



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 204 OF 2014

JAMES MURIITHI MAINA.....PLAINTIFF

VERSUS

SHEKALE BWANA.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaintiff dated and filed herein on 4th November 2014, James Muriithi Maina (the Plaintiff) prays for Judgment against Shekale Bwana (the Defendant) for: -

a) Kshs 1,800,000/-

b) General damages;

c) Costs of this suit;

d) Interest on (a) (b) and (c) above.

2. Those prayers arise from the Plaintiff's contention that on 29th February 2012, he entered into a Sale Agreement with the Defendant for the purchase of a house without land erected on Land Portion No. 49/II/MN Mombasa Kisauni. Despite payment of the purchase price by the Plaintiff, the Defendant failed to hand over possession of the house as set out in the Agreement and it has now come to the Plaintiff's knowledge that the Defendant had as a matter of fact sold the house to a third party.

3. But in his Statement of Defence dated 24th February 2016, the Defendant denies having entered into any Sale Agreement with the Plaintiff for the sale of a house without land. He avers that he has never owned a house in the said portion of land and has never tried to sell any to the Plaintiff. The Defendant further denies instructing any agent to execute the sale documents on his behalf and invites the Plaintiff to strict proof.

The Plaintiff's Case

4. At the trial herein the Plaintiff (PW1) testified as the sole witness in his case. He told the Court that he presently resides in the Netherlands and that he has known the Defendant ever since he was a young man.

5. PW1 testified that sometime in January 2012, the Defendant who is ordinarily resident in Germany and Kenya approached him with a proposal to sell to him a house without a land erected on Portion No. 49/II/MN Mombasa Kisauni. As proof of ownership, the Defendant produced an agreement dated 5th January 2007 drawn between the Defendant and one Mbaruk Ayubu Ali and detailing the sale of the house to the Defendant.

6. PW1 further testified that he came to Kenya in January 2012 whereupon he visited the firm of Muli and Ole Kina Advocates and instructed them to prepare a Sale Agreement. The Agreement was prepared and signed after PW1 paid to the Defendant's agent one Margaret Wanjiru Moroseti the purchase price. That Agreement provided that vacant possession would pass to the Plaintiff on the completion date which was 25th January 2012.

7. PW1 told the Court he later returned to Germany before vacant possession was handed over and when he subsequently came back in

January 2013, he was shocked to learn that one Khadija Ahmed Abdalla was claiming ownership of the house. PW1 contacted the Defendant who on 18th February 2013 wrote a note confirming the sale of the house to the Plaintiff.

8. PW1 further told the Court that as a result of the Defendant's actions, he had lost the income he would have made from rent and urged the Court to compensate him by way of general damages.

9. On cross- examination, PW1 told the Court he paid the sum of Kshs 1.8 M to the Defendant in Margaret Wanjiru Mosoretti's house. The Agreement was done later in Mrs Ole Kina Office. PW1 conceded he had nothing to show the Defendant acknowledged receipt as the Agreement was executed between PW1 and Margaret.

10. PW1 further testified he was unaware if the power of attorney between Margaret and the Defendant had been revoked. He conceded he had not sued Margaret and told the Court he believed the house belonged to the Defendant because the Defendant showed him a previous sale agreement between himself and one Mbaruk Ali. He told the Court they executed the Agreement on 29th March 2012 even though paragraph 4 thereof indicated the completion date as 25th January 2012.

The Defence Case

11. The Defendant (DW1) equally testified as the sole witness in his case at the trial. He told the Court he resides in Germany where he is a citizen having lived there for some 31 years. He further told the Court he travels to Kenya once every year, normally in December, to see his parents.

12. DW1 told the Court he knows the Plaintiff and that they used to be neighbours when they were growing up. The two do business together in Europe where they sell African food and other artefacts at festivals.

13. DW1 testified that he has never sold the Plaintiff any house or land. He further denied that he had given any power of attorney to any lady by the name Margaret Wanjiru. DW1 told the Court the Plaintiff may have picked his particulars from elsewhere and put them on the power of attorney since they do business elsewhere. He told the Court they have since disagreed in the course of their business.

