



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 82 OF 2014

SHARIFF MOHAMED OMAR.....1ST PLAINTIFF

BOGANVILLEA COTTAGES LIMITED.....2ND PLAINTIFF

VERSUS

ORNELLA BONTEMPI LUIGI [Defending in the capacity of legal representative of the estate of

BONTEMPI LUIGI [Deceased].....DEFENDANT

JUDGEMENT

Background

1. By the Plaint dated 9th April 2014 as amended on 6th January 2020, Shariff Mohamed A. Omar and Boganvillea Cottages Ltd pray for:
 - a) *Spent;*
 - b) *A declaration that the suit property has been illegally transferred to the Defendant and that any dealings on the property subsequent to the said transfer are also null and void and of no effect;*
 - c) *An order directed to the Registrar of Lands*
 - i) *To revoke the indenture dated 15/8/1994;*
 - ii) *To cancel registration of the same dated 14/5/1997; and*
 - iii) *To issue a new title in the name of the 2nd Plaintiff company – Boganville Cottages Ltd.*
 - d) *General damages [to] the 2nd Plaintiff for loss of user;*
 - e) *Costs of and incidental to this suit and interest; and*
 - f) *Any other further relief that this Honourable Court may deem fit to grant.*
2. Those prayers arise from the Plaintiff's contention that at all times material to this suit, the 1st Plaintiff and the initial Defendant herein – Bontempi Luigi were shareholders in the 2nd Plaintiff's company, holding shares in the ratio of 150 shares for the 1st Plaintiff, 25 shares held by the Defendant and another 25 shares held by one Bontempi Claudio.
3. The Plaintiffs aver that on or about 1991, the 1st Plaintiff and the Defendant being directors of the 2nd Plaintiff did resolve to purchase the suit property being sub-division No. 5650, Malindi as an asset for the 2nd Plaintiff company. Pursuant to the said resolution, the 1st Plaintiff and the Defendant entered into a sale agreement date 26th December 1991 towards the purchase of the said property.
4. The Plaintiffs assert that despite making payments for the said property the same was transferred and was solely registered in the sole name of the Defendant on 14th May 1997, thereby occasioning loss and damage to the Plaintiffs.

5. But in a terse Statement of Defence dated and filed herein on 21st May 2014, the said Bontempi Luigi [the Defendant] urges this court to dismiss the Plaintiff's suit on the grounds stated at paragraph 3 and 4 thereof as follows:

“3. The Defendant protests to reply to paragraphs 4,5,6,7,8,9,10,11,12,13,14,15,16,17,18 and 19 of the Plaintiff for [the] reason that this matter is res judicata Mombasa High Court Civil Suit No. 255 of 1995; Shariff Mohamed & Bongaville Cottages Ltd – vs – Bontempi

4. The jurisdiction of this Honourable Court to hear and determine this matter is denied on grounds of res judicata.”

6. Subsequently and by an application dated 1st December 2014 but filed herein on 19th January 2015, Messrs Safe Haven Ltd filed an application to be enjoined in the suit as the 2nd Defendant and to be allowed to file a Counterclaim against the 1st Defendant. That application was allowed on 26th February 2015.

7. Accordingly on 13th March 2015, the 2nd Defendant filed its Defence and Counterclaim herein seeking various orders against the 1st Defendant. However by another application dated 13th December 2016, the 2nd Defendant sought leave to withdraw both its Defence and Counterclaim as filed against the 1st Defendant. That application was allowed by the consent of the parties on 7th February 2017 and the matter henceforth proceeded as originally filed between the Plaintiffs and the sole Defendant herein.

8. However, the Defendant – Bontempi Luigi passed away on 17th July 2018. Following an application made herein dated 10th July 2019, his daughter and legal representative Ornella Bontempi Luigi was enjoined and substituted in his stead.

The Plaintiff's Case

9. At the trial herein the Plaintiffs called one witness who testified in support of their case. The Defendants neither called any oral testimony nor produced any documents at the trial.

