



REPUBLIC OF KENYA



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**Maria Zaccagnino v Wanjiru Yusuf Abdalla (Environment & Land Case
227 of 2017) [2020] KEELC 2875 (KLR) (6 May 2020) (Judgment)**

Maria Zaccagnino v Wanjiru Yusuf Abdalla [2020] eKLR

Neutral citation: [2020] KEELC 2875 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 227 OF 2017

JO OLOLA, J

MAY 6, 2020

BETWEEN

MARIA ZACCAGNINO PLAINTIFF

AND

WANJIRU YUSUF ABDALLA DEFENDANT

JUDGMENT

Background

1. By her Complaint dated and filed herein on 21st November 2017, Maria Zaccagnino (the Plaintiff) prays for Judgment against Wanjiru Yusuf Abdalla (the Defendant) for:-
 - a) An order of specific performance directing the Defendant to at her own cost cause to be subdivided the suit property known as Plot No. 728(Original No. 71/18) Watamu.
 - b) An order of specific performance directed at the Defendant compelling her to sign all documents and do all acts for the purposes of completing the sale of a half share of all that property known as Plot No. 728 (Original No. 71/18) Watamu.
 - c) An order that the Defendant do give vacant possession of the Plaintiff's half share of the suit property
 - d) Damages for breach of contract;
 - e) Costs of this suit and interest.
2. The Plaintiff's prayers arise from her contention that on 16th November 2007, she entered into a sale agreement with the Defendant who agreed to sell to her half (1/2) share of the suit property at a



consideration of Euros 19,000/-. Despite payment of the purchased price in full, the Plaintiff avers that the Defendant remained in actual possession and did not proceed with the transaction.

3. The Plaintiff further asserts that by a further agreement dated 30th August 2016, they agreed that the Defendant would pay unto her Euros 23,000/- on or before 31st January 2017, upon which the earlier agreement dated 16th November 2007 would stand rescinded. In default the suit property was to be divided into two portions as per the initial agreement. The Defendant has however failed, neglected and/or refused to pay the sum agreed and/or to undertake sub-division of the suit property.
4. But in her Written Statement of Defence dated and filed herein on 11th May 2018, the Defendant vehemently denies that she entered into the alleged or any agreements with the Plaintiff for the sale of the suit property. It is therefore her case that the Plaintiff is not entitled to any of the orders sought in the Plaintiff.

The Plaintiff's Case

5. The Plaintiff (PW1) testified as the sole witness in support of her case. She told the Court that the Defendant is the proprietor of the suit property measuring 0.1000 Ha. On 16th November 2007, she entered into an agreement with the Defendant for the purchase of half a share of the property for Euros 19,000/- which purchase price she paid in full. The Defendant did not however proceed with the transaction.
6. PW1 told the Court that later on, the Defendant approached her and sought to buy back the half share she had earlier sold. PW1 agreed and by another Agreement executed on 30th August 2016, it was agreed that the Defendant would pay Euros 23,000 to PW1 on or before 31st January 2017 failure to which the earlier Agreement dated 16th November 2007 would be enforced.
7. PW1 testified that in breach of the Agreements, the Defendant neither paid the agreed sum nor undertook the sub-division of the property as agreed.

The Defence Case

8. The Defendant (DW1) equally testified as the sole witness in her case. She told the Court that she is the registered proprietor of the suit property and that she resides thereon. DW1 admitted that she executed the Agreement dated 16th November 2007 with the Plaintiff and that she was paid Euros 18,000/- while the balance of Euros 1,000/- was to be paid to her upon sub-division of the property.
9. She told the Court that after signing the Agreement, the Plaintiff, her husband Franco and a friend known as Shani took away the Original documents and disappeared. DW1 told the Court that after one (1) year, the said Shani took back the title to her and told her to keep it until the time when the Plaintiff would be ready for the transaction. DW1 thereafter never heard from them.
10. DW1 testified that in 2015, she started looking for the Plaintiff. One day DW1 met the Plaintiff's husband but he told her that he had divorced the Plaintiff and that they were no longer interested in the suit property. In August 2016, the Plaintiff went to DW1 and asked her to refund the Euros 18,000/-. DW1 told the Court that at the time, she had a major surgery and was weak and scared and that is why she signed the Agreement to refund the money. She told the Court that she is no longer interested in sub-dividing the suit property.

