivided share in the said parcel of land known as Portion N 631 Malindi with the other half share remaining in the name of the 1st Defendant.
3. The Plaintiff asserts that there was erected on the suit property a hotel building known as Tamani Jua Hotel and that they agreed between herself and the 1st Defendant that all past, present and future developments on the suit property whether in pursuance of the hotel project or otherwise would be owned in equal shares by the two parties.
4. The Plaintiff avers that on February 20, 2004, she was shocked to learn that the suit property was registered in the name of the 2nd Defendant Company and that there was a lease thereon dated February 18, 2002 in favour of Tamani Jua Properties Limited for a term of 52 years. The Plaintiff asserts that she is a stranger to the said transfer and subsequent registration of the suit property to the 2nd Defendant and hence the prayers sought herein.
5. Luigi Formica (the 1st Defendant) is however opposed to the orders sought in the Plaintiff. In his Statement of Defence and Counterclaim dated June 20, 2006, the 1st Defendant avers that sometime in 1988, he relocated from Rome, Italy to Malindi Kenya and that he bought properties both in Malindi and Nairobi in his own name and in the name of his company known as Icaform Limited.
6. The 1st Defendant further avers that he constructed a hotel in the name of Tamani Jua Hotel on the property he purchased in Malindi and that sometime in 1989, the Plaintiff who was then his wife also relocated to Kenya on condition that the 1st Defendant would transfer to her a half-share of all the properties the 1st Defendant had in Kenya.
7. The 1st Defendant avers that he agreed to the condition imposed by the Plaintiff but soon after he effected the transfer of half-shares of his properties, the Plaintiff separated with him and immediately returned to Italy. The 1st Defendant states that he decided to sell his half-share in his various properties after he became seriously sick with cancer in 1996.
8. The 1st Defendant avers that thereafter they travelled to Italy to purchase the Plaintiff's shares and that one Fernando Vischi purchased the suit property on August 30, 1997 at an agreed price of Italian Lira 33,000,000. Out of the said amount, a sum of Italian Lira 15,000 was paid to the 1st Defendant while Italian Lira 18,000,000 was deducted from Fernando Vischi's account and was paid directly to the Plaintiff.
9. Ms Sankrit Investment Limited (the 2nd Defendant) is equally opposed to the orders sought in the Plaintiff. In its Statement of Defence and Counterclaim dated May 5, 2005 as amended on March 28, 2011, the 2nd Defendant avers that it was on October 30, 1997 registered as proprietor of an estate in fee simple of all that parcel of land measuring 2.37 acres or thereabouts situated in Malindi North and known as Portion No 631. The said registration followed a successful sale of the said portion of land to itself by both the Plaintiff and the 1st Defendant herein.
10. The 2nd Defendant avers that the Plaintiff's suit is time-barred as the transfer of the suit property to itself was registered on October 3, 1997 while the suit herein was not instituted until October 29, 2004. The 2nd Defendant accuses the Plaintiff of being guilty of prolonged, inordinate and inexcusable delay in bringing the present action and asserts that by her conduct the Plaintiff had waived her right, if any, to claim the alleged or any relief against the 2nd Defendant.



11. The 2nd Defendant asserts that it is an innocent purchaser for valuable consideration, is in possession of the suit property, has not participated in the alleged fraud and that it did not at the time of the purchase know or have any reason to believe that any fraud had been committed, if at all.
12. The 2nd Defendant further asserts that a lease for a term of 52 years dated February 18, 2002 is registered against the title of the property in favour of Tamani Jua Properties Limited which has not been made a party to these proceedings and any orders issued as prayed in the Plaint are likely to prejudice the said third party.
13. The 2nd Defendant avers further that in August, 1997 it came to the attention of one Fernando Vischi that the 1st Defendant had placed his hotel on sale. The said Fernando Vischi then approached one Aldo Brearani with whom they incorporated the 2nd Defendant and proceeded to purchase the suit property from the 1st Defendant who had led them to believe that he had the authority of the Plaintiff to sell and transfer the property.
14. By way of its Counterclaim the 2nd Defendant prays for Judgment as against both the Plaintiff and the 1st Defendant as follows:
 - (a) As against the Plaintiff, a declaration that the 2nd Defendant was a bonafide purchaser for value without notice;
 - (b) As against the Plaintiff and the 1st Defendant Judgment on the improvements made by the 2nd Defendant on the suit property;
 - (c) In the alternative and without prejudice to the foregoing, as against the 1st Defendant restitution to the tune of the difference between the improved value of the hotel and the value of the defunct hotel in addition to the purchase price, costs and interest thereon from the time of payment to the time of restitution at commercial rates;
 - (d) As against the 1st Defendant general damages for the fraudulent misrepresentation;
 - (e) Costs;
 - (f) Interest on all pecuniary awards; and
 - (g) Any other order that the Court would deem fit and just to make in the circumstances of this case.

