



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 11 OF 2016

AHMED OMAR SWADAN.....PLAINTIFF

VERSUS

FREDRICK NDAMBUKI MUTISYA.....DEFENDANT

JUDGMENT

BACKGROUND

1. By his Plaint dated and filed herein on 21st January 2016 Ahmed Omar Swadan (the Plaintiff) prays for Judgment against Fredrick Ndambuki Mutisya (the Defendant) for:-

- a. Kshs 2,162,200/-;**
- b. General damages for breach of contract;**
- c. Costs of the suit and interest.**

2. The Plaintiff's prayers arise from his contention that by an agreement dated 12th January 2015, the Defendant sold to him a parcel of land known as Plot No. Kilifi/Kadzonzon/Madzimbani/26. At the time of the sale the Defendant presented a title deed showing that the property was 1.37 Ha (or 3.38 acres) in size but he verbally represented to the Plaintiff that the actual size on the ground was 18 acres.

3. The Plaintiff avers that the agreement was made subject to the verification of the actual acreage and that the full payment was to be in respect of the verified acreage. He further avers that the County Surveyor later verified that the subject parcel of land was 3.37 Ha (8.327 acres) and not what the Defendant had stated.

4. As at the time of the execution of the agreement the Plaintiff asserts that he paid the Defendant a deposit of Kshs 1,000,000/- and a further sum of Kshs 50,000/- which the Plaintiff paid to the Sale Agent. Thereafter and as allowed by the Agreement, the Plaintiff moved into the property and spent Kshs 602,200/- leveling it, on fencing posts, cement, deposit on labour and for the caretakers expenses. He also spent a further sum of Kshs 360,000/- on fuel.

5. It is however the Plaintiff's case that when he started fencing the suit property, the Defendant violently stopped his workers and thereby caused the material he had deposited to go to waste. The Defendant is no longer willing to perform his part of the obligation under the agreement and the Plaintiff now claims the deposits made as well as other expenses related to the land.

6. But in his Statement of Defence dated 3rd May 2016, the Defendant avers that while indeed they entered into an agreement on 12th January 2015, the purpose was to secure the release of Kshs 1 Million by the Plaintiff to the Defendant in anticipation of a Sale Agreement to be entered into thereafter.

7. The Defendant further asserts that the purchase price per acre was to be Kshs 4 Million and hence the 18 acres were to be sold for Kshs 72 Million. The parties were to enter into a formal agreement which was to show the actual price upon verification of the actual size. The transaction however collapsed when the Plaintiff's Advocates went to the Land Control Board and insisted that the entire purchase price was Kshs 4 Million for the whole parcel of land.

8. The Defendant concedes that he received 1 Million from the Plaintiff but denies that the Plaintiff spent the alleged or any sums of money in developing the suit property. He accuses the Plaintiff of being the one who breached their contract and avers that the Plaintiff should

accordingly be made to forfeit the deposit paid.

THE PLAINTIFF'S CASE

9. At the trial herein, the Plaintiff called two (2) witnesses in support of his case.

10. PW1-Ahmed Omar Swadan is the Plaintiff himself. He testified that the Defendant was introduced to him by some property agents. They then entered into an agreement for the sale of the suit property on 12th January 2015. At the time of the agreement, the Defendant produced a title deed showing the property measures 1.37 Ha (3.38 acres). The Defendant however insisted that the entry was erroneous as the whole property comprised of 18 acres.

11. PW1 further told the Court that given the discrepancy, they were forced to enter into an agreement subject to the verification of the size. That verification was done by the County Surveyor Kilifi and a title deed reflecting the right acreage was issued. At the time of entering the agreement, there was an understanding that each acre of the land was to be sold at Kshs 222,000/-.

12. PW1 told the Court that the new title deed indicated that the land was 8.327 acres in size and the purchase price should therefore have been Kshs 1,849,260/-. Since the Plaintiff had paid a deposit of Kshs 1,000,000/- he deposited the balance of Kshs 850,000/-with Messrs Odongo B.O. & Company Advocates to be released to the Defendant upon his availing completion documents.