10. PW1- Shariff Mohamed Omar is the 1st Plaintiff and a director of the 2nd Plaintiff herein. He told the court that together with Bontempi Luigi they incorporated the 2nd Plaintiff company on 31st December 1986. They began the company with himself holding 5 shares while Bontempi Luigi and his son Claudio Bontempi each held one share. The shares were later increased with PW1 holding 150 while the other two shareholders held 25 shares each.

11. PW1 told the court that sometime in 1991 Bontempi Luigi and himself decided to purchase the parcel of land known as sub-division No. 5650, Malindi through the 2nd Plaintiff company. The two then signed a sale agreement in which PW1 placed a deposit for the purchase of the property in the sum of Ksh. 300,000/=

12. PW1 testified that the balance of the purchase price was to be paid in the year 1992 when the Deed Plan for the property was to be issued. The remaining funds for the purchase were to come from the 2nd Plaintiff Company's account. PW1 told the court that unknown to him, Bontempi Luigi went ahead to have the property registered in his sole name on 15th August 1994. It was his care that the transfer and registration was illegally done and hence the orders sought herein.

13. On cross-examination, PW1 told the court that they had started the 2nd Plaintiff company with the Defendant and his son with the intention to run a hotel business. He was later told his partner had sold the land. However, when PW1 did a search, he discovered that the land was registered in the Defendant's name. They were to buy the land at Ksh. 1,200,000/= and the balance of Ksh. 900,000/= was paid by the 2nd Plaintiff.

14. PW1 however concede that he had not produced anything to show that they were buying the land for the 2nd Plaintiff and/or that the 2nd Plaintiff had paid the balance of Ksh. 900,000/=.

Analysis and Determination

15. I have carefully considered the pleadings filed herein, the testimonies of the Plaintiffs sole witness and the evidence adduced at the trial. I have equally considered the submissions and authorities placed before me by Mr. Matheka, Learned Counsel for the Plaintiff. The Defendant neither testified nor filed closing submissions herein.

16. The Plaintiffs have sought a declaration that the suit property, Land Parcel No. 5650 Malindi was illegally transferred to the Defendant and that any dealings on the property subsequent to the said transfer are also null and void and of no effect. The Plaintiffs further seeks to revoke the indenture dated 15th August 1994 through which the Defendant was registered as the proprietor of the property. In addition, they want the Registrar of Lands to cancel the registration and issue a new title in the name of the 2nd Plaintiff. The Plaintiffs also pray for general damages for loss of user of the suit property.

17. In support of those prayers, the 1st Plaintiff who was the sole witness herein told the court that he and the Defendant had on 31st December 1986 incorporated the 2nd Plaintiff company – Boganvillea Cottages Limited. Thereafter in 1991, the 1st Plaintiff and the Defendant resolved to purchase the suit property as an asset of the 2nd Plaintiff company.

18. In this respect PW1 told the court they did execute a sale agreement on 26th December 1991 during which he made a personal payment of

Ksh. 300,000/=. The property was being bought at Ksh. 1.2 million and PW1 told the court the balance of the purchase price was to be paid from the 2nd Plaintiff's accounts once the Deed Plan was ready.

19. The 1st Plaintiff told the court that it was only much later that he came to hear that the Defendant had sold the land. When he carried out a search at the Lands Registry, he was surprised to find that the land had been registered in the sole name of the Defendant on 14th May 1997 thereby depriving the Plaintiffs of their interests thereon as the land was still registered in the Defendant's name, PW1 told the court he proceeded to register a caution thereon. He however told the court that the caution was later removed in unclear circumstances thereby necessitating the institution of this suit.

20. In his statement of Defence filed herein on 21st May 2014, the Defendant generally denied the Plaintiffs averments and asserted that the court had no jurisdiction to deal with the matter herein as the same was *res judicata*.

