



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL SUIT NO. 206 OF 2016

LICINUS INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

MAURIZIO DALPIAZ.....DEFENDANT

JUDGMENT

BACKGROUND

1. This suit was initially filed at the High Court at Mombasa as Civil Suit No. 60 of 2008.

2. In its Complaint dated 18th March 2008, Licinus Investment Limited (the Plaintiff) prays for the following orders:-

a) A declaration that the Agreements dated 24th November 2004 and 28th September 2006 are null and void;

b) A declaration that the Defendant acquired possession of part of the suit premises unlawfully and is therefore trespassing into the suit premises;

c) A declaration that the continued possession of the suit premises by the Defendant without the prior written consent of the Plaintiff and the Commissioner of Lands is illegal and unlawful;

d) Vacant possession of the suit premises in good order and condition and in the condition in which the suit premises were when the Defendant acquired possession thereof;

e) An order of injunction restraining the Defendant by himself, his employees, servants and/or agents from digging any well or continuing to dig any well and from altering the structure of the house, or any of the developments standing on the suit property or altering any fence and from building any additional structures thereon or leasing or pledging or trespassing or remaining upon any part of the suit property;

f) Mesne profits;

g) General damages; and

h) Costs.

3. Those Prayers arise from the Plaintiff's contention that it is the registered proprietor of LR No. 5054/275 Kilifi. The Plaintiff asserts that under the conditions of the Grant, the suit property cannot be sub-divided, sold, charged, transferred, leased or otherwise dealt with without the consent in writing of the Commissioner of Lands.

4. By the two agreements dated 24th November 2004 and 28th September 2006, a director of the Plaintiff agreed to sell Portion 'A' of the suit premises to the Defendant but at the said time the said Portion 'A' did not exist. The Plaintiff therefor denies executing the said agreements as it did not sell or receive any consideration from the Defendants.

5. The Plaintiff accuses the Defendant of moving into the suit premises and proceeding to dig a well thereon damaging the garden, altering the structure of the premises and thereby interfering with the beauty and general appeal of the premises. The Plaintiff is now apprehensive that the Defendant's activities may lead to the forfeiture of the Grant and hence the institution of this suit.

6. But by an Amended Statement of Defence and Counterclaim dated and filed herein on 23rd March 2009, Maurizio Dalpiaz (the Defendant) refutes the position taken by the Plaintiff and asserts that the said Portion 'A' existed on the suit premises and that it was clearly marked on a plan annexed to the Agreement dated 24th November 2004.

7. It is further the Defendant's position that the Agreements dated 24th November 2004 and 28th September 2006 were lawfully executed by the Plaintiff through its director one Pietro Cannobio and that the same are valid and binding.

8. By way of the Counterclaim against the Plaintiff and its director the said Pietro Cannobio, the Defendant avers that by the Sale Agreement dated 24th November 2004 the Plaintiff and its said director agreed to sell to him the said Portion 'A' of the suit property for the consideration of Kshs 10,000,000/- out of which sum the Defendant paid a deposit of Kshs 4,000,000/-.

9. The Defendant avers that by the Sale Agreement dated 28th September 2006 the Plaintiff and its director further agreed to sell to him the said Portion 'A' of the suit property upon payment of the balance of the purchase price of Kshs 6,000,000/-.

10. It is the Defendant's case that despite paying the full purchase price and fully complying with the Agreements, the Plaintiff and its said director have failed to transfer the property as agreed or to refund the purchase price. As a result the Defendant asserts that it has suffered loss and damage and prays for Judgment against the Plaintiff and its director Pietro Cannobio for:-

a) Special damages of Kshs 10,000,000/-;

b) In the alternative specific performance of the agreements dated 24th November 2004 and 28th September 2006;

c) In default of compliance with an order of specific performance, the Deputy Registrar of this Court to execute all necessary documents to ensure the transfer of the property; and

d) Costs and interest.

The Plaintiff's Case

11. At the trial herein, the Plaintiff called one witness in support of its case.

12. PW1-Pietro Cannobio is a director and Chairman of the Plaintiff Company. He adopted his Written Submissions dated and filed herein on 27th September 2018. In the said Statement, he avers that by the two Sale Agreements dated 24th November 2004 and 28th September 2006, the Plaintiff agreed to sell and the Defendant agreed to purchase a portion of the suit property referred to as a Portion 'A' at a purchase price of Kshs 10,000,000/.

13. PW1 told the Court that prior to the execution of the Agreements, the Defendant who was his close friend was staying in his home and was allowed to occupy the suit property as a friend in August 2006.