13. PW1 testified however that after the verification exercise, the Defendant stopped co-operating with him, stopped picking his calls and chased away his workers from the site. The Defendant even went back to the Sale Agent Sheikhamin Msellen and demanded his contribution of Kshs 50,000/- which he had paid towards the verification exercise. PW1 told the Court he had to reimburse the agent for the shortfall of Kshs 50,000/-.

14. PW1 further testified that in order to stop the transaction completely, the Defendant and his wife went to the Kaloleni Land Control Board and stopped them from giving consent to the transfer. By then the Plaintiff had spent Kshs 50,000/- sending his lawyers to the Board. He had also spent Kshs 602,200/- towards the development of the property. The Defendant is now in the process of selling the property to other people.

15. PW2-Benard Odongo is an Advocate of the High Court practicing as Odongo B.O. & Company Advocates, Mombasa. He told the Court that the Agreement between the parties dated 12th January 2015 was drawn by his law firm.

16. PW2 testified that the Agreement was for the sale of Plot 26 Kilifi/Kadzongo/Madzimbani and that the Defendant was selling the same to the Plaintiff at a consideration of Kshs 4 Million. To this end, a deposit of Kshs 1 million was paid in PW2's presence. The balance of Kshs 3 Million was to be paid upon verification of the size as the seller claimed that the land was bigger.

17. PW2 refuted claims that the purchase price was Kshs 4 Million per acre. He told the Court that the Defendant is a knowledgeable person and that he read the Agreement before he signed it. The sale did not however go through. At first the Defendant's wife objected and on the second occasion, the Defendant himself attended the Land Control Board Meeting and objected to the transaction indicating that they had some issues to sort out. PW1 told the Court that the Plaintiff was entitled to a refund of his deposit as per the special conditions to the agreement. He also told the Court that the corrected title remains in the Plaintiff's possession.

THE DEFENCE CASE

18. The Defendant testified as the sole witness in his case. Testifying as DW1, he told the Court that he entered into the Sale Agreement with the Plaintiff on 12th January 2015. The Agreement arose after he agreed to accept some money from the Plaintiff. He told the Court that in actual fact they were not really buying or selling anything.

19. DW1 testified that as at the time they executed the Agreement, they were yet to agree on the acreage of the land. The title deed indicated a lower figure and DW1 had assured that the land was 18 acres. DW1 told the Court that they agreed on a purchase price of Kshs 4 Million per acre. He further told the Court that the land lies along the Nairobi-Mombasa Road near Mariakani and that the price was suitable.

20. DW1 further testified that the property was thereafter surveyed and sub-divided into 59 pieces of 50 x 100 feet. They had agreed that the price be adjudicated according to acreage and the suit property was later determined to be 8.37 acres in size. No new agreement was however executed to reflect the changed position.

21. DW1 told the Court that when they later went to the Land Control Board, the Board demanded for the original title but that was not availed as then the Plaintiff's agent had been given money by the parties to process the same but he was yet to avail it. The Board ordered them to go back and agree on the purchase price.

22. DW1 told the Court that he had received a sum of Kshs 1 million as deposit and that he was ready to refund the same to the Plaintiff. He however denied that the Plaintiff had carried out any development on the land.

ANALYSIS AND DETERMINATION

23. I have perused and considered the pleadings as filed by the parties herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have equally perused and considered the written submissions as well as the authorities placed before me by the Learned Advocates for the parties.

24. It is not contested that the Plaintiff and the Defendant entered into an agreement on 12th January 2015. While the Plaintiff in his long and winding pleadings asserts that the Defendant was by virtue of that agreement selling to him all that parcel of land known as Kilifi/Kadzonzo/Madzimbani/26, the Defendant avers that that was not the case.

25. According to the Defendant, while it is true they entered into that agreement, they were not actually buying or selling anything. The purpose of the agreement was instead to secure the release of Kshs 1 Million by the Plaintiff to him in anticipation of a sale agreement that was to be entered into thereafter.

26. Just as they could not agree on its purpose, the parties could not agree on the acreage sold or even the purchase price therefore. While the Plaintiff holds out that he bought the property for Kshs 1,849,260/- the Defendant states that the purchase price was Kshs 72,000,000/-.