21. Indeed, prior to the filing of the said Statement of Defence which was apparently filed in protest, the Defendant had a week earlier on 13th May 2014 filed a Notice of Preliminary Objection wherein he objected to the suit on the grounds that it was *res judicata* **Mombasa HCCC No. 255 of 1995; Shariff Mohamed & Bongavillea Cottages Ltd –vs- Bontempi Luigi** and further that being a derivative action, the same could only be commenced with the leave of the court.

22. The said Preliminary Objection was the subject of a Ruling delivered herein on 31st October 2014 wherein the Honourable Justice Oscar Angote then seized of the matter dismissed the same and did find that the said Mombasa HCCC No. 255 of 1995 had nothing to do with the suit property and hence the suit herein was not *res judicata* as contended by the Defendant.

23. In his testimony herein, the 1st Plaintiff produced a copy of the Sale Agreement dated 26th December 1991. A perusal thereof reveals that the suit property was indeed bought jointly by the Defendant and the 1st Plaintiff from one Salim Bakshwein at a consideration of Ksh, 1,200,000/=. It further reveals that a deposit of Ksh. 300,000/= was received on execution of the Agreement by the vendor and that the balance of the purchase price was to be paid **“immediately the deed plan is issued in 1992 or within [a] reasonable time otherwise the deal would stand canceled.”**

24. In addition to the sale agreement, the 1st Plaintiff has produced a counterfoil copy of the cheque paid for Ksh. 300,000/= which he told the court was his personal contribution to the purchase. It was his position that the balance of the purchase price came from the 2nd Plaintiff's account and that the suit property should have been registered in the name of the 2nd Plaintiff.

25. The Plaintiffs have also produced as exhibits 3 an Indenture in respect of the suit property in the sole name of the Defendant entered into between the Defendant and the vendor – Salim Bakshwein on 11th August 1994. That Indenture, registered three years later on 14th May 1997 despite the presence of a caveat by the 1st Plaintiff dated 24th June 1994 has all the details of the sale agreement executed on 26th December 1991 except that neither the name of the 1st Plaintiff nor that of the 2nd Plaintiff have been captured thereon.

26. That Indenture shows the Defendant as the sole transferee and one would have expected the Defendant to give an explanation as to what happened after they jointly executed the sale agreement with the 1st Plaintiff on 26th December 1991. As it were, the Defendant has neither produced any documents herein nor explained if he did enter into another separate agreement with the vendor to warrant the transfer of the property to his sole name. Indeed, the Defendant does not even purport to have paid the balance of the purchase price.

27. While it is true that the suit property is registered in his name, it was incumbent upon him in the circumstances such as herein to explain how the registration came to be. That was indeed the position taken by the Court of Appeal in ***Munyu Maina –vs- Hiram Gathiha Maina, Civil Appeal No. 239 of 2009 [2013] eKLR*** where the Court held thus:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would be noted in the register.” [emphasis added]

28. Arising from the foregoing and in the absence of any rebuttal by the Defendant, the Plaintiffs case must succeed on a balance of probabilities. I am persuaded that it has been so proved and that there is merit in allowing the same.

29. I note however that the Plaintiffs had also sought general damages to loss of user. Such damages are special damages that must strictly be proved. No attempt was made to prove the same before me and I decline to award any figures therefor.

30. Accordingly, Judgement is hereby entered for the Plaintiffs as against the Defendant as follows:

i) ***A declaration is hereby issued that the suit property has been illegally transferred to the Defendant and that any dealings on the property subsequent to the said transfer are also null and void and of no effect.***

ii) ***An order is hereby issued directed to the Registrar of Lands***

a) To revoke the indenture dated 15th August 1994;

b) To cancel the registration of the indenture dated 14th May 1997; and

c) *To issue a new title in the name of the 2nd Plaintiff company – Bouganvillea Cottages Ltd.*

iii) *The Plaintiffs shall have the costs of this suit.*

Dated, signed and delivered at Malindi this 31st day of August, 2021.

J.O. OLOLA

JUDGE