



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL SUIT NO. 109 OF 2017**

**SILVIA MORETTI.....PLAINTIFF**

**VERSUS**

**TONY PETER OKELLO.....DEFENDANT**

**JUDGMENT**

1. By her Plaintiff dated 6<sup>th</sup> May 2017 as filed herein on 11<sup>th</sup> May 2017, Silvia Moretti (the Plaintiff) prays for Judgment to be entered against Tony Peter Okello (the Defendant) for:-

- a. A permanent injunction restraining the Defendant from leasing, transferring, selling or otherwise interfering with the Plaintiff's rights over a house constructed on the property situated at Kwa Chocha, Malindi measuring 49 by 39 feet;**
- b. A declaration that the Plaintiff be granted access and vacant possession of the said property; and**
- c. Costs and interest thereon.**

2. Those prayers arise from the Plaintiff's contention that on 13<sup>th</sup> April 2013 she entered into an agreement wherein she was authorized to invest on the Defendant's parcel of land measuring 49 by 39 feet situated at the said Kwa Chocha Malindi. The Plaintiff asserts that she was allowed to construct a house on the said property on condition that she would reside thereon together with her daughter Caterina Faggioli.

3. The Plaintiff avers that in line with their agreement, neither herself nor the Defendant could sell and or dispose of the suit property. Contrary to the said agreement, the Defendant has since evicted the Plaintiff from the suit property and has evinced his intention to sell the same and evict the Plaintiff's daughter who remains thereon.

4. But in his Statement of Defence dated 27<sup>th</sup> August 2018, the Defendant denies that he evicted the Plaintiff from the suit premises and/or that he had any intention to sell or dispose of the suit land.

5. The Defendant avers that they lived in the suit premises with the Plaintiff as his girlfriend and that it is the Plaintiff who moved out after falling in love with another man with whom they now live.

6. At the trial herein, the Plaintiff testified as the sole witness in her case. The Defendant did not however bring any oral testimony in support of his case.

7. Testifying as PW1, the Plaintiff told the Court that she knew the Defendant sometime in 2012. The Defendant told her that he had a piece of land in Kwa Chocha, Malindi. The Plaintiff agreed to construct a house on that piece of land after they entered into an agreement on 13<sup>th</sup> April 2013.

8. PW1 told the Court that she spent Euro 30,000/- in the construction and that she wanted to live with the Defendant but he mistreated her so much that it became impossible to live together. PW1 told the Court that she left the house due to frequent assault by the Defendant. The Defendant has since married another white woman.

9. Before filing the case PW1 told the Court that she asked the Plaintiff to refund a portion of the money she had spent but the Defendant refused. She urged the Court to consider what she spent on the house and to allow her to sell the house to recover the same.

10. On Cross-examination, PW1 denied that the Defendant had already constructed the house half-way when they met. She told the Court

that there was nothing on the land and that the Defendant was living in a hut. On being shown the Agreement they executed however, PW1 conceded that it refers to a building under construction. She however insisted there was no construction on the land.

11. PW1 further told the Court that she left the house sometime between 2014 and 2015 as the Defendant kept throwing away her things. She left her daughter in the house and moved to a hotel. Her daughter was also living in the house with someone to whom she was married. The daughter later left on her own in November 2016.

12. I have perused and considered the pleadings filed herein, the oral testimony of the Plaintiff and the evidence adduced before the Court. I have equally considered the submissions placed before me by the Learned Advocates for the parties.

13. The Plaintiff herein craves a permanent injunction to issue restraining the Defendant from advertising, leasing, selling or in any way interfering with the Plaintiff's rights over the suit property. She further craves that she be granted access and vacant possession of the property, a house erected on a parcel of land said to be measuring 49 by 39 feet situated at Kwa Chocha within Malindi Municipality.

14. It was the Plaintiff's case that by an agreement in writing dated 13<sup>th</sup> April 2013, she was authorized by the Defendant to invest on the said parcel of land belonging to the Defendant by building a house thereon on condition that the Defendant would allow both the Plaintiff and her daughter one Caterina Faggioli to reside in the house.