14. PW1 asserts that the Defendant failed to pay the full purchase price thereby prompting the Plaintiff to file this suit. He averred that in a bid to gain illegal ownership of the property, the Defendant caused him to be charged in Malindi SRM Criminal Case No. 1460 of 2008 with the offence of obtaining money by false pretences. PW1 was acquitted after trial.

15. PW1 told the Court that the Defendant has altered the structure and beauty of the house on the suit premises by knocking down a bedroom and converting it into a veranda without the consent of the Plaintiff. By the said reasons the Plaintiff has suffered loss and is likely to suffer further loss and damages by exposing the suit premises to disrepair and dilapidation.

16. On cross-examination by Mrs Omondi, Learned Counsel for the Defendant, PW1 denied that the Defendant paid to him any sum of money. While acknowledging that his signature was in the receipt dated 24th November 2004 he denied that he was paid Euros 14,000/- or any other sum, PW1 told the Court that the money may have been deposited with their Advocate-Sachdeva & Company Advocates but the Plaintiff never got any payment.

The Defendant's Case

17. The Defendant equally testified as the sole witness in his case. Adopting his Statement as filed herein on 9th February 2017, Maurizio Dalpiaz (DW1) testified that by the Sale Agreement dated 24th November 2004, the Plaintiff agreed to sell to him a parcel of land known as Portion No. 'A' situated on LR No. 5054/275 Kilifi at a consideration of Kshs 10,000,000/-. On the same date of the agreement he paid a sum of Kshs 4,000,000/- which was acknowledged in the Sale Agreement.

18. DW1 told the Court that by a further Agreement dated 28th September 2006, the Plaintiff confirmed that it had agreed to sell the property to him and that upon receipt of the balance of the purchase price of Kshs 6,000,000/- it would transfer the property to him. DW1 avers that they agreed that the balance of the purchase price be paid to Sachdeva & Company Advocates who would hold the funds in trust.

19. DW1 stated that he has lived on the said Portion of land which is clearly discernible from the rest of the suit property since 2006 and that PW1 has been his neighbour.

20. DW1 testified that he has paid the full purchase price. He avers that since PW1 was his friend from as early as 1997, some of the payments were made in cash and were not documented.

21. DW1 told the Court that despite making the full payment, the Plaintiff did not transfer the property as agreed. Despite demand for completion of the transaction, the Plaintiff has never done so. Neither have they refunded the purchase price. Accordingly DW1 urged the Court to dismiss the Plaintiff's case and allow his Counterclaim as prayed.

22. Upon Cross-Examination by Mr. Kinaro, Learned Counsel for the Plaintiff, DW1 told the Court that he was to pay the sum of Kshs 4 Million by 30th April 2005 and that on 24th November 2004, he had only paid a sum of Euros 14,000/- which could have been about Kshs 1,400,000/- going by the exchange rates then. He told the Court that he later paid 5000 Euros and made a final payment of Euros 6,800/- bringing the total to Euros 25,800/-.

23. DW1 testified that he paid the balance in cash to PW1 as they were friends. The last amount of Euros 6,800/- he did pay in Italy to one Cannobio Renata who is a sister to PW1. In regard to the second agreement, DW1 told the Court that he paid the sum of Euros 60,152/- to Sachdeva & Company Advocates through Bank transfer. The Advocate never told DW1 that the amount he paid was less than Kshs 6 Million. He only received a letter two years later on 10th March 2008 stating the amount was not enough. There was nothing attached to the letter to show the exchange rate.

Analysis and Determination

24. I have perused and considered the pleadings, the oral testimony of the witnesses as well as the evidence adduced at the trial. I have also perused and considered the written submissions as filed herein by the Learned Advocates for the parties.

25. From their pleadings as filed, the gist of the Plaintiff company's case is that it did not enter into any agreement with the Defendant in respect to the suit property. That argument is premised on the fact that the agreements relied on were only signed by one director of the company and that as a Corporate body the Plaintiff did not execute the agreement of sale with the Defendant.

26. The Plaintiff further argued that the said Portion 'A' of LR No. 5054/275 purported to have been sold to the Defendant did not exist and that in any event it was part of the land comprised in the Grant from the Government which forbid any sub-division and sale of any part thereof. In that regard, it was the Plaintiff's case that the consent of the Commissioner of Lands was a prerequisite before any sub-division could be done.

27. In the absence of the said consent and any approval of the Deed Plans by the Director of Surveys, the Plaintiff asserted that the Sale Agreements in question are null and void and it urged the Court to declare the Defendant's continued possession of the suit premises pursuant to the said Agreements as illegal and unlawful.