The Plaintiff's Case

15. The Plaintiff called two witnesses who testified in support of her case in the trial that commenced before the Honourable W Ouko J (as he then was) on September 27, 2005.
16. PW1 – Silvana Corsaro is the Plaintiff and a resident of Rome, Italy. She told the Court the 1st Defendant was her husband for 30 years and that they are now separated. Previously, she had lived in Malindi Kenya with her husband for two years (1989/1991).
17. PW1 testified that during her stay in Kenya, they had acquired Plot No 631 Malindi. The land was bought by the 1st Defendant but PW1 told the Court she later bought ½ portion of it from the 1st Defendant and an indenture was prepared between the parties in respect of the conveyance of the ½ portion. PW1 told the Court they had another agreement in respect of the suit property in which it



- was agreed that future and past developments on the land would be shared equally between herself and the 1st Defendant.
18. PW1 told the Court she had never discussed about the sale of the property with the 1st Defendant. She however came to learn that it had been sold. PW1 told the Court her Advocates did a search which revealed the new owners as the 2nd Defendant. PW1 told the Court she saw the transfer documents which purported she had signed the transfer before a Notary Public in Rome. While the Notary Public was known to PW1, she told the Court she did not appear before him in respect of this transaction.
 19. PW1 further told the Court that when she received the copies of the documents of transfer from her lawyers in Kenya, she went to see the Notary Public who checked the number placed on the documents. The Notary Public told her that number did not exist in his documents and that the signature appended thereon was not for the Notary Public.
 20. PW1 testified that she was in Rome during the transfer and that the 1st Defendant never informed her about the sale. She did not receive any money from the sale and urged the Court to order that she gets her ½ share of the proceeds of sale.
 21. On cross-examination PW1 told the Court she left Kenya in 1991 but had returned twice in 1992 and 1993. Between 1993 and 1997, she had made inquiries about the property from her friends. She was informed the Hotel was closed. In 2003/2004, PW1 saw an advertisement inviting people in Rome to go for holiday at the Hotel. She did not herself make any effort to re-open the hotel and told the Court she was stressed after the 1st Defendant married a Kenyan lady.
 22. PW1 further testified that she was not involved in the purchase of the property. She got involved after the 1st Defendant purchased the property although she could not remember how much she paid to the 1st Defendant to acquire her portion. Although the indenture she produced in evidence indicated the portion was gifted to her by the 1st Defendant for love and affection, PW1 told the Court she paid for the property. She told the Court she must have paid approximately 15 Million Lira per month for 18 months.
 23. PW2 – Lahori Jethanand is an Advocate working with Sachdeva & Company Advocates. He confirmed that the Indenture and transfer documents for the suit property were drawn in his office by his son who is a qualified solicitor. While the 1st Defendant signed in their presence, the Plaintiff was not there. PW2 further told the Court the proceeds of the sale were not paid to their office but they were paid their fees. PW2 was not aware if the document was sent to Italy. It was their firm which lodged the documents for stamp duty payment. They registered the document after all the parties signed.
 24. On cross-examination. PW2 conceded that the indenture was not on the face of it suspicious. He further conceded that if it was signed abroad, the same needed to have been witnessed by a Notary Public as was done in this case. PW2 further told the Court the consideration for the transfer was Kshs 11 Million and that the document acknowledged that payment was made.

The Defence Case

25. The 1st Defendant testified as the sole witness in his case at the trial. The 2nd Defendant did not however call any witness at the trial.
26. DW1 – Luigi Fornica is the 1st Defendant herein and an Italian Pensioner resident of Malindi. He told the Court the Plaintiff was his former wife and that they lived together as husband and wife between 1964 and 1989. DW1 told the Court they came to Kenya with the Plaintiff on January 3, 1989 and that she only stayed for a month after which the two filed a Deed of Separation on February 8, 1989.



