



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 246 OF 2016

NELSON RICCARDO PASOTTO.....PLAINTIFF

VERSUS

MAURIZIO MARINO.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaintiff dated and filed herein on 16th September 2016, Nelson Riccardo Pasotto (the Plaintiff) prays for Judgment against Maurizio Marino (the Defendant) for:-

a) A declaration that the Defendant is in breach of the Agreement dated 13th November 2015;

b) An order that the Defendant be compelled to pay Kshs 1,123,547 being repair costs so far incurred and pay for the remaining repairs (sic);

c) Damages for breach of the Agreement dated 13th November 2015;

d) Costs and interest.

2. Those prayers arise from the Plaintiff's contention that through a Sale Agreement dated 13th November 2015, the Plaintiff and the Defendant had agreed to sell their respective houses to each other. The Plaintiff thereby purchased the Defendant's apartment situated on Land Portion No. 865 Watamu while the Defendant purchased the Plaintiff's apartment No. 6E situated on Land Portion No. 863 Watamu.

3. The Plaintiff asserts that it was a term of the agreement that he would pay an additional 70,000 Euros to the Defendant and that if there were any damages to the Defendant's apartment situated on Land Portion No. 865 Watamu, the Defendant would shoulder the cost of any necessary repairs.

4. Pursuant to the said agreement the Plaintiff paid a total of 58,000 Euros and by a further agreement dated 26th February 2016, it was agreed that the balance of the purchase price (12,000 Euros) would be paid in six equal installments commencing 31st July 2016.

5. It is the Plaintiff's case that when he moved into the Defendant's premises, he found extensive damages. Despite notice given to the Defendant however, he has failed to carry out the necessary repairs as a result whereof the Plaintiff has been forced to incur a sum of Kshs 1,123,547/- to repair the house. In addition there are still other outstanding repairs estimated to cost the sum of Kshs 1,285,000/-.

6. But in his Written Statement of Defence and Counterclaim dated 13th February 2018 as filed herein on 19th February 2018, the Defendant denies being in breach of the agreements and instead accuses the Plaintiff of always renegotiating the terms thereof and failing to pay the balance of the purchase price as agreed.

7. It is the Defendant's case that the Plaintiff negotiated afresh agreement dated 26th February 2016 and that the agreement dated 13th November 2016 was never incorporated into the new agreement and was thereby terminated. The Defendant further asserts that having entered the suit premises in March 2016, the Plaintiff was deemed to have accepted the premises as they were and the allegations that the premises were not habitable are an afterthought and part of a nefarious scheme by the Plaintiff to refuse to pay the balance of the purchase price.

8. By way of Counterclaim the Defendant asserts that the Plaintiff has wrongfully failed to pay the balance of the purchase price and urges the Court to order the Plaintiff to pay to him the sum of Euros 12,000/- with interest together with the costs of the suit.

The Plaintiff's Case

9. The Plaintiff testified as the sole witness in his case at the trial. It was his testimony that they executed an agreement dated 13th November 2015 with the Defendant in which the Defendant sold to him a house while he sold an apartment to the Defendant.

10. The Plaintiff told the Court that there was a difference in the price of the house he was buying and the apartment he was selling and accordingly he was required to pay Euros 70,000/- to the Defendant while the Defendant was to carry out the necessary repairs on the house. The Plaintiff further told the Court that while he paid upto Euros 58,000/- the Defendant did not carry out the agreed repairs.

11. The Plaintiff testified further that they executed another agreement on 26th February 2016 for the payment of the balance of Euros 12,000/- which was to be done in six equal installments of Euros 2,000/- each. The Defendant did not however repair the house. Eventually the Plaintiff made the repairs himself as the power plant and the plumbing works were non-functional.

12. The Plaintiff testified that he incurred about Kshs 1.5 Million in carrying out the repairs which are only half-way done so far. The Defendant has not refunded the money to him and the pending repairs could cost a further Kshs 2 Million.

The Defence Case

13. The Defendant similarly testified as the sole witness in his case. He told the Court that they executed an agreement on 13th November 2015 in which the Plaintiff was to pay him Euro 70,000/- but the Plaintiff failed to honour the payments agreed. The Defendant told the Court that he decided to terminate the agreement when the Plaintiff failed to honour its terms.

14. The Defendant told the Court that after some time, the Plaintiff went back and requested to re-negotiate the agreement. Since the Plaintiff had dishonoured the previous arrangement, the Defendant asked that they go before an Advocate. The parties thereafter went to Mr. Ole Kina Advocate before whom they executed an agreement on 26th February 2016.

15. The Defendant told the Court that the Plaintiff had been to the house a number of times before he offered to buy it. After the new agreement was executed the Plaintiff failed to pay the balance of Euros 12,000/- as agreed. The Defendant denied that he was required under the agreement to make any repairs to the house. He urged the Court to order that he be paid the balance of his money together with interest and the costs of this suit.

Analysis and Determination

16. I have perused and considered the pleadings filed herein by the parties. I have equally considered the oral testimonies of the witnesses, the evidence adduced as well as the Written Submissions by the Learned Advocates acting for the parties herein.

17. The facts leading to the dispute herein are rather straight forward. On or about 13th November 2015, the two parties herein entered into a sale agreement by virtue of which they were to exchange two buildings they both owned. By the said agreement, the Plaintiff was to purchase a house belonging to the Defendant and erected on Land Portion No. 865 Watamu while the Defendant was to purchase an apartment No. 6E belonging to the Plaintiff and erected on Land Portion No. 863 Watamu.

