



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 106 OF 2015**

**SUSAN WANJIKU MUTHAMA.....PLAINTIFF**

**VERSUS**

**MALINDI ESTATES LIMITED.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint dated 19<sup>th</sup> June 2015 and filed herein on 2<sup>nd</sup> July 2015, Susan Wanjiku Muthama (the Plaintiff) prays for Judgment against Malindi Estates Limited (the Defendant) for:

*a) An order compelling the Defendant to perform and complete its part of the bargain vide a contract executed on 7/5/2007 (and in (the) event it fails to execute (the) registrable documents and/or transfer, the Deputy Registrar Malindi Law Courts be ordered to execute the same on behalf of the Defendants;*

*b) General damages; and*

*c) Costs.*

2. Those prayers arise from the Plaintiff's claim that on the said 7<sup>th</sup> day of May 2007, she executed a sale agreement with the Defendant wherein the Defendant agreed to sell to her a portion of LR No. 4883 (Original No. 1935/626) Malindi at a consideration of Kshs 650,000/-. The Plaintiff asserts that despite her payment of the agreed purchase price, the Defendant has to-date failed, refused and or neglected to execute an indenture prepared by the Plaintiff to enable the transfer of the parcel of land and as a result, the Plaintiff has suffered loss and damage.

3. But in its Statement of Defence dated 14<sup>th</sup> July 2015, the Defendant denies that the Plaintiff paid the agreed purchase price in full. The Defendant asserts that the Plaintiff only paid a deposit of Kshs 100,000/- on the date of execution and thereafter failed to pay the balance of the purchase price in 11 equal instalments as agreed or at all.

4. The Defendant asserts that it was an express term of the agreement that if the Plaintiff failed to meet any of the payments on the due dates, then the Defendant was at liberty to treat the transaction as cancelled and forfeit the amounts paid as liquidated damages. Accordingly, the Defendant asserts that the Plaintiff is not entitled to the orders sought and urges this Court to dismiss the Plaintiff's suit herein with costs.

**The Plaintiff's Case**

5. At the trial herein, the Plaintiff called two witness in support of her case.

6. PW1- Susan Wanjiku Muthama is the Plaintiff herself. She told the Court she is a businessman residing in Zanzibar. PW1 testified that the Defendant and herself executed a Sale Agreement in respect of land parcel No. 4883 (Original No. 1935/626) for which she paid the entire consideration of Kshs 650,000/-.

7. PW1 told the Court that it was an agreed term of the contract that upon payment of the entire purchase price, the Defendant was bound to deliver completion documents such as the original Deed Plan, photographs of the Defendant's directors, their Pin numbers and any other necessary documents. In compliance with that requirement, PW1 testified that the Defendant had supplied only some of the documents but had failed to supply the correct Deed Plan. PW1 told the Court that instead of being supplied with the Deed Plan for plot numbers 4883, they

had instead supplied one for plot number 4884 (Original No. 1935/627) Malindi.

8. PW1 further told the Court that despite her Advocates preparing an indenture for execution by the Defendant, they had declined to execute the same. As a result, PW1 told the Court she had suffered and continues to suffer loss and damage,

9. On cross-examination, PW1 insisted she had purchased Plot No. 4883 and not Plot No. 4884 Malindi. She denied that she had only paid the sum of Kshs 450,000/- to the Defendants stating that the receipts she had produced in Court were for the entire purchase price of Kshs 650,000/-.

10. PW2- Anne Nyambura Muthama is a business lady in Malindi and a younger sister to the Plaintiff. She told the Court she knew the Defendant's two directors very well as she had been introduced to them by the Plaintiff. PW2 testified that as her sister resided away in Zanzibar, the Plaintiff would regularly send her money for onward transmission to the Defendant. PW1 would normally pass the money to the Defendant's director by the name Dinkar Meghji Chhaya.

11. PW2 further told the Court that she was aware that the purchase price of Kshs 650,000/- had been fully paid by the Plaintiff to the Defendant. She told the Court the discrepancy in the receipts for Kshs 200,000/- was a result of an understanding between the Plaintiff and the Defendant as the Defendant desired to pay less in terms of stamp duty.