27. DW1 testified that he bought the whole of Plot No 631 Malindi in 1987 when he resided in Italy. In 1988, he proceeded to build a luxurious residence thereon named Tamani Jua. DW1 told the Court he did the construction alone before he moved to Kenya and that the Plaintiff made no contribution thereto.
28. DW1 told the Court that one and half years after separation, the Plaintiff informed him that it was possible for a family re-union if and only if he donated a half share of his properties in Malindi and Nairobi. DW1 accepted the proposal and executed a Deed of Gift dated November 9, 1990. Shortly after the donation however, the Plaintiff abandoned DW1 and returned to Italy.
29. DW1 testified that he became seriously ill in 1997 as a result of which he decided to sell his 50% share of the property to one Fernando Vischi who was a legal representative of the 2nd Defendant herein at the price of Italian Lira 330 Million (equivalent to Kshs 11 Million). DW1 told the Court the property was then valued at Kshs 30 Million and that he executed a Sale Agreement with the said Fernando Vischi on August 30, 1997 disposing his 50% share to the 2nd Defendant before his Advocates Sachdeva & Company Advocates.
30. DW1 further told the Court he communicated the sale of his shares to the Plaintiff through his daughter Maria and that aware of the issues DW1 had with the Plaintiff, the 2nd Defendant contacted the Plaintiff directly for other formalities regarding the sale. He testified that on September 24, 1997 he signed an Indenture at his Advocates offices in Mombasa after getting the balance of 282 million Italian Lira.
31. DW1 accused the 2nd Defendant of engaging in mafia-like behavior by counterfeiting documents and engaging in perjury in its acquisition of the suit property. DW1 testified that while the 2nd Defendant states in its pleadings that the sale Agreement between them was partly oral and partly in writing, the Agreement was only done in writing.
32. On Cross-examination DW1 testified that he is the proprietor of Plot No 631 Malindi. On November 9, 1990, he did transfer half of his undivided share to the Plaintiff after which they had both owned the property. DW1 told the Court that on August 30, 1997, he had sold his half share to Fernando Vischi who was a director of the 2nd Defendant. DW1 told the Court he was paid 330 million Italian Lira which was half the value of the property. DW1 told the Court he is no longer in possession of the land after he sold his share of the same.

Analysis And Determination

33. I have carefully perused and considered the pleadings filed herein, the oral and written testimonies of the witnesses as well as the evidence adduced at the trial herein. I have similarly perused and considered the written submissions and authorities placed before me by the respective parties.
34. By her Plaint initially filed in Mombasa on October 1, 2004 and amended on March 22, 2005, the Plaintiff herein prays for a declaration that the purported transfer of the parcel of land known as Portion No 631 Malindi to the 2nd Defendant was fraudulent, illegal and incapable of passing title to the 2nd Defendant or any other person. She also prays for the registration of a restriction forbidding any further dealing with the land save for the purposes of reconveying the same back to herself. In addition, the Plaintiff prays for an order nullifying the transfer to, and cancelling the registration of the property to the 2nd Defendant as well as an order directing the Registrar of Titles, Coast Region, to rectify the register and reverse the entries made on the property in favour of the 2nd Defendant and an entity known as Tamani Jua Properties Limited.