28. On the other hand, the Defendant argued that he lawfully purchased the property from the Plaintiff and paid the entire purchase price as agreed. While not disputing the fact that he had only dealt with one director of the company one Pietro Cannobio, the Defendant asserted that the said director held himself out as having authority to execute the agreements for and on behalf of the Plaintiff and that as a result, the said agreements were valid and binding.

29. The Defendant contends that having fulfilled his part of the bargain by paying the agreed consideration in full, it fell upon the Plaintiff to ensure that the transfer of the suit premises to himself is effected as agreed.

30. As it turned out, it is the Plaintiff's self-same director –Pietro Cannobio (PW1) who testified in support of the Plaintiff's case. Contrary to what the Plaintiff states in the pleadings that the Sale Agreements were null and void as the same were not executed by itself, PW1 confirmed to the Court that indeed the Plaintiff entered into those two agreements with the Defendant.

31. According to PW1, they were selling a Section of LR No. 5054/275 known and marked out as Portion 'A' to the Defendant at a consideration of Kshs 10,000,000/-. It was PW1's position that the Defendant breached the said agreements by failing to pay the full purchase price. Since the Defendant was already in occupation by virtue of their friendship, the Plaintiff was compelled to come to Court and apply for the orders sought herein after the Defendant declined to vacate and started messing up with the beauty of the suit premises.

32. On his part, the Defendant denies being in breach of the agreements. He asserts that he paid the full purchase price to the Plaintiff and that it is the Plaintiff who later on refused to transfer the property to himself despite the fact that he has been in occupation thereof since the year 2006.

33. I have perused and considered the two agreements. While the two provide that the same were between the Plaintiff and the Defendant, it is apparent that the Plaintiff's seal was not affixed thereto. It was however illustrative as I have already stated that Pietro Cannobio, the director who executed the agreements for and on behalf of the Plaintiff is the same one who testified at the trial herein as PW1.

34. In his testimony before the Court, PW1 did not contest the fact that the Plaintiff company in relation to which he described himself as the director and Chairman, had entered into the agreements with the Defendant. On the contrary, it was his position that they were selling the portion of land to the Defendant at a consideration of Kshs 10,000,000/- but the Defendant had failed to pay the agreed purchase price. The two agreements were therefore clearly valid and binding on the parties.

35. That being the case, the only other issue for determination by this Court is who between the Plaintiff and the Defendant breached the sale agreements.

36. In his testimony before this Court, the Plaintiff accused the Defendant of breaching the agreements by failing to pay the agreed purchase price of Kshs 10,000,000/- in full. The Plaintiff did not however disclose to this Court the extent of that breach or the amount that was outstanding from the Defendant.

37. From the material and facts placed before me, it is clear that both parties to the agreements were very casual in the manner in which they went about this transaction. This was probably due to the fact that before things fell apart, the parties herein considered themselves more as friends rather than those entering into a business transaction. Indeed both the Plaintiff's director (PW1) and the Defendant alluded to this friendship which by some account started way back in 1997, long before the agreements were executed.

38. This can be seen when pinned down during cross-examination herein, the Defendant could not explain clearly how he had paid the initial sum of Kshs 4,000,000/-. It was a term of the agreement dated 24th November 2004 that the Defendant would pay a sum of Kshs 4,000,000/- at execution of the agreement and balance thereafter (being Kshs 6,000,000/-) on or before 30th April 2005.

39. At his cross-examination herein, the Defendant could only demonstrate payment of Euros 25,800/- including a sum of Euros 6,800/- which he insisted he paid to PW1's sister one Cannobia Renata in Italy on 4th March 2005. On that account, the Plaintiffs submit that there was a shortfall of an equivalent of Kshs 1,420,000/- going by the exchange rate then of 1 Euro to Kshs 100/-.

40. The Defendant however insisted that he paid the full amount in installments and that a number of the installments were undocumented.

41. But while the absence of any documentation on the alleged payments may have brought doubt to the Defendant's assertions, a perusal of the second agreement executed on 28th September 2006 leaves no doubt that indeed the payments were made to the Plaintiff. Paragraph 2 to 5 of the short agreement executed before Sachdeva & Company Advocates are of great interest as they state as follows:-

“WHEREAS by an Agreement dated the 24th November 2004 made between the parties hereto the Vendor agreed to sell to the Purchaser Portion No. ‘A’ of LR No. 5054/275 (“the property”) as per plan attached to the said Agreement provided the Vendor settles the matter with one Mr. Gilberto Agosta who had originally agreed to purchase the property.

The Vendor confirms that the matter between the Vendor and the said Gilberto Agosta has been settled and that he is now in a position to transfer the property to the Purchaser.