12. On cross-examination, PW2 told the Court she paid the money sent to her by the Plaintiff to a son of the director by the name Chhaya. There was a dispute of about Kshs 250,000 because the Defendants told her they had talked to the Plaintiff and that they had agreed they would not issue receipts for the said sum.

13. PW2 further told the Court she was not sure of the number of the parcel that was being purchased. She conceded that the receipts filed showed both the number 4883 and 4884.

### **The Defence Case**

14. The Defendant equally called two witnesses in support of their case in the course of the trial herein.

15. DW1- Meghji Velji Chhaya is a Director of the Defendant. He told the Court the Defendant executed a Sale Agreement with the Plaintiff on 7<sup>th</sup> May 2007 for the sale of a portion of LR No. 4883 (original No. 1935/626) Malindi. He further told the Court the parties later agreed that the contract would be in respect of a portion of LR No. 4884 (Original No. 1935/626) as indicated in the contract.

16. DW1 further told the Court that the purchase price was Kshs 650,000/- and that the Plaintiff paid a deposit of Kshs 100,000/-. The balance was to be paid in 11 equal monthly payments of Kshs 50,000/- each. DW1 testified that the Defendant only received the sum of Kshs 450,000/- from the Plaintiff with the last payment being on 28<sup>th</sup> February 2009 when the completion date ought to have been 15<sup>th</sup> May 2008.

17. DW1 testified that the Plaintiff was not available for sometime after executing the sale agreement but sometime in January 2013, they received a letter from the Plaintiff's Advocates asking them to send the transfer documents. The Defendant immediately dispatched the documents. DW1 told the Court that while Plot No. 4883 was mentioned, the Plaintiff got it changed to 4884 and that her Advocates confirmed it.

18. DW1 further told the Court that a period of two years then lapsed before the Plaintiff did the transfer. On enquiry, he was told the Plaintiff felt the then Advocates were charging very high fees for transfer and she had hence taken the documents elsewhere. Later on the Plaintiff went to his office and tried to force him to sign transfer documents which indicated that the price paid was Kshs 250,000/-. DW1 told the Court he refused to sign as the Valuation was false.

19. On cross-examination, DW1 conceded that prior to the time the Plaintiff filed this suit, they had not made any demand for payment of Kshs 200,000/- from the Plaintiff. He further conceded that even though the Agreement as drawn indicated they had received a deposit of Kshs 100,000/- on that date, they had not exhibited any payment receipt for that amount.

20. DW1 further told the Court he could not recall when they last paid rates to the local authority. While the agreement stated that the rates would be apportioned among themselves and the Plaintiff, he testified that the Plaintiff had called him and told him she would be paying the rates herself.

21. DW1 further conceded that even when they were asked for the documents of transfer, they had not raised the issue of a balance of Kshs 200,000/- being due to themselves. He further told the Court they had no formal agreement for the swapping of the two plots of land.

### **Analysis and Determination.**

22. I have perused and considered the pleadings filed herein, the oral testimonies and the evidence adduced at the trial. I have also perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

23. By a Sale Agreement dated 7<sup>th</sup> May 2007, the Defendant herein agreed to sell to the Plaintiff all that land surveyed as Portion No. 4883 (Original No. 1935/626) Malindi. Clause 3 of the said Agreement stipulated as follows: -

***“3. The Purchase Price is Kenya Shillings Six Hundred and Fifty Thousand (Kshs 650,000/-) of which Shillings One Hundred***

***Thousand (Kshs 100,000) are paid to the Vendor on the signing hereof as deposit and part payment of the Purchase Price, receipt whereof the Vendor hereby acknowledges. It is agreed that the purchaser will pay the remainder Shillings Five Hundred and Fifty Thousand (Kshs 550,000/-) in Eleven equal instalments of Kenya Shillings Fifty Thousand Kenya Shillings (50,000/-) each payable on 15<sup>th</sup> day of each month beginning the 15<sup>th</sup> day of June. In the event the purchaser fails to meet any of the payments on the due dates, then the Vendor will be at liberty to treat the transaction as cancelled and forfeit the amounts paid as liquidated damages. Time is the essence of the Agreement.”***

24. By her suit herein, the Plaintiff asserts that she paid the agreed purchase price to the Defendant but the Defendant has contrary to the Agreement refused to execute the necessary documents to have the property transferred to her name. Accordingly, the Plaintiff urges this Court to compel the defendant to complete its part of the bargain and to have the suit property transferred to herself.