15. The Plaintiff told the Court that she honoured her part of the bargain and invested a sum of Euros 30,000/- in constructing a house on the property. She however accuses the Defendant of breaching the agreement by evicting her from the property and thereafter threatening to evict her said daughter with a view to selling the suit property.

16. The Defendant did not testify at the trial herein. He however denies the Plaintiff's accusation in his Statement of Defence and asserts that the Plaintiff left the suit premises on her own will and accord. He further denies that the Defendant spent the alleged sum of money in constructing the house and avers that the house was already half-built as at the time they entered into the Agreement dated 13<sup>th</sup> April 2013.

17. From the material placed before me, the Plaintiff and the Defendant met and fell in love sometimes in the year 2012. In the process, the Plaintiff learnt that the Defendant, who according to her was then residing in a hut, had a parcel of land in the Kwa Chocha area at Malindi.

18. According to the Plaintiff, when she was shown the land it was completely empty. The Defendant however pleaded that there was a half-built house on the land whose construction he had started earlier. Whatever the case the two love birds entered into an Agreement which was reduced into writing on 13<sup>th</sup> April 2013. The Agreement which describes the Plaintiff as "the Investor" and the Defendant as "the Owner" provides in the relevant portion as follows:-

***"WHEREAS the Owner is the registered proprietor of and/or otherwise beneficially entitled to the possession and occupation of a parcel of land situate at Kwa Chocha by virtue of having inherited the same from his father which said parcel of land measures 49 feet by 39 feet or thereabouts and whereas there is a building under construction on the said parcel of land and the Owner has agreed with the Investor that she will invest in and complete the said construction.***

**NO THIS AGREEMENT WITNESSETH pursuant to the aforesaid as follows:-**

- 1. That the Investor shall invest money in the said parcel of land towards completion of the building under construction thereon.**
- 2. That in consideration of the aforesaid the Investor will have the right to reside in the said building together with the Owner.**
- 3. That the Investor's daughter one Caterina Figoli will also be entitled to reside in the said house.**
- 4. That the Investor shall not have any authority or power to sell the said house or parcel of land and/or otherwise dispose of the same.**
- 5. That the Owner hereby undertakes that he will never under any circumstances deny the Investor of her right to reside and live in the house once it is completed."**

19. Pursuant to this Agreement, the Plaintiff asserts that she invested a sum of Euros 30,000/- to erect a house on the parcel of land. It is apparent that upon its completion, the Plaintiff moved in with the Defendant and they were later joined by the Plaintiff's daughter and the daughter's husband.

20. Testifying before this Court, the Plaintiff accused the Defendant of gradually becoming hostile towards her to the extent that he would throw her and her belongings outside the house on several occasions. Later the Plaintiff moved away and went to put up in a hotel. Her daughter subsequently also left the house in November 2016 when, according to her, the Defendant threatened to sell the house.

21. I have looked at the Agreement between the parties and the other evidence adduced by the Plaintiff herein. While it is true that the Agreement provided that she and her daughter would live in the property, I did not see anywhere that allowed her to sell the property where they disagreed with the Defendant.

22. As it were, while the Plaintiff claims in her pleadings that the Defendant evicted her from the house, it was her testimony before this Court on oath that she left the house on her own when the Defendant became hostile and proceeded to marry another white woman. Indeed while she alleged that the Defendant assaulted her on various occasions forcing her to leave, there was no evidence of any such assault or a report thereof made to the Police.

23. Similarly while the Plaintiff claimed to have spent a total of Euros 30,000/- to erect a house on the Defendant's land, not a single receipt was produced in evidence of such expenditure. From the Agreement executed, there was indeed an admission that what she did was to complete a house which the Defendant had started constructing and she did not therefore entirely put up the house with her own money as she told the Court.

24. As it were, Courts do not make contracts for parties. The duty of the Court is to enforce such contracts. While she urges this Court to decree to her the contribution she made to the building on the house, it was not possible from the material placed before me to ascertain the extent of that contribution.

25. There was similarly no evidence that the Defendant had evicted her or denied her the use of the house as provided in the Agreement.

26. In the premises, I was not persuaded that the Plaintiff had proved her case against the Defendant. The same is accordingly dismissed.

27. Given the past relationship of the parties and the circumstances herein, I shall make no order as to costs.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

**JUDGE**