18. Apparently the value of the two were different and it was by the said agreement also expressly provided that the Plaintiff would, in addition, pay the Defendant a sum of Euros 70,000/-. The agreement prepared by the two parties initially in Italian further provided in the penultimate paragraph thus:-

“It is further agreed with specific mention, as follows:-

A. The respective properties will be handed over with the annexed furnishings as seen and liked, with double bed at the first floor of the property sold by Mr. Marino, in the property of the current tenant, in case he wants to take it out.

B. The furnishings sold by Mr. Marino to Dr. Pasotto currently in lease to a third party, he should hand it over in perfect condition and without damages caused by the current tenant or by other people, through negligence. In case there should be some damages caused by the stay of the tenant, it is agreed that Mr. Marino will commit himself to bear the costs, and damages caused by the current tenant.”

19. According to the Plaintiff while he kept his bargain and paid upto Euros 58,000/- to the Defendant in partial fulfillment of the bargain, the Defendant declined to repair the house. It is his case that he informed the Defendant about the needed repairs some fifteen days after he took possession of the house in March 2016 but the Defendant refused to carry out the repairs.

20. The Plaintiff told the Court at the trial that on 26th February 2016, the two parties executed a further agreement in regard to the balance of Euros 12,000/-. The Defendant however declined to honour his part of the bargain and the Plaintiff was thereby compelled to spend approximately the sum of Kshs 1.5 Million to bring the house into a tenable state of repair. The repairs are however not yet over and the Plaintiff may require a further sum of Kshs 2 Million to complete the same.

21. I have perused the said agreement dated 13th November 2015. While the Plaintiff contends that the premises were inhabitable and that there was a requirement for the Defendant to repair the same, I was unable to read any such requirement in the letter and spirit of the first contract as executed.

22. As it were, it was clear to me that before the parties appended their signature to the Agreement, each of them had viewed the premises and agreed on the possible value thereof. There cannot otherwise have been any reason to require the Plaintiff, in addition to transferring his apartment No. 6E erected on Land Portion No. 863 Watamu, to also pay the sum of Euros 70,000/- to the Defendant.

23. The Plaintiff's protest that he had only a fleeting glance on the house before he purchased it cannot in law carry any weight for it was his obligation to view the house and consider its state before he committed to purchase the same.

24. While the Plaintiff contends that the said agreement required the Defendant to repair the property he had purchased, a clear perusal of Clause 'b' of the Agreement as cited hereinabove merely referred to the state of the furnishings in the house and not the general condition of the house.

25. That Clause appears to me to have been necessitated by the fact that as at the time the parties negotiated for the sale and purchase of the properties in question, there was an existing tenant in the Defendant's house. Out of the fear that the Defendant's tenant could damage some of the furnishings, the parties found it necessary to commit the Defendant under the said Clause to repair any damage thereto.

26. A perusal of the documents produced as receipts by the Plaintiff at the trial herein reveals that other than repairing any damaged furnishings, the Plaintiff embarked on a process of altering the aesthetics of the house to suit his own taste. They include quotations for plumbing works and replacement of all manner of items including the toilet seats, basins and mixers, shower mixers and water taps. Others are for the painting of the Swimming Pool, the House Wall and the installation of what is described as an Eco Salt Pool and Acquarius. Some of the quoted items are to be sourced from India, and other parts of this wide World. The Valuation Report by Amazon Valuers Ltd dated 9th May 2016 is further confirmation that the Plaintiff wanted to repair more than the furnishings.

27. I was not persuaded that those were the repairs contemplated by the parties when they entered into the agreement dated 13th November 2015. As the Court of Appeal observed in *National Bank of Kenya Ltd –vs- Pipeplastic Samkolit (K) Ltd (2002) 2 EA 503:-*

“A Court of law cannot rewrite a contract between parties. The parties are bound by the terms of their Contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the Charge. As was stated by Shah JA in the case of Fina Bank Ltd –vs- Spares and Industries Ltd (2000) 1EA 52:-

“It is clear beyond peradventure that save for those special cases where equity might be prepared to retrieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape a bad bargain.”

28. Besides it was evident that after the Plaintiff failed to remit the full amount of Euros 70,000/- to the Defendant, the parties re-negotiated the deal and executed another contract dated 26th February 2016 before an Advocate of this Court. While the Plaintiff submitted that the second agreement incorporated the terms of the first one in reference to the alleged repairs, again I did not find any evidence of such incorporation.

29. Other than requiring the Plaintiff to pay the balance of the purchase price of Euros 12,000/- in six equal installments, the agreement dated 26th February 2016 is clear at Clause III and IV (c) thereof that “the parties intend to exchange the entirety of their said properties in the manner described and that the conveyance is only subject to the consideration specified in Clause 4 thereof which requires the Plaintiff to remit the balance of Euros 12,000/- as aforesaid.

30. Clause 4.1.2 of the agreement required the Plaintiff to pay the six installments of Euros 2,000/- effective 31st July 2016. In his testimony before this Court, the Plaintiff admitted that he is yet to offset the said balance despite having taken possession of the house in March 2016.

31. In the premises herein, I was not satisfied that the Plaintiff's case had any merit. On the contrary, I was satisfied that the Defendant's had proved his Counterclaim to the required standards.

32. Accordingly I hereby dismiss the Plaintiff's suit and enter Judgment for the Defendant as sought in the Counterclaim.

33. The Defendant shall have both the costs of the dismissed suit and the Counterclaim.

Dated, signed and delivered at Malindi this 28th day of February, 2020.

J.O. OLOLA

JUDGE