Analysis and Determination

11. I have perused and considered the pleadings filed by the parties, the oral testimonies of the witnesses and the evidence adduced at the trial. I have equally perused and considered the submissions and



authorities placed before me by Mr. Ole Kina, Learned Counsel for the Plaintiff and Mr. Gicharu, Learned Counsel for the Defendant.

12. It was not in dispute that on 16th November 2007, the Plaintiff and the Defendant entered into an Agreement for the sale of a half (1/2) share of the suit property at an agreed consideration of Euros 19,000/-. However, while the Plaintiff contends that she paid the entire purchase price, the Defendant testified that she only received a sum of Euros 18,000/- and that the balance of Euros 1,000/- was to be paid upon completion of the sub-division of the suit property.
13. That initial transaction did not get concluded and either of the parties blamed each other for the failure to conclude the same. Be that as it may, by a Further Agreement dated 30th August 2016, the parties agreed to rescind the first Agreement on condition that the Defendant would buy back the half-share of the suit property she had sold to the Plaintiff at a consideration of Euros 23,000/-.
14. It was a term of two Further Agreements that the consideration was to be paid to the Plaintiff on or before 31st January 2017 failure to which the Defendant was to cause the suit property to be sub-divided into two portions and to execute all documents necessary to conclude the initial transaction as per the Agreement dated 16th November 2007.
15. According to the Defendant, when she executed the Further Agreement, she had undergone a major surgery and was weak and scared. It was therefore her case that she only understood the Further Agreement to require her to refund the Plaintiff the Euros 18,000/- which she had paid earlier.
16. In cross-examination however, she admitted that she had executed both Agreements and that she had not performed or concluded either of them. Paragraphs 3 and 4 of the Further Agreement dated 30th August 2016 provided as follows:-

“3. In default of payment, the Vendor shall cause at her own cost the land known as Plot No. 728 (Original No. 71/18) Watamu to be divided into two portions of land and the Vendor shall execute all necessary documents and take all necessary steps to conclude the sale.

4. The parties agree that (the) Purchaser is entitled to the remedy of specific performance of this agreement and of the agreement dated 16th November 2007.”

17. As it were, the allegation that the Defendant was weak from a surgery or illness and was scared at the time she executed the Further Agreement on 30th August 2016 was not supported by any evidence. There was no claim in her pleadings and/or in her oral testimony before the Court that she executed the document under duress. She has been holding the Plaintiff's money for the past 13 years and she did not give any reason why she has now changed her mind and is no longer interested in sub-dividing the property as they agreed on two occasions.
18. In addition to her claim for specific performance, the Plaintiff has also sought general damages for breach of contract. As was stated by the Court of Appeal in *Caltex Oil (Kenya) Ltd -vs- Rono Ltd* (2016) eKLR:-

“As a general rule, a purchaser is entitled to recover damages at large where a seller refuses to implement an agreement for any reason other than a defective title and compensation contemplated by the contract or which could reasonably have been in contemplation of the parties as likely to be wasted if the contract is broken.”



19. In *Ritho –vs- Kariithi & Another* (1988) KLR 237, the same Court held as follows:-

“In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for specific performance of any covenant, contract or agreement, it shall be lawful for the same Court, if it thinks fit, to award damages to the party injured, either in addition to or in the substitution for an injunction or specific performance and such damages may be assessed in such manner as the Court shall direct.”

20. In the circumstances before me, the Defendant has not shown why she would like to avoid an otherwise valid agreement. Bearing in mind the period she has held the purchase price from the Plaintiff, I think the Plaintiff is entitled to an amount of general damages which I hereby assess at Kshs 500,000/=.

21. The upshot is that I am persuaded that the Plaintiff has proved his case to the required standard and Judgment is accordingly entered for her as against the Defendant as follows:-

- a) An order of specific performance directing the 1st Defendant to, at her own cost cause to be sub-divided the suit property known as Plot No. 728 (Original No. 71/18) Watamu.
- b) An order of specific performance is hereby issued directed at the Defendant compelling her to sign all documents and do all acts for the purposes of completing the sale of a half share of all that property known as Plot N. 728 (Original No. 71/18) Watamu.
- c) An order that the Defendant do give vacant possession of the Plaintiff's half share of the suit property.
- d) Damages assessed at Kshs 500,000/- for breach of contract.
- e) Costs in this suit and interest until payment in full.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF MAY, 2020.

J.O. OLOLA

JUDGE