25. The Defendant on the other hand accuses the Plaintiff of breaching the said Agreement by failing to pay the purchase price in full and within the timelines provided. The Defendant in this respect asserts that the Completion date as provided at Clause 4 of the Agreement was to be 15<sup>th</sup> May 2008. It is however its case that by 28<sup>th</sup> February 2009, -several months after the appointed completion date, the Plaintiff had only paid the sum of Kshs 450,000/- thereby leaving an outstanding balance on the purchase price of Kshs 200,000/-.

26. From the material placed before me however, the contention by the Defendant that it had only been paid Kshs 450,000/- did not appear to me to be candid. In support of that contention, the Defendant produced a bundle of duplicate receipts purporting to show the payments made by the Plaintiff. While a majority of the receipts were clearly printed Malindi Estates Ltd, Lamu Road Malindi, two of the receipts purporting to reflect the payment of the sum of Kshs 100,000/- have the printed words “Kijabe Street, Nairobi” clearly crossed and the words Lamu Road Malindi introduced in ink.

27. There was no explanation offered for those crossings. More significant however is the fact that while some of the receipts refer to the property being purchased as Plot No. 4883, others refer to Plot No. 4884 Malindi. According to the Defendants, they did after the Agreement was executed agree with the Plaintiff to swap the Plots being sold from Plot No. 4883 to Plot No. 4884, Malindi.

28. From the testimony of the witnesses herein, it was clear that the attempt by the Defendant to change the property being sold was the sticking point for the implementation of the Agreement. While the Defendant purported that there had been a mutual agreement to change the plot numbers, the Plaintiff denied this insisting that she had inspected the suit property prior to the purchase and that she would settle for nothing less.

29. In the absence of any written agreement, it was difficult for the Defendant to persuade this Court that the Agreement executed on 7<sup>th</sup> May 2007 could be varied by an oral agreement.

30. It was however evident that by their conduct the parties had agreed to vary certain aspects of the contract such as the completion date. I say so because while the contract in essence provided for the completion date to be 15<sup>th</sup> May 2008, the Defendant from the receipts produced received a payment of the sum of Kshs 100,000/- some four months later on 7<sup>th</sup> September 2008. Again several months down the line and almost a year after the payments were to have been made, the Defendant received a further payment of Kshs 100,000/- on 28<sup>th</sup> February 2009 from the Plaintiff.

31. By such conduct the Defendant in my view waived the requirement for completion to be on 15<sup>th</sup> May 2008. Indeed, if thereafter there was any further payment outstanding, one would have expected the Defendant to decline receipt of part payment and or to formally give notice to the Plaintiff that it would no longer proceed with the contract unless the balance of the purchase price was paid forthwith. No such thing however happened.

32. Questioned during cross-examination as to the exact payments received by themselves from the Plaintiff, the Defendant’s director Dinkar Meghji Chhaya (DW1), conceded that the receipts produced in Court for Kshs 450,000/- did not include the amount received on the date of execution of the Agreement on 7<sup>th</sup> May 2007 when they acknowledge to have received the sum of Kshs 100,000/ as deposit from the Plaintiff.

33. Nothing much appears to have happened between the parties between the last payment said to have been made on 28<sup>th</sup> February 2009 until sometime in January 2013. According to the Plaintiff however, it was during this time that the Defendant had declined to transfer the suit property insisting that the Plot being sold was Plot No. 4884 Malindi.