IT IS NOW AGREED between the parties that the Vendor would transfer the property to the Purchaser on receipt of the balance of purchase price which is confirmed and agreed between the parties as Kshs 6 Million and the Purchaser agrees to pay the said sum of Kshs 6 Million to Messrs Sachdeva & Company Advocates on receipt of the title deed for the property to effect transfer in favour of the Purchaser.

Messrs Sachdeva & Company would hold the funds in trust and pay the same to the Vendor on successful registration of the transfer in favour of the Purchaser at Land Registry Kilifi”. (Underlining mine).

42. Accordingly, the parties themselves confirmed and affirmed by this second agreement that a sum of Kshs 4,000,000/- had indeed been paid by the Defendant to the Plaintiff and that the balance being Kshs 6, 000,000/- was to be paid to the Plaintiff through their mutual Advocate Sachdeva & Company Advocates. The Plaintiff was thereby estopped from claiming that the Defendant had not paid the full amount of Kshs 4,000,000/- due under the first agreement.

43. In regard to the balance of Kshs 6,000,000/- it was again evident from the material placed before me that on 2nd October 2006, some four (four) days after the second agreement was executed, the Defendant through a bank transfer deposited a sum of Euros 60,142 to the account of the said Sachdeva & Company Advocates.

44. Matters appear to have gone quiet until some two(2) years later when the Defendant's Advocates vide a Letter dated 26th February 2008 demanded from the Plaintiff and its director (PW1) the completion of the transfer. By a letter dated 30th March 2008, the said Sachdeva & Company Advocates responded to the Defendant as follows:-

“We refer you to the visit at our office with regard to this matter.

We have discussed the matter with Mr. Pietro Cannobio who informs us that you had agreed to purchase the above property for Kshs 10 Million. You were supposed to pay a sum of Kshs 6 Million in Kenya and the balance to our client in Italy. You paid to us a sum of Euros 59,968.60 which was converted at that time at the rate of Kshs 89.25 totaling to Kshs 5,352,273.00/-. You have neither paid the difference nor the amount payable to our Client in Italy.

Our Client is willing to treat the agreement as cancelled on condition that you hand over the property which you are occupying from our Client in vacant possession and collect the amount which you paid to us in Kenya Shillings towards the purchase of the above property.”

45. Arising from the foregoing, it was clear to me that the Defendant had made payment of the purchase price if not in full then substantially. The allegation by the firm of Advocates two years later that the sum paid did not amount to Kshs 6,000,000/- was not supported by any evidence on the alleged exchange rate.

46. From the material placed before me, it was further clear that the Defendant obtained Judgment in its favour on 25th September 2017 in

Mombasa HC Misc Application No. 51 of 2017 wherein the Honourable Njoki Mwangi J determined that the said law firm received a sum of 60,000/- Euros from the Defendant. Arising from the foregoing, I am satisfied that the Defendant has provided proof that the deposit was made and therefore fulfilling all his obligations under the said two agreements.

47. In conclusion herein, I reiterate the words of Azangalala J in a Ruling delivered in this same matter at Mombasa on 5th May 2008 where his Lordship stated at page 9 thereof as follows:-

“I have also found that the conduct of the Plaintiff does not meet the approval of a Court of Equity. It received the purchase price from the Defendant through its authorized director and the same director swears that the Plaintiff did not execute the agreements and is therefore not bound by the agreement of sale. It is the Grantee of title in question and under the Grant it alone can seek the requisite consents and approvals and uses the failure to obtain the same as a basis to seek relief from a Court of equity.”

48. It is that same director referred to by the Learned Judge in the above decision who now denies receipt of the balance of payment despite the clear provision in the agreement that the amount be deposited with his Advocates to hold in trust as the title deed is processed. While there is evidence that the Defendant fully complied with his part of the bargain, there is no evidence that t Plaintiff made any attempt to process title in the Defendant’s name.

49. In the premises, I was not persuaded that there was any iota of truth in the Plaintiff’s case herein. The Defendant has on the other hand proved his Counterclaim on a balance of probabilities.

50. Accordingly I hereby grant orders as follows:-

a) An order of specific performance to issue compelling the Plaintiff to comply with the agreements dated 24th November 2004 and 28th September 2006 and to execute all necessary documentation and to take all necessary steps to complete the transaction within 90 days from the date hereof.

b) In default of compliance, the Deputy Registrar of this Court to execute all necessary documents to ensure the transfer of the property to the Defendant’s name.

c) The Defendant shall have the costs of the Plaintiff’s suit as well as that of the Counterclaim.

Dated, signed and delivered at Malindi this 30th day of January, 2020.

J.O. OLOLA

JUDGE