14. On cross- examination, DW1 told the Court he did not know Khadija Abdalla and that his mother's name is Fatma Ali. He further testified that he did not know Margaret Moserretti or how the Law Firm Muli & Ole Kina Advocates got his documents. He further told the Court he never went to the Law firm and he was not in the Country at the time.

Analysis and Determination.

15. I have perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have also perused and considered the rival submissions as placed before me by the Learned Advocates for the parties.

16. The Plaintiff's case is that by an agreement dated 29th February 2012, he purchased from the Defendant a house without land erected on Land Portion No. 49/II/MN Mombasa Kisauni. It is further the Plaintiff's case that despite payment of the purchase price which was agreed at Kshs 1,800,000/-, the Defendant failed to hand over vacant possession to the Plaintiff. The Plaintiff told the Court he had subsequently come to learn that the Defendant had sold the house to a third party and hence his claim herein for a refund of the purchase price together with damages and costs.

17. On his part, the Defendant denies owning any such house and/or entering into a sale agreement with the Plaintiff for the sale thereof at the said Kshs 1,800,000/- or at all. He further denies that he received the alleged purchase price from the Plaintiff either directly or through an agent.

18. According to the Plaintiff, in his testimony in chief, the Defendant had sold to him the house on 29th February 2012. He told the Court he paid the purchase price of Kshs 1,800,000/- in cash. The Plaintiff told the Court that they were initially with the Defendant at the time of making payment but that at the time the agreement was prepared and executed, the Defendant's agent one Margaret Wanjiru Masoretti is the one who was present.

19. During cross- examination, the Plaintiff further told the Court that he had paid the purchase price to the Defendant in the said Margaret Wanjiru Mosoretti's house. The Agreement was however executed later on in Messrs Muli & Ole Kina Advocates Offices between the Plaintiff and the said Margaret acting as the Defendant's agent.

20. In my view, in a transaction such as this where the Defendant was said to have acted through an attorney that he has disowned, it was crucial to give a proper chronology of events and adduce clear evidence of payment made either to the principal or the donee of the power of attorney.

21. While the Plaintiff claims to have paid the purchase price to the Defendant, in the said Margaret's Mosoretti's house, there was absolutely no acknowledgment of receipt of such sum of money from the Defendant. The Plaintiff did not tell the Court where the said house in which the payment was made is situated and on which particular date only telling the Court that they later on, on 29th February 2012 went with the said Margaret to the Advocates office where the Sale Agreement was prepared some days after the money exchanged hands.

22. As it were, the cardinal rule of evidence is that he who alleges must prove. This being the Plaintiff's case, the burden of proving that he paid the Defendant the sum of Kshs 1,800,000/- in cash lay with him. The said Margaret in whose house the money is said to have been paid was neither sued as such an agent nor was she called to corroborate the Plaintiff's testimony herein.

23. Indeed, a perusal of the Sale Agreement implies that the payment was made on 29th February 2012 when the Agreement was executed between the Plaintiff and the said Margaret Wanjiru Mossoretti described herein as the attorney of the Defendant. While the Agreement was shown to have been executed before Mrs Lucy Ole Kina Advocate, the said Advocate was also not called as a witness herein to clarify what took place before her.

24. In my view, in a situation such as this where the Defendant vehemently denied appointing the person who executed the Sale Agreement on his behalf as his duly appointed attorney, it was crucial that such person be called and or the Advocate who prepared the instrument be called to testify and confirm the instructions to prepare the power.

25. Otherwise, the only other way was for the Plaintiff to call a document examiner to come to Court and confirm the signatures and handwritings on the document. That was not done and this Court was then left to engage in guesswork as to whether the attorney had been so appointed by the Defendant.

26. In the premises, I was not persuaded that the Plaintiff had discharged the burden of proof. He has failed to prove his case on a balance of probabilities and this Court is left with no option but to dismiss his case.

27. The Defendant shall have the costs of this suit.

Dated, signed and delivered at Malindi this 29th day of January, 2021.

J.O. OLOLA

JUDGE