



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 377 OF 2016

MARIALUISE FRIEDERIKE ESTERL.....PLAINTIFF

VERSUS

JOHN ERICK1ST DEFENDANT

GERARDINE MUMBUA MUSYOKA..2ND DEFENDANT

RULING

1. This ruling is in respect to the notice of motion dated 16th November 2020 by the plaintiff/applicant seeking for orders that:

a. Spent

b. Spent

c. **The defendants by themselves, their agents or otherwise whomsoever acting under their instructions be and are hereby restrained from selling/transferring/dealing in any way in a manner to cause the change in registration of ownership from the current owner pending the hearing and determination of this application and conclusion of the suit herein.**

d. **The defendants by themselves, their agents and/or servants or otherwise whomsoever acting under their instructions be ordered to pay the balance of the purchase price plus mesne profits, interest and costs for breaching the agreement entered into between the parties before dealing otherwise with the said parcel of land.**

e. **That in the alternative the defendants by themselves, their agents and/or servants or otherwise whosoever acting under their instructions be ordered to revert to the plaintiff/applicant two parcels of land KWALE/GALU KINONDO/1287 and 1288 for not having been paid for and further do pay for in compensation for the loss and damage arising out of breach.**

f. **That the costs of this application be provided for.**

2. The application is premised on the grounds on the face of the application and is supported by the affidavit of MARIALUISE FRIEDERIKE ESTERL, the applicant sworn on 16th November 2020. The applicant avers that she has been the rightful owner of the parcels of land known as KWALE/GALU KINONDO/1283, 1284, 1285, 1286, 1287 and 1288. That there existed an agreement between the plaintiff and the defendants which agreement has been an issue before the court. That believing the transaction would be completed, the applicant released the original title documents to the defendants through an advocate who was meant to be acting for the applicant. The applicant avers that there has been an issue on payment, and whilst the case was before court, the applicant and the defendant entered into a consent on the said payment in which the last installment of Kshs.20,000,000.00 was to be paid within forty five (45) days from 15th October, 2018. That the defendants have never paid the said money prompting the applicant to instruct another advocate to now prosecute the matter on the applicant's behalf. That the matter has been in court on several occasions. The applicant contends that the defendants breached the consent entered and is no longer bound by the same since it was time bound. The applicant states that save for two plots, KWALE/KINONDO/1287 and 1288, in which she is staying in, the other parcels of land had already been transferred to the defendants who have been utilizing the hotel part for several years. The applicant is apprehensive that unless this matter is tried urgently, the defendants are intend of disposing off the said parcels of land without completing the purchase price and it will be difficult for the applicant to claim it from a third party. The applicant states that strangers have visited the parcels of land with surveyors claiming that the land is on sale. The applicant wants the court to grant the orders sought herein in order to preserve the subject matter of the suit, adding that the applicant stands to suffer irreparable damage if the said orders are not granted.

3. The application is opposed by the defendants vide an affidavit sworn by John Eric Musyoka on 12th February, 2021. It is the defendants

contention that the application and the orders sought herein are not tenable and that the application is frivolous and a total waste of the court's time. That the applicant on her own volition agreed that upon receipt of Kshs.10,000,000.00 as the balance of the purchase price, she was to move out of the suit property whose title had been transferred to the defendants, but remained in the occupation of the plaintiff as a sign of good will from the defendants. That the plaintiff of her own accord has not only acknowledged payment in full but has further stated in writing that she had no further claim on the property that has been the subject of this suit. The deponent has stated that payment to the plaintiff was effected by way of RTGS from the 1st defendant's account in Stanbic Bank Ltd to the plaintiff's Account at Absa Bank Diani Branch in Ukunda. An application for funds transfer form marked JNA-ZA has been annexed. It is the defendants contention that the application has been overtaken by events in that the plaintiff has been paid in full and has acknowledged receipt of such payment. Copies of the acknowledgement receipt of such payment have also been annexed.

4. The application herein was canvassed by way of written submissions. The plaintiff/applicant filed her submissions on 25th May, 2021 while the defendants/respondents filed theirs on the same date.

5. This court has considered the application and the rival submissions. The issue before this court for determination is whether the applicant has met the threshold to be granted the orders sought. From the pleadings, it is apparent that the plaintiff entered into an agreement to sell some parcels of land to the defendants. It is the plaintiff's contention that the defendants did not perform their obligation by failing to pay the purchases price in full as agreed, thereby leaving some balance that is the subject of the instant suit. The court record indicates that whilst the matter was before court, the parties entered into a consent in which the defendants were to pay the balance of Kshs.15,000,000/= within 30 days from 28th February, 2019 in default, the parties were to fix the matter for hearing. Whereas the plaintiff alleges that the defendants failed to comply with the said consent, the defendants on their part contend that the plaintiff has been paid in full and therefore the application has been overtaken by events. The defendants have in their affidavit in reply exhibited what they term as acknowledgment receipt of payment made to the plaintiff, including an application for funds transfer. The plaintiff has not challenged the said payment as no supplementary affidavit or further affidavit has been filed. Moreover, in the consent entered into by the parties in court on 28th February, 2019, it was clear that in case of default, the parties were to fix a hearing date for the case. In my view, the plaintiff should have invoked the said default clause and fix the matter for hearing instead of making the present application. Having carefully considered the material before me, I am not satisfied that the applicant has made out a clear case to warrant the grant of the orders sought.

6. I find that the plaintiff has not established a prima facie case with a probability of success. Further, the plaintiff would not suffer irreparable loss as the dispute is over an outstanding balance, the sum of which can be ascertained. I therefore take the view that any damage suffered by the plaintiff, if any, can be quantified in damages.

7. Arising from the above reasons, I find that the Notice of Motion dated 16th November 2020 lacks merit and the same is hereby dismissed with costs to the defendants.

8. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE