



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 61 OF 2009

ROSSI RENATA.....PLAINTIFF

VERSUS

1. FABIO MARELLI.....1ST DEFENDANT

2. SONGHAI INVESTMENT LTD.....2ND DEFENDANT

3. MOHAMED ESSAK BACHANI.....3RD DEFENDANT

JUDGMENT

BACKGROUND

1. By her Complaint dated and filed herein on 19th June 2009 as amended on 26th May 2014 and re-amended on 31st July 2018, Rossi Renata (the Plaintiff) prays for Judgment against the three (3) Defendants jointly and severally for:-

a) The sum of Kshs 2,680,000/- being the penalty for the delay in completing and handing over the property to the Plaintiff at the contractual rate of Kshs 20,000/- per day from the date of default until payment thereof in full;

b) A declaration that the property known as House No. 18 Saba Saba Watamu on sub-division Plot No. Kilifi/Jimba/1355 belongs to the Plaintiff and a transfer thereof be effected by the Defendant together with the original building plan and deed plan for the said portion;

c) The sum of Kshs 704,347.55/- being demurrage charges as above claimed;

d) Special damages of Kshs 1,161,449/- as above claimed and General damage for breach of contract;

e) Title Deed 1335 (sic) plus building plan of the house and general damages for breach of contract;

f) Interest at Court rates;

g) Costs of this suit;

h) Any other reliefs that the Court may deem fit to grant.

2. Those prayers arise from the Plaintiff's contention that on or about 28th August 2007 she entered into agreement wherein Songhai Investments Ltd (the 2nd Defendant) agreed to construct and to transfer to her the said property known as House No. 18 Saba Saba Complex Watamu within a period of five (5) months.

3. The Plaintiff avers that it was expressly provided in the agreement that if the Defendants failed to complete and hand over the works as aforesaid, there was to be a Penal Charge of Kshs 20,000/- per day payable until the date when the house was handed over. Pursuant to the completion of the said agreement, the Plaintiff and the 2nd Defendant's agent Mohamed Essak Bachani (the 3rd Defendant) executed a supplementary agreement on 15th July 2008.

4. The Plaintiff avers that it was a term of the Supplementary Agreement that the 3rd Defendant would carry out the works described in the said agreement on behalf of the 2nd Defendant Company and its director Fabio Marelli (the 1st Defendant) at an agreed consideration of Kshs 9,100,000/- within five (5) months from the date thereof.
5. In breach of the two agreements, the Defendants failed to complete the works as agreed and to hand over the premises. In anticipation of the completion of the house, the Plaintiff was induced to freight all her household goods from Italy to Watamu. Due to the delay, the Plaintiff was compelled to pay demurrage charges of Kshs 704,347.55 at the Mombasa Port where the goods were stored.
6. The Plaintiff further avers that the Defendants have to-date failed to complete the works as agreed and that as a result she has had to incur considerable expenses to buy new materials and to fix and repair the house and hence the figures claimed herein.
7. In their joint Statement of Defence and Counterclaim dated 28th August 2009 as amended on 23rd March 2010 and re-amended on 21st October 2014, Fabio Marelli, Songhai Investments Ltd and Mohamed Essak Banchani (the 1st, 2nd and 3rd Defendants respectively) deny owing the Plaintiff the figures given in the Plaintiff.
8. The 3rd Defendant in particular asserts that he was not a party to the agreement dated 28th August 2007 and hence he cannot be sued on the facts arising therefrom. On his part, the 1st Defendant avers that at all material times, he was acting as the director and agent of the 2nd Defendant and therefore the Plaintiff has no right of action against him.
9. The Defendants deny that there was any agreement requiring the 2nd Defendant to sub-divide the suit plot and or to transfer the plot or House No. 18 to the Plaintiff. It is their case that the said House was to remain the 2nd Defendant's property and that the Plaintiff was only to be allocated shares in the 2nd Defendant company. The Defendants assert that the house was duly completed and the Plaintiff took possession of the same.
10. The Defendants further deny that there was any clause in the contract requiring them to pay any penalty to the Plaintiff. They further assert that the Plaintiff was not the only party to the agreement dated 15th July 2008 and she cannot therefore sue alone on that contract.
11. It is further the Defendants case that the agreement between the Plaintiff and the 2nd Defendant was not properly executed and is therefore unenforceable. Alternatively, the 2nd Defendant states that the agreement dated 28th August 2007 was modified or cancelled by that of 15th July 2008 between the Plaintiff and one Carla Roncaralo on the one part and the 3rd Defendant on the other.
12. By way of Counterclaim, the 3rd Defendant herein claims against the Plaintiff and the said Carla Roncaralo the sum of Kshs 2,800,000/- being the balance of the contract sum for construction works carried out pursuant to the agreement executed on 15th July 2008. The 3rd Defendant craves payment of the said sum together with interest thereon at Court rates.

THE PLAINTIFF'S CASE

13. At the trial herein, the Plaintiff called one witness in support of her case.
14. PW1-Carla Roncarolo is an Italian national and a daughter to the Plaintiff herein. She told the Court that the Plaintiff is now 91 years old and was unable to come and testify. She had a Special Power of Attorney registered on 15th August 2012 from the mother (**Pexh 1**) and adopted her Statement as filed herein on 10th July 2018.
15. PW1 told the Court that on 2nd August 2007, she came to Kenya on holiday with her mother with an intention of buying a house to live in while in Kenya. Some two days before their return, one Joseph Kiponda introduced them to the 1st Defendant within Saba Saba Resort, Malindi where they were shown some properties some of which were still under construction.
16. PW1 testified that the 1st Defendant told them that on completion the resort would have, among other things, a common swimming pool and an access to a private beach with a great view of the Indian Ocean. PW1 and her mother liked the property and they chose to purchase House No. 18 on Plot No. Kilifi/Jimba/1355 after confirming that the 1st Defendant had title for the suit property on which the Resort was built which was Kilifi/Jimba/391.
17. On 29th August 2007 after their return to Italy, they paid a deposit of Euros 4,000/- upon which the 1st Defendant sent them a Preliminary Agreement. Subsequently, the 1st Defendant asked for a further deposit of Euros 30,000/- but they thought the amount was too much and instead sent him Euros 3,000/-. In the meantime, PW1 and the Plaintiff contacted a Shipping Company which confirmed that it could ship their household goods to Mombasa Kenya from Genoa, Italy in 1 ½ months at a cost of Euros 8,300/-.
18. Later on, PW1 and her mother returned to Kenya to find that one Claudio Fuscolo had registered a caveat against the title Kilifi/Jimba/391 and that in order for the construction to continue, all those who had purchased houses were required to pay Euros 500/- to remove the caution.
19. PW1 told the Court that at that time, the 1st Defendant had taken in the 3rd Defendant as his partner and they were therefore required to sign another agreement with the 3rd Defendant. This agreement specified the stages or phases in the construction of the house and the payments to be made at every step.

20. Thereafter PW1 told the Court that construction began on 15th July 2008 and was to be completed within five months. PW1 and her mother then made payments amounting to Kshs 8,835,858.87/- on the understanding that they would be refunded Euros 200/- per day where there was delay in completion.

21. PW1 further testified that as per the agreement and advise by the Defendants, their household goods arrived from Italy in November 2008 but the house was not complete. They were therefore compelled to incur demurrage charges until 30th May 2009 when they were compelled to take up the house even though it was incomplete.

22. PW1 told the Court that when they took over the house, there was rubble and dirt everywhere, that sinks were leaking and doors were missing. The compound was not fenced and the Car Park and other common sections were incomplete. They were compelled to break the walls to restore many sockets. Because of those deficiencies, they had to undertake major works to repair the house and put it in a proper condition.

23. PW1 testified that as a result, they spent Kshs 160,072/- on labour, Kshs 48,345/- on purchase of new tiles, Kshs 81,032/- for electricity and water connection and Kshs 704,347.55/- on demurrage charges. They also engaged a contractor who advised that it would cost Kshs 227,000/- to repair the terrace and another Kshs 595,000/- to complete the construction of the house.

24. PW1 further testified that despite having paid the entire contract price to the Defendants, they have to-date failed to transfer the property to her mother's name as they had agreed. The property further lacks the promised access to the beach and has no common swimming pool. She denied that they owe the Defendants the sum of Kshs 2,800,000/- as claimed in the Counterclaim.

25. During her cross-examination, PW1 told the Court that the agreement executed by her mother indicates that the 1st Defendant was representing the 2nd Defendant company. She further told the Court that there was no indication that they were buying Plot No. 1355 Kilifi/Jimba. PW1 conceded that her mother was only buying House No. 18 and that the ownership thereof would be by way of ownership of shares in the 2nd Defendant company.

26. PW1 further told the Court that it was her understanding that the house was to be completed by 15th December 2008 but the agreement did not specify what was to happen if the house was not completed within that time. The contract did not show that any goods were coming from Italy and there was no requirement that the Defendants would pay Euros 200/- per day if the house was not ready.

27. PW1 told the Court that she had not paid all the monies required as per the schedule in the agreement. They had paid a total of Kshs 7,150,000/- and she had not completed the payments as the house remained unfinished for more than eight months. She further told the Court that the tiles had only come out later in the year 2014.

THE DEFENCE CASE

28. The Defence equally called one witness in support of their case at the trial herein.

29. DW1-Mohamed Esaak Bachani is the 3rd Defendant herein. He testified that on 15th July 2008, he had entered into an agreement with the Plaintiff and PW1 in which it was agreed that he would carry out certain construction works for them at an agreed contract price of Kshs 9,000,000/-.

30. DW1 told the Court that the works he was to carry out were specified in the agreement and that he did his part on the bargain but to-date he has not been paid a sum of Kshs 2.65 Million. He urged the Court to amend the figures of Kshs 2.8 Million stated in his Counterclaim to read the sum of Kshs 2.65 Million. He testified that the amount was to be paid at the end of the works but the same is yet to be paid to-date.

31. On cross-examination, DW1 told the Court that he became a director of the 2nd Defendant after he signed the agreement of 15th July 2008. He conceded that the house was not completed in five months as agreed and that they were forced to accommodate the Plaintiff at their expense for sometime at their Saba Saba Villas.

32. DW1 further told the Court that they communicated the fact of the delay to the Plaintiff verbally in December 2008. He told the Court that the delay arose due to the Plaintiff's failure to make payments as stipulated at Paragraphs 8 and 9 of the Schedule. He however insisted that they handed over a complete house to the Plaintiff even though she had not completed the payments.

33. DW1 further told the Court that even though they had agreed to give the Plaintiff a share certificate, they later agreed with her that they would instead give her a title deed. They are yet to give her a title though as she is yet to complete the payments.

34. DW1 further testified that he was unaware that the Plaintiff had arranged to ship furniture to Kenya. He asserted that the delay in completion was due to the delay on the Plaintiff's part to make the necessary payments.

ANALYSIS AND DETERMINATION

35. I have perused and considered the pleadings as filed herein by the parties. I have similarly considered the oral testimonies of the two witnesses who testified before me and the evidence adduced at the trial.

36. The Plaintiff instituted this suit on 19th June 2009 seeking payment of a sum of Kshs 2,680,000/- as the penalty payable per day for the delay in completing and handing over to her all that property known as House No. 18 Saba Saba Watamu. She further prays for a declaration

that the said house which according to her pleadings is situated on sub-division Plot No. Kilifi/Jimba/1355, belongs to her.

37. In addition the Plaintiff urges the Court to compel the Defendants to transfer the property to her name and that they be compelled to pay her Kshs 704,347.55/- as demurrage charges as well as Kshs 1,161,449/- as special damages. She also prays for general damages for breach of contract and interest thereon at Court rates.

38. It was the Plaintiff's case that on or about 28th August 2007, she entered into an agreement wherein the 2nd Defendant company agreed through its 1st Defendant director to construct and transfer to her the said property known as House No. 18 Saba Saba Complex, Watamu within a period of five months.

39. The Plaintiff told the Court that for the purposes of concluding the transaction, the 1st and 2nd Defendants introduced her to the 3rd Defendant who was to carryout the actual construction of the agreed building. In the premises, the Plaintiff executed a Supplementary Agreement with the 3rd Defendant on 15th July 2008.

40. According to the Plaintiff, it was a term of the Supplementary Agreement that the 3rd Defendant would carry out the construction works described in the Agreement on behalf of the 1st and 2nd Defendants within a period of five months at a consideration of Kshs 9,100,000/-. It is the Plaintiff's case that in breach of the Agreement, the Defendant failed to complete the house thereby causing the Plaintiff to incur considerable expenses to store her household goods shipped from Genoa, Italy, to buy new materials to complete the house and to fix and repair the incomplete works.

41. While they filed a joint Statement of Defence and a Counterclaim, each of the three Defendants made specific denials to the various aspects of the Plaintiff's suit. In particular, the 3rd Defendant denied being party to the First Agreement dated 28th August 2007 while the 1st Defendant asserted that he only executed that First Agreement as a director and agent of the 2nd Defendant company.

42. The 3rd Defendant further asserted that he did manage to complete the construction works and that the House No. 18 was eventually handed over to the Plaintiff after a slight delay and despite the fact the Plaintiff still owed him money. In that respect 3rd Defendant by way of Counterclaim demanded a sum of Kshs 2.8 million from the Plaintiff, a figure which at the trial herein was amended and reduced by consent to read Kshs 2.65 Million.

43. In her Amended Statement of Defence to the Counterclaim dated 6th July 2018, the Plaintiff avers however that the only balance unpaid to the 3rd Defendant was Kshs 1,950,000/- after she paid a sum of Kshs 7,150,000/- in respect of the construction works agreed at the said Kshs 9,100,000/-.

44. The Plaintiff however avers that she was forced to pay a further Kshs 81,032/- for water and electricity; Kshs 704,347.55/- for demurrage at the Port of Mombasa; Kshs 50,000/- for the removal of a caveat on the property and a sum of Kshs 208,417/- for extra labour. In addition, she purchased tiles worth Kshs 1,685,858.87/-. The Plaintiff avers that if these additional figures are off-set against the sum of Kshs 1,950,000/- owing to the Defendants, they still owe her a sum of Kshs 779,655.42/-.

45. A perusal of the First Agreement headed the "Preliminary Sale Contract" dated 28th August 2007 reveals that it was indeed not executed by the 3rd Defendant. Paragraph 1 thereof further reveals that the 1st Defendant executed the Agreement as a Shareholder and director of the 2nd Defendant who is the one described therein as the Vendor. I therefore had no difficulty accepting the 1st and 3rd Defendants' protests in their Statement of Defence that they were not personally bound by the terms of the First Agreement as the 2nd Defendant is a legal entity on its own separate and distinct from its directors and shareholders.

46. According to the Plaintiff's daughter Carla Roncarolo (PW1), this First agreement was dispatched to herself and the mother after they returned to Italy following their inaugural visit to Malindi Kenya in August 2007. While the Agreement initially written in Italian is headed "Preliminary", a reading of the translated version thereof did not reveal to me any anticipation of any other further or subsequent agreement between the parties.

47. Annexed to the First Agreement however was an attachment marked "B" reading as follows:-

a) Period of Maintenance and Guarantee-Month 6

b) Period of Realization from the Signature of the Agreement month-To be established

c) Payment Modalities

¾ Down payment at the Signature of

Preliminary – Euros 4000/-

¾ At the beginning of construction – Euro 30,000/-

¾ At the beginning of the Concrete Slab- Euro 20,000/-

¾ At the beginning of the roof- Euro 20,000/-

¾ At the Delivery, it means at the Formal

Transfer act of the Shares and consequent Transfer of Property safe (sic), that the parties consensually agreed to extend such term- Euro 6,000/-

Total Euro 80,000/-

48. While one would have assumed that the First Agreement would have sufficed, it does appear to me that this initial agreement was treated more in the sense of the Plaintiff buying shares in the 2nd Defendant company as provided at the bottom of the attachment marked "B". The actual construction of the house it would appear was placed under the separate Supplementary Agreement executed between the Plaintiff and the 3rd Defendant on 15th July 2008.