34. By a letter dated 30<sup>th</sup> January 2013, the Plaintiff’s Advocates Khaminwa & Khaminwa wrote to the Defendant as follows: -

**“RE: Susan Wanjiku Muthama Plot No. 4883**

***The above matter refers. We wrote to you on 25<sup>th</sup> January 2013 on the following lines.***

***We have been instructed by one Susan Wanjiku Muthama to prepare an Indenture on her behalf. We shall be grateful if you would arrange to let us have the documents in respect of the land she purchased from yourselves.***

***We had not put on Plot Number is 4883.”***

35. It is apparent from the face of that letter produced herein in evidence that when it was presented to the Defendants, they did not deny that the Plaintiffs had made a purchase from themselves save that according to them the property on purchase was Plot No. 4884. This is evident

from an undated endorsement on the letter by hand in which the writer addresses one Morris as follows: -

***“Dear Morris***

***The Plot No. is 4884***

***I will give you photocopy of Deed Plan.***

36. Subsequently by a letter dated 11<sup>th</sup> February 2013, Messrs Khaminwa & Khaminwa Advocates addressed the Defendant as follows: -

***“RE: Susan Wanjiku Muthama Plot No. 4884***

***Refer to our letter dated 30<sup>th</sup> January 2013. As indicated, we understand that the correct Plot Number is 4884. We shall be grateful if you will hand over to the bear (sic) of this letter William the documents in your possession.”***

37. In response to this letter, the Defendants by a letter dated 28<sup>th</sup> February 2012 addressed Khaminwa & Khaminwa Advocates as follows: -

***“RE: Portion No. 4884 Malindi & Susan Wanjiku Muthama***

***We refer to your letter of 11<sup>th</sup> February 2013 regarding the above purchaser who has instructed you to act for her in the above matter. We are enclosing the following for the above-mentioned plot.***

- 1. Original Deed Plan No. 158606***
- 2. Municipal rates Clearance Certificate No. 0374.***
- 3. Photographs (total 6) 3 for each Director of the Company.***
- 4. Company Pin No. P00618637D***
- 5. M.DM Chhaya- Director Passport No.-***
- 6. Mr. M.V. Chhaya –Director Passport No.-***
- 7. Copy of our precedent of Indenture***

***Please get the documents registered at the Lands Office and send a copy of the registered conveyance to us for our future reference.”***

38. Arising from the foregoing, it was evident that the Defendant was prepared to transfer Plot No. 4884 Malindi to the Plaintiff. When it came to this plot, the Defendants did not claim that there was any balance of payment and it was clear to me that the claim for the sum of Kshs 200,000- was an afterthought aimed at frustrating the Plaintiff to accept a separate piece of land from that which was the subject of the sale Agreement executed on 7<sup>th</sup> May 2007.

39. While the Defendants told the Court that the agreement to change the Parcel of land was mutual and that it had been acknowledged and endorsed by the Plaintiffs Advocates in their letter dated 11<sup>th</sup> February 2013, above-cited, I was not persuaded that the letter was written after consultation with the Plaintiff who resided in Zanzibar and or that it amounted to a confirmation that the Sale Agreement had been so varied. That letter to me amounted to nothing but the good intention of an Advocate trying to expedite his client’s case. As it were the Plaintiff vehemently denied that she agreed to take an alternative Plot to that mentioned in their Agreement.

40. In the premises, I am persuaded that the Defendant received the full purchase price from the Plaintiff for Plot No. 4883 Malindi. I am also persuaded that the Defendant have refused to move the Agreement to completion by failing to provide the correct Deed Plan for Plot No. 4883 to the Plaintiff, and instead insisting on giving the Plaintiff a Deed Plan for a parcel of land she did not purchase.

41. As a result of this delay I am persuaded that the Plaintiff has suffered loss and damage. Unfortunately, there was no proof of special damages and this being a claim for breach of contract, I did not find any basis for an award of general damages.

42. In the result, I hereby enter Judgment for the Plaintiff as prayed at Paragraph ‘a’ of the Plaintiff.

43. The Plaintiff shall also have the costs of this suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF MARCH, 2021.**

**J.O. OLOLA**

JUDGE