



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 106 OF 2015

SUSAN WANJIKU MUTHAMA.....PLAINTIFF

=VERSUS=

MALINDI ESTATE.....DEFENDANT

R U L I N G

1. In its Application dated 22nd December, 2015, the Defendant is seeking for the following orders:

- (a) THAT the Plaintiffs suit herein be struck out with costs to the Defendant**
- (b) THAT the costs of the Application be provided for.**

2. The Application is premised on the grounds that the suit is founded on a sale agreement of 7th May, 2007; that the agreed purchase price for portion number 4883 was Ksh 650,000 of which the Plaintiff paid a deposit of Kshs. 100,000; that later on, the parties agreed that the sale would be in respect of land portion number 4884 and that the balance of the purchase price was to be paid by the Plaintiff in eleven(11) equal installments of Ksh 30,000 payable on the 15th day of each month.

3. The Defendant's Director deponed that the parties agreed that if the Plaintiff failed to meet any of the payments on the due dates, the Defendant was at liberty to treat the transactions as cancelled and forfeit the amounts paid; that time was of essence in the contract and that the agreed completion date was 15th May, 2008.

4. It is the Defendant's case that it received Ksh 450,000 from the Plaintiff with the last payment being made in February, 2009 and that there is no evidence to show that the Plaintiff paid the entire purchase price of Kshs 650,000.

5. According to the Defendant, this suit was filed on 2nd July, 2015, almost seven years from the appointed completion date and that the law allows claims to be made within six years of accrual of the cause of action.

6. In response, the Plaintiff/Respondent deposed that she mutually agreed with the Defendant to change the completion date from 15th May, 2008 until completion of payment of the consideration in full; that upon the change of the said completion date, the Applicant accepted further payments on 28th February, 2009 and that after the said payments, the Applicant handed over the completion documents and that she was later informed by her advocate that the property she had purchased was different from the documents

she had and in particular the Deed Plan.

7. It is the Plaintiff's case that unknown to her, she has been paying annual rates to the local authority in respect to a plot that was not hers; that all the payments were made were in respect to portion number 4884 which she did not purchase and that she agreed with the Defendant to swap portion number 4883 with 4884.

8. According to the Respondent, the limitation period in this matter is 12 years and not 6 years and that it is only fair that the suit be heard on merit.

9. In his Supplementary Affidavit, the Defendant's director deponed that the parties never agreed on the extension of the completion period; that after the exchange of the plots, the Plaintiff's advocate confirmed the correct plot number to be 4884 vide his letter of 30th January, 2013 and 11th February, 2013 and that the Defendant handed over the completion documents in respect to the new plot number.

10. The advocates filed brief submissions which I have considered.

11. In her Complaint, the Plaintiff has averred that pursuant to the agreements of 7th May, 2007, she purchased plot number 4883 and not plot number 4884; that the Defendant was duty bound to transfer to her the suit property and that she paid the entire purchase price.

12. The Plaintiff has accused the Defendant for failing to execute the registered documents and is seeking for an order compelling the Defendant to complete its part of the bargain.

13. In his Affidavit, that Defendant's director has acknowledged that the Defendant entered into an agreement with the Plaintiff vide an agreement dated 7th May, 2007.

14. In the said agreement, the property that the Defendant agreed to sale to the Plaintiff is portion number 4883 and the purchase price was Ksh 650,000.

15. In the agreement, the Defendant acknowledged receipt of a deposit of Ksh 100,000 with the balance of the purchase price to be paid in installments of Kshs 50,000 per month.

16. Although the completion date was indicated as 15th May, 2008 and time was of the essence, the Defendant has deponed that he received further payments of Ksh 100,000 from the Plaintiff on 28th February, 2009.

17. Having received the payment of Ksh 100,000 after the completion date, the issue of whether the agreement between the parties stood rescinded as at 15th May, 2008 can only be determined after the hearing of the suit.

18. Although the Defendant's case is that the parties agreed to swap plot numbers 4883 with 4884 after the agreement of 7th May, 2007, there is no evidence to show that the agreement of 7th May, 2007 was varied by the consent of the parties.

19. The mere fact that some receipts shows that the Plaintiff paid for plot numbers 4884 and not 4883 cannot in itself imply that the agreement of 7th May, 2007 was varied.

20. The claim by the Plaintiff is for recovery of land and not for breaching of contract *per se*

21. In the circumstances, it could be true that the limitation period in this matter is twelve (12) years in view of the fact that the limitation of Actions Act allows one to file a suit for recovery of land within 12 years.

22. Considering the triable issues that I have pointed above, the Plaintiff's suit cannot be said to be

frivolous , vexatious or an abuse of the court process. The Plaintiff is entitled to have his day in court in this matter.

23. For those reasons, I dismiss the Defendant's Application dated 22nd December, 2015 with costs.

Dated, signed and delivered in Malindi this 3rd day of **February**, 2017.

O. A. Angote

Judge