27. As it turned out, it was not just the positions the parties took in their pleadings and testimonies before the Court that were contradictory. The agreement itself produced by the Plaintiff as his Exhibit 1 and titled "Agreement for Sale of Land" provides at paragraphs 3 and 4 thereof, in part as follows:-

"WHEREAS the vendor is the registered proprietor in fee simple of ALL that parcel of land known as Kilifi/Kadzonzo/Madzimbani/26 Mainland North measuring One decimal Three Seven(1.37) hectares or thereabouts, as shown in the Title Deed, while it is roughly 18 acres on the ground, hereinafter referred to as "the property"

AND WHEREAS the Vendor is desirous and has agreed to sell to the purchaser, the said parcel of land and the purchaser has also agreed to purchase the same,

Now this Agreement Witnesseth as follows:-

a. The Purchase Price is Kshs 4,000,000/- payable as follows:

b. Kshs 1,000,000/- upon execution of this instrument

c. The balance to be paid after the verification of acreage and successful transfer, which verification should read/reflect 18 acres as is the position on the ground. Should it found to be less, the purchaser shall retain the amount in respect of the reduced acreage, and should it be found to be more than 18 acres, the purchase price will go up proportionately to the increased acreage.

d. The Vendor shall carryout the aforesaid verification of acreage at an expense to be apportioned at 50:50 between the Vendor and the Purchaser."

28. From the foregoing, it was evident to me that the agreement was entered into in a hurry with each side hoping to reap a windfall from the ignorance of the other. As the deal appeared so good, the Plaintiff had no time to do due diligence and verify the size of the land he was buying. While he thought he was buying the land at Kshs 222,000/- per acre, those figures did not exist anywhere. His own transaction lawyer testifying before this Court as PW2 thought the sale price was fixed at Kshs 4,000,000/- as reflected in the agreement he drafted.

29. When the ground verification was done, it turned out that the Defendant's assessment of the size of the land was seriously exaggerated. Instead of the 18 acres he had talked about the real size came to be 8.327 acres. Despite this huge discrepancy, the Plaintiff still thought of the deal as good and sought to proceed with the transfer.

30. As it turned out however, the Defendants had since had a change of mind. Having of course confirmed that this land was bigger than had been stated in the Title Deed, he brought in his wife and together they marched to the Kaloleni District Land Control Board and objected to the transfer of the land to the Plaintiff.

31. In the meantime, the Plaintiff claims to have expended a total of Kshs 2,162,200/- in the course of the transaction and in pursuit of the transfer. He urges this Court to compel the Defendant to refund him the said sum and to compensate him by way of general damages for breach of contract.

32. As a general rule however, such damages are not recoverable in our law and jurisdiction. Addressing itself to an instance where a Court had purported to award such damages in *Kenya Tourist Development Corporation –vs- Sundowner Lodge Ltd (2018)eKLR*, the Court of Appeal asserted thus:-

"With the greatest respect to the Learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the Learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the Court to award any amount of damages. The opposite is infact the case as a general rule damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason."

33. In the matter before me there would be absolutely no basis upon which I could make such an award more so given the ambiguous nature of the agreement entered into between the parties herein and the obvious lack of due diligence on the part of the Plaintiff before executing the agreement.

34. In regard to the expenditure in relation to the transaction, it was evident that the Plaintiff had indeed incurred some expenses. Special

damages are however subject to strict proof. While he claimed to have spent a total of Kshs 2,162,200/-, the Plaintiff has only produced a conveyance fee note of Kshs 100,000/- from Odongo B.O. & Company Advocates, two Cash Sales Receipts for Kshs 207,200/- and an acknowledgment slip from the Defendant of Kshs 50,000/-. This makes a total of Kshs 357,000/-.

35. Accordingly and granted that the Defendant admits to have received Kshs 1,000,000/- as deposit for the sale transaction, Judgment is hereby entered for the Plaintiff in the sum of Kshs 1,357,000/- with interests at Court rates.

36. The Plaintiff shall also have the costs of this suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF MAY, 2020.

J.O. OLOLA

JUDGE