35. It was the Plaintiff's case that sometime in the year 1990 while she was still married to the 1st Defendant, she did purchase one-half undivided share in the said property while the other half-share remained in the name of the 1st Defendant. The Plaintiff asserts that they thereafter constructed on the property a hotel known as Tamani Jua Hotel and that they agreed between herself and the 1st Defendant that any past, present or future developments on the property would be owned in equal shares by the two parties.
36. The Plaintiff told the Court that on or about February 20, 2004, she was shocked to learn that the suit property had been registered in the name of the 2nd Defendant and that there was a lease thereon dated February 18, 2002 in favour of an entity known as Tamani Jua Properties Limited for a term of 52 years.
37. The 1st Defendant however denies that the Plaintiff participated in the purchase of the suit property and/or the construction of the said Tamani Jua Hotel. On the contrary, the 1st Defendant avers that he relocated from Rome, Italy to Malindi Kenya sometime in the year 1988 and that he thereafter purchased the suit property and solely constructed the hotel thereon.
38. It is the 1st Defendant's case that sometime in the years 1989, the Plaintiff who was then his wife also relocated to Kenya but on condition that the 1st Defendant would transfer to her a half-share of all the properties the 1st Defendant had acquired in Malindi and Nairobi Kenya. The 1st Defendant however told the Court that immediately he obliged and transferred the properties as requested, the Plaintiff orchestrated a separation with him and immediately thereafter returned to Italy.
39. It was the 1st Defendant's case that sometime in the year 1997, he became seriously ill and decided to dispose of his half-share in the suit property. Accordingly, he sold his shares to one Fernando Vischi, a representative of the 2nd Defendant who subsequently travelled to Italy to purchase the other half of the shares from the Plaintiff. In that respect the 1st Defendant told the Court the proceeds of the purchase price for the suit property were shared between himself and the Plaintiff while a portion went to meet the legal fees for the sale transaction.
40. That position was supported by the 2nd Defendant which through its pleadings herein asserted that it was on October 30, 1997 registered as proprietor of an estate in fee simple of the parcel of land known as Portion 631 Malindi following a successful sale of the same to itself by both the Plaintiff and the 1st Defendant.
41. The 2nd Defendant goes ahead to plead at the same time that it purchased the suit property from the 1st Defendant who had led them to believe that he had the authority of the Plaintiff to sell and transfer the property. As a result and by way of its counterclaim, the 2nd Defendant seeks a declaration that it was a bonafide purchaser for value without notice of any default in the title as well as a refund of the purchase price and the improvements made on the suit property.
42. From the material placed before me, there was no dispute that the 1st Defendant and the Plaintiff herein were married as husband and wife until the February 8, 1989 when they got separated with the Plaintiff subsequently returning to Italy while the 1st Defendant remained in Malindi, Kenya. During their good times, the couple jointly came to own the suit property, a piece of land measuring 2.37 acres on which was subsequently erected the hotel known as Tamani Jua Hotel.
43. While the Plaintiff insisted that she had contributed towards the purchase of the land and the construction of the hotel, she was unable to produce by way of any tangible evidence her contribution thereto. Instead it was clear from the Indenture produced by herself in evidence as executed between herself and the 1st Defendant and dated November 9, 1990 that the transfer of the one-half undivided



share in the piece of land together with the buildings thereon was in consideration of the 1st Defendant's natural love and affection for herself.

44. Whichever was the case, by the said indenture, the Plaintiff and the 1st Defendant came to possess the suit property as tenants in common with each one of them holding an undivided interest in the property. That sort of ownership similarly allowed each of them the right to alienate or transfer their interest.

45. As Madan J (as he then was) stated in *Gatimu Kinguru v Muya Gathangi (1976) eKLR*:

' Each tenant in common is the owner of the whole land but limited to the extent of his share therein because it is not subdivided in conjunction with his co-tenant in common.'

46. Arising from the foregoing, it was clear that until the tenancy in common were severed by the subdivision of land so that each tenant in common can have his or her share of the land, each of them owned the 'whole' land and the portion that belongs to either of them in the entire parcel was unidentifiable.

47. It follows therefore that the 1st Defendant had no power or right to alienate the suit property without the involvement of the Plaintiff herein. That much was acknowledged by the 1st Defendant both in his testimony-in-chief and during cross-examination wherein he insisted that he had only sold his 50% stake in the property to the 2nd Defendant.

48. As it turned out however, the Agreement for Sale dated August 30, 1997 as initially executed between the 1st Defendant and the said Fernando Vischi for and on behalf of the 2nd Defendant does not reflect that position. The said Agreement prepared by Messrs Sachdeva & Company Advocates, Malindi identifies the 1st Defendant as 'the Vendor' and the said Fernando Vischi as 'the Purchaser' and proceeds to provide as follows:

- ' 1. The Vendor agrees to sell (subject to the payment of the deposit referred to hereunder) and the Purchaser agrees to purchase upon the terms, conditions and special conditions referred to hereafter all that piece of parcel of land situate in Malindi Township in Kilifi District containing by measurement two decimal three seven (2.37) acres or thereabouts known as Portion No 631 Malindi including all the buildings and structures thereon ('the Property')
2. The interest sold is freehold.
3. The purchase price is Kshs 330,000,000 Liras (sic) of which the sum of Kshs 33,000,000 million Liras (sic) has been paid to the vendor as stakeholder.'

49. From their pleadings filed herein, Fernando Vischi who is named as the Purchaser in the Agreement was a co-founder and director of the 2nd Defendant. At Paragraph 9 to 11 of its Amended Statement of Defence and Counterclaim dated March 28, 2011, the 2nd Defendant pleads as follows:

- ' 9. That sometime in August, 1997 it came to the attention of one Mr Fernando Vischi that the 1st Defendant had placed his defunct Hotel for sale. Mr Vischi aforesaid developed an interest and sought partners with whom he could engage in the venture. He approached one Aldo Breciani who agreed to join him in the venture.