49. A perusal of the Supplementary Agreement reveals that the cost of the construction of the House No. 18 was placed at Kshs 9,100,000/-. It is this Agreement which now defined step by step what the 3rd Defendant would do and how much the Plaintiff was required to pay at each stage. The Agreement puts the duration of Works at five months. Curiously, this Agreement neither made reference to the First Agreement nor to the 2nd Defendant herein.

50. Ultimately, the Plaintiff herein accuses the Defendants of failing to complete the house within the duration stated of five months and of generally carrying out shoddy works contrary to the Plaintiff's expectations. As it turned out, the disputants could not agree on who was to take the blame for the delay.

51. In his testimony before this Court as the sole witness for the Defence, the 3rd Defendant attributed the delay in completion to the delay in remittance of payments by the Plaintiff. During her cross-examination, the Plaintiff's daughter conceded that they did not make some of the payments in time a fact she attributed to the issues they were having with the Defendants.

52. Going by PW1's testimony, they have so far paid a total of Kshs 7,150,000/- to the 3rd Defendant. That would leave a balance according to the Plaintiff of Kshs 1,950,000/-. While the 3rd Defendant claimed a higher figure of Kshs 2,650,000/-, they did not place any document or a reconciliation of payments to demonstrate that the higher figure was due.

53. I have however looked at the Plaintiff's figures and it is obvious to me that she had not been remitting the payments as required. From the schedule of payments in the Supplementary Agreement, owing the figures they admit would mean that they had actually not honoured items 8 to 11 of the Schedule which lists the payments of such things as completion of floors and tiles as well as Paint works and other finishes. That being the case I did not find any basis for the blame attributed to the Defendants for the delay.

54. Arising from the foregoing, the Plaintiff's claim for demurrage charges and other charges attributed to the delayed completion cannot arise. Indeed while the Plaintiff purported that she was entitled to a sum of Euros 200/- per day for every day of delay, such a Clause was only in the First Agreement with the 2nd Defendant and there was nothing to demonstrate that the same had been imported to the Supplementary Agreement with the 3rd Defendant.

55. Similarly, while the Plaintiff purported to have spent a sum of Kshs 1,685,858/- to purchase tiles, PW1 conceded during cross-examination herein that the tiles built by the 3rd Defendant had only come off in the year 2014. That would be some five (5) years since she moved into the house on 30th May 2009 and about the same period of time after she filed this suit.

56. In the premises, I was not persuaded that the Plaintiff had made out any case against the Defendants. Her accusations against the Defendants were simply not backed by any evidence.

57. On the contrary, I was persuaded that the 2nd Defendant gave out its parcel of land as agreed and that the 3rd Defendant constructed a house thereon that was handed over to the Plaintiff on 30th May 2009. The Plaintiff and her daughter took over the house and reside thereon to-date despite not paying the full construction price as agreed.

58. While the 3rd Defendant claimed however that the balance due to him was in the region of Kshs 2,650,000/-, I did not see the evidence backing that up. From a perusal of the Plaintiff's evidence herein and the admission by PW1 that a figure of Kshs 1,950,000/- was all that was due, I am satisfied the balance of payment due and owing to the 3rd Defendant is the said sum of Kshs 1,950,000/-.

59. Accordingly the Plaintiff's case is dismissed and Judgment is hereby entered for the 3rd Defendant in the sum of Kshs 1,950,000/- as prayed in the Counterclaim.

60. The 3rd Defendant shall have the costs of both the Plaintiff's suit and the Counterclaim.

Dated, signed and delivered at Malindi this 27th day of May, 2020.

J.O. OLOLA

JUDGE