



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL SUIT NO.216 OF 2018

1. NADIM HASSAN BHATTI
2. STEFANO BUZZI
3. PIETRO BERLOTTI.....PLAINTIFFS

VERSUS

1. WILLIAM KAHINDI RUWA
(As Administrator of the Estate of the late KAHINDI KALAMA FONDO)
2. TOM ONYANGO MBAKA
3. ODHIAMBO OGOLA VINCENT
4. JEFRED MTESEHE MWAKUHA.....DEFENDANTS

RULING

1. I have before me for determination a Notice of Motion application dated 29th November 2018. By the said application the three (3) Plaintiffs pray for an order restraining the four (4) Defendants from selling, transferring or alienating, constructing, occupying or developing Plot No. Gede/Mijimboni/1563 pending the hearing and determination of this suit. In addition, the Plaintiffs urge the Court to order that rent payment be deposited in Court pending the said determination.

2. The application which is supported by an affidavit sworn by the 1st Plaintiff Nadim Hassan Bhatti is based on the grounds that:-

a) The Plaintiffs made substantial payments for the purchase of the suit property to the 1st Defendant who has failed to complete the transaction;

b) The 1st Defendant has transferred the suit property to the 2nd, 3rd and 4th Defendants in total disregard of the Plaintiff's interest;

c) The 2nd, 3rd and 4th Defendants have taken possession and are developing the same without the Plaintiffs' knowledge or consent; and

d) The Plaintiffs are likely to suffer great harm and prejudice and are likely to lose the suit property unless the orders sought are granted.

3. The application is opposed. In a Replying Affidavit sworn on their behalf by the 1st Defendant William Kahindi Ruwa and filed herein on 28th February 2019, the Defendants deny that the Plaintiffs are entitled to the orders sought. The 1st Defendant while admitting that he agreed to sell to the 1st Plaintiff a portion of the suit property denies any knowledge of the 2nd and 3rd Plaintiffs.

4. The 1st Defendant avers that when the 1st Plaintiff asked to buy the land in 2014, he informed the 1st Plaintiff that only three of the six acres belonged to him while the other three belonged to one Japhet Kingi Muramba. The said Japhet had in turn sold his portion to one Anne Wanjiru Nganga a fact that was brought to the notice of the 1st Plaintiff.

5. The 1st Defendant further avers that since Japhet had disagreed with the buyer Anne Wanjiru Nganga, it was agreed that the 1st Plaintiff would refund the purchase price to Anne directly on behalf of Japhet. According to the arrangement, the 1st Defendant would receive the purchase price of Kshs 1,800,000/- from which he would keep half and pay the other half to Japhet from which a sum of Kshs 688,000/- would be refunded to Anne.

6. The 1st Defendant however asserts that the 1st Plaintiff only paid a sum of Kshs 370,000/ after which he disappeared and could not be found to complete the transaction. Later on the 1st Defendant asked the 1st Plaintiff to collect the deposit from his Advocates but he has since proceeded to sell the land to the 2nd to 4th Defendants after obtaining a Grant of Letters of Administration for his father's estate and other necessary consents.

7. I have perused and considered the Plaintiffs' application and the response thereto by the Defendants. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

8. It is not in dispute that the Plaintiffs and the 1st Defendant entered into an Agreement of Sale for Plot No. Gede/Mijimboni/1563. While the 1st Defendant denies knowledge of the 2nd and 3rd Plaintiffs herein, a Copy of the Agreement dated 16th September 2014 clearly shows that it was executed between the three (3) Plaintiffs as the Purchasers and the 1st Defendant as the Vendor.

9. It is also clear that the purchase price for the suit property measuring six acres was agreed at Kshs 1,800,000/- and that the Plaintiff paid a sum of Kshs 200,000/- as deposit. Under Clause 6 of the Agreement, the balance of the Purchase Price (Kshs 1,600,000/-) was to be paid within 90 days from the date the Agreement was executed.

10. According to the Plaintiffs, they made further payments on diverse dates totaling the sum of Kshs 850,000/-. While admitting that some other payments were made after the initial deposit, the 1st Defendant avers that only a sum of Kshs 390,000/- was paid to him. It is the 1st Defendants case that the Plaintiffs disappeared thereafter and he was thereby forced to sell the land to the 2nd and 4th Defendants.

11. I have perused and studied the attachments to the Plaintiffs Supporting Affidavits. There are a number of Petty Cash Vouchers purporting to show payments made to the 1st Defendants. A sum of Kshs 100,000/- appears to have been paid in October 2014 to one Christopher Benzi as Commission and deposit for survey fees. From the material availed to me, it is not immediately clear how and when the sum of Kshs 850,000/- was paid to the 1st Defendant.

12. Be that as it may, the conditions for consideration for the grant of an interlocutory injunctions were settled in the case of **Giella –vs- Cassman Brown & Company (1973) EA 358** where the Court explained the requirements thus:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

13. In the matter before me, the parties entered into a Sale Agreement about six (6) years ago on 16th September 2014. That Agreement stipulated that the purchase price was to be paid in full within 90 days. That was not done. While the Plaintiffs attribute the delay to the fact that the 1st Defendant was to undertake certain tasks before completion, those tasks were not captured in the Agreement.

14. At any rate, the Plaintiffs have clearly quantified the sum of money whose refund they require from the 1st Defendant as being Kshs 850,000/-. It cannot therefore be said that they stand to suffer an irreparable injury which may not be compensated by an award of damages.

15. The Plaintiffs had a second prayer for rent payment to be deposited in Court. I did not find the basis of that Prayer as no reference or submission was made thereto in the pleadings placed before me.

16. In the premises, I did not find any merit in the Plaintiff's application. The same is dismissed.

17. Each of the Parties shall bear their own costs.

Dated, signed and delivered at Malindi this 29TH day of April, 2020.

J.O. OLOLA

JUDGE