10. It was agreed as between Mr Vischi and Mr Breciani that a limited liability company be incorporated or be sought for the purpose of taking over the contract and acquiring the purchaser's interest hence the second Defendant.
11. By an agreement partly oral and partly in writing entered into between the 1st Defendant and the said Mr Vischi, 1st Defendant agreed to sell the property in issue together with the moveable properties enumerated therein at the agreed consideration of Italian Lira 330 million equivalent of Kshs 11 Million. The 1st Defendant agreed to transfer the property to the said Mr Vischi or his nominee. The purchase price was payable as follows:
 - (i) 15 million upon execution of the agreement.
 - (ii) 18 million on or before the August 31, 1997; (and)
 - (iii) The balance of the purchase price being 297 million upon execution and registration of the transfer and in any event on the September 30, 1997'
50. While as can be seen above clause 5 of the Agreement placed the completion date at September 30, 1997, it was not clear as to when and to whom the balance of the purchase price was paid. According to the 1st Defendant, he did communicate to the Plaintiff about the sale through their daughter Maria and the 2nd Defendant knowing their strained relationship with the Plaintiff took up the matter and hence directly dealt with the Plaintiff as regards her share of the property.
51. On their part, the 2nd Defendant contended that the 1st Defendant had represented to them that he would secure the Plaintiff's signature on the transfer document and that the 1st Defendant eventually on September 24, 1997 availed to them a transfer document signed by the Plaintiff before a Notary Public on the basis of which they proceeded to conclude the transaction.
52. In her testimony, the Plaintiff denied executing the transfer document. In addition, the Plaintiff told the Court the particular Notary Public in Italy before whom the document was purported to have been signed denied that the same was executed in his office.
53. Testifying as to how the Indenture and Transfer documents were executed, Lahori Jethanand Advocate of Sachdeva & Company Advocates (PW2) told the Court that while the 1st Defendant executed the documents in their presence, the Plaintiff was not there. PW2 further told the Court the proceeds of the sale were not paid in their office and that they were not aware if the documents had been sent to Italy for purposes of execution by the Plaintiff and the requisite notarisation.
54. Arising from the foregoing and given that both the Plaintiff and the 1st Defendant have denied receipt of the full purchase price from the 2nd Defendant it was incumbent upon the 2nd Defendant whom the 1st Defendant accused of all sorts of malpractices to come clean on how the full purchase price for the suit property had been paid to the two tenants in common who were proprietors of the property before it was transferred to the 2nd Defendant's name.
55. As it turned out the 2nd Defendant did not call any evidence or produce any documents in support of their claim that they were bonafide purchasers of the suit property. That being the case, the accusations made against the 2nd Defendant by both the Plaintiff and the 1st Defendant remained uncontroverted and unchallenged. Since there was no evidence that the 2nd Defendant paid the full purchase price for the suit property, it can only follow that they caused the suit property to be transferred to their name before paying the consideration due therefore to the Plaintiff.



56. Accordingly, this court was satisfied that the registration of the 2nd Defendant as the proprietor of the suit property was obtained irregularly and through misrepresentation. In the premises I am satisfied that the Plaintiff has proved her case on a balance of probability and Judgment is hereby entered as follows:

- (a) The 2nd Defendant's counterclaim is dismissed with costs;
- (b) A declaration is hereby issued that the purported transfer of the half undivided share of the Plaintiff of all that parcel of land known as Portion No. 631 Malindi to the 2nd Defendant was fraudulent, illegal and incapable of passing any title to the 2nd Defendant or any other person;
- (c) The Registrar of Titles Coast Region is hereby directed to register a restriction restraining any dealings with the land by the Defendants save for the purpose of reconveying the half-undivided share of the property to the Plaintiff;
- (d) An order is hereby issued nullifying the transfer to, and cancelling the registration of, the 2nd Defendant as the proprietor of the land and all leases that may have been registered thereunder comprising the half-undivided share of the Plaintiff;
- (e) An order is hereby issued directing the Registrar of Titles coast Region to rectify the Register and reverse the entries in favour of the 2nd Defendant and Tamani Jua Properties Limited and to reflect the Plaintiff's ownership of the half undivided share of the suit property; and
- (f) The Plaintiff shall also have the costs of her suit.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 19TH DAY OF OCTOBER, 2022.

In the presence of:

Mr. Luigi Formica – 1st Defendant in person

Mrs Thuku holding brief for Mbura for 2nd Defendant

No appearance for the Plaintiff

Court assistant - Kendi

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J. O. Olola

JUDGE

