



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 154 OF 2017

ANTOLELLA GRIMALDI.....PLAINTIFF

VERSUS

ITAKEY INVESTMENTS LIMITED.....1ST DEFENDANT

GIMALOWI COMPANY LIMITED.....2ND DEFENDANT

RULING

1. By an application dated 8th April 2019, Itakey Investments Ltd (the 1st Defendant) prays for orders:-

- a) That the Plaintiff's suit be struck out/dismissed as it discloses no cause of action against the 1st Defendant.*
- b) That the suit is fatally defective, scandalous, frivolous and vexatious as against the 1st Defendant and ought to be dismissed.*
- c) That the Plaintiff's suit is an abuse of the process of the Court.*
- d) That the Plaintiff do pay the costs of this application to the 1st Defendant.*

2. The application which is supported by an affidavit sworn by the 1st Defendant's director Antonella Braccini is premised on the grounds that:-

- a) The Plaintiff lacks the capacity to sue the 1st Defendant and the Plaintiff as drawn lacks merit; and*
- b) The Plaintiff has no claim of right or interest in the 1st Defendant's property being Plot Nos. Chembe/Kibabamshe/549 and 599.*

3. By Grounds of Opposition dated 17th September 2019 Antonella Grimaldi (the Plaintiff) is opposed to the application on the grounds inter alia:-

- i) The application is totally unmerited, frivolous and vexatious since its agenda is to delay justice for the Plaintiff herein.*
- ii) The Plaintiff entered into a Sale Agreement with the 2nd Defendant for the purchase of three residential villas known as Maisha Village situated on LR No. Chembe/Kibabamshe/549 and 599.*
- iii) The 1st Defendant entered into an agreement on 29th November 2013 for the purchase of the 2nd Defendant's interests in the said properties.*
- iv) The 1st Defendant by the said purchase took over the 2nd Defendant's obligations to the purchases of the villas and cannot be allowed to turn around and deny the existence of such relationship between it and the Plaintiff.*

4. I have perused and considered the application and the response thereto. I have equally taken into account the submissions and authorities placed before me by Mr. Chebukaka, Learned Counsel for the 1st Defendant/Applicant.

5. In her Complaint filed herein dated 14th July 2017, the Plaintiff prays for a declaration that the Defendants do specifically perform their part of the bargain by transferring residential villas Nos. 11BO, 15B and 16C to the Plaintiff or in the alternative a refund of the full purchase price thereof being Euros 159,600/-. She also prays for interest and general damages for inconvenience and loss.

6. Those prayers arise from the Plaintiff's contention that by various agreements between herself and the 2nd Defendant, she purchased the said residential villas situated on LR No. Chembe/Kibabamshe/549 and 599 and that as at the time of filing the suit, she had paid the sum of Euros 159,600/- towards the purchase thereof. It is her case that to-date, there has been no transfer of the villas nor a refund of the purchase price and hence this suit.

7. In its Statement of Defence dated 13th June 2018, the 1st Defendant asserts that it was only incorporated on 25th October 2013 and hence it had no knowledge of the particulars of the agreement said to have been executed between the Plaintiff and the 2nd Defendant.

8. The 1st Defendant further avers that it only purchased the properties from Kenya Commercial Bank Ltd when they acted in exercise of their Statutory Power of Sale in respect of monies owned by the 2nd Defendant and sold the suit properties to the 1st Defendant.

9. From a perusal of the material placed before me, it is apparent that when the said Kenya Commercial Bank advertised the suit properties for sale, the two Defendants herein filed an Originating Summons in ***Mombasa HCCC No. 135 of 2013; Gimalowi Company Ltd and Itahey Investments Ltd –vs- Kenya Commercial Bank Ltd.***

10. By a consent settling the dispute recorded in that matter before the Honourable Justice M. Kasango on 30th April 2014, the parties agreed inter alia that the 2nd Defendant herein would be allowed by the Bank to sell the Charged property by way of Private Contract to the 1st Defendant who was the 2nd Plaintiff in the Originating Summons.

11. Clauses 11 and 12 of the consent formally recognized an Agreement executed between the 1st and 2nd Defendants herein on 29th November 2013 in regard to the suit properties. Clause 12 in particular provided that the consent was entered in further recognition of the Agreement the 1st Plaintiff (the 2nd Defendant herein) had with the purchasers of the Villas that were under construction and it was thereby agreed that the 2nd Plaintiff (the 1st Defendant/Applicant) shall make available to them the Villas they had purchased from the 2nd Defendant herein.

12. Arising from the foregoing, I am in agreement with the Plaintiff in the matter before me that the 1st Defendant/Applicant herein took over some of the obligations of the 2nd Defendant herein and it cannot turn around now and deny the existence of a relationship between itself and the Plaintiff.

13. The 1st Defendant's application is as a result bereft of merit. It is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE