



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 120 OF 2013

MAURINE AKINYI MALOBA

LINET PESA MALOBA.....PLAINTIFFS

VERSUS

ABBAS ABUBAKAR ALWI.....DEFENDANT

JUDGMENT

BACKGROUND

1. By their Complaint dated and filed herein on 12th July 2013, Maurine Maloba and Linet Pesa Maloba (the Plaintiffs) pray for Judgment against the Defendant for orders as follows:-

i) A permanent injunction restraining the Defendant by himself, his agents or anyone claiming interest through (him) from alienating, selling, sub-dividing, constructing (or) developing the suit plots and the removal of structures thereon illegally built without the consent of the Plaintiffs or approval of the Council;

ii) Specific performance of the agreements executed on the 1st day of September 2009;

iii) Costs of the suit

iv) Interest on (iii) above at Court rates; and

v) Any other relief this Honourable Court may deem fit to grant in the circumstances.

2. Those prayers arise from the Plaintiffs contention that at all times material the Defendant was the beneficial, actual or registered owner of all that parcel of land known as Block II/118 India-Village/Lamu. On or about 1st September 2009, the Plaintiffs who were in need of space for building entered into an agreement with the Defendant wherein the Defendant sold to them two portions of the said property each measuring 30 metres by 40 metres at a consideration of Kshs 80,000/- per portion payable by installments of Kshs 3,000/- per month.

3. The Plaintiffs aver that they have since paid the full purchase price being Kshs 160,000/- for the two plots but to their dismay in June 2013, the Defendant re-entered the suit plots and commenced construction of a permanent structure thereon. Despite demand made and notice of intention to file suit, the Defendant has refused, ignored and/or failed to honour the agreement.

4. But in his Statement of Defence dated 12th August 2013 and filed herein on 16th August 2013, Abbas Ababakar Alwi (the Defendant) denies the averments contained in the Complaint and asserts that he has never entered into any sale agreement with the Plaintiffs as alleged or at all.

5. The Defendant further avers that he has no knowledge of any payments being made to Ms Omwancha & Mukiri Advocates as stated by the Plaintiffs as he has never received any money towards the purchase of the said plots of land.

6. In addition, the Defendant denies that he re-entered the suit plots in 2013 as stated by the Plaintiffs. He avers that he has been in actual possession of the plots of land since August 2010 when he terminated the lease agreements entered into between himself and the Plaintiffs and repossessed the same.

The Plaintiff's Case

7. In support of their case the Plaintiffs called one witness at the trial.
8. PW1-Maurine Akinyi Maloba is the 1st Plaintiff. Relying on her Statement dated 13th July 2016, PW1 told the Court that she is a business lady in Lamu town. PW1 testified that together with her sister Linet Pesa Maloba (the 2nd Plaintiff), they had been looking for a building space when they were introduced to the Defendant on 1st September 2009.
9. PW1 told the Court that the Defendant agreed to sell to them two portions of land measuring 30 x 40 metres which plots were to be curved off his parcel of land known as Block II/118 India-Village/Lamu at an agreed purchase price of Kshs 80,000/- per plot. It was further agreed between them that the purchase price would be liquidated by monthly installments of Kshs 3,000/- until payment in full.
10. PW1 testified that the Defendant introduced them to his Advocate M/s Omwancha & Mukiri Advocates and advised them to sign a commitment of terms and conditions before the said Law Firm. The Plaintiffs committed themselves as agreed and proceeded to liquidate the purchase price through deposits made to the Law Firm which were duly acknowledged.
11. PW1 told the Court that to their dismay however, in or about June 2013, the Defendant re-entered the two sold plots through an agent and started putting up a permanent structure thereon. Despite several attempts to sort out the matter amicably, the Defendant has to-date refused to honour his part of the bargain.
12. On cross-examination, PW1 told the Court that they had previously leased the two plots and were paying Kshs 700/- per year to the Defendant for each plot. She conceded that the agreement in issue was executed between themselves and Mr. Omwancha as the Defendant's Advocate. She further told the Court they gave all the money to the Advocate and did not see him give any money to the Defendant. PW1 however maintained that the Defendant authorized the Advocate to sell the plots.

The Defence Case

13. The Defendant similarly testified as the sole witness in support of his case. Testifying as DW1 and relying on his statement filed herein on 16th August 2013, the Defendant told the Court that he is the registered owner of all that parcel of land known as Block II/118 India-Village/Lamu measuring approximately 10 acres and situated within Lamu Island.
14. DW1 told the Court he has sub-divided the said property into various plots and that he recalls having let out two portions measuring 30 x 40 feet to the Plaintiffs for a sum of Kshs 700/- per year. DW1 however testified that he terminated the lease after the Plaintiffs failed to enter into a contract for the purchase of the said plots after he gave them an offer to purchase the same.
15. DW1 told the Court that he gave the same offer to various individuals many of whom took it up and entered into agreements which he made himself and were witnessed by one Mohamed Adnan Mudh-hir. Instead of entering into written agreements with himself, the Plaintiffs proceeded to enter into the same with M/s Omwancha & Mukiri Advocates and proceeded to pay them the purchase price.
16. DW1 testified that he was shocked when he met the Plaintiffs in 2011 and they told him they had paid the whole purchase price for the two plots. He has never received the said monies and had never entered into any written agreement with the Plaintiffs or authorized them to do so with anyone on his behalf. DW1 told the Court that he asked the Plaintiffs to go to the Law Firm and get their money back after which they could enter into a proper agreement but the Plaintiffs instead filed this suit.
17. On cross examination, DW1 told the Court that he had leased portions of the land to about 300 people and that at one time, he asked Mr. Omwancha who was his Advocate to write to the people to whom he had leased the land. He was however not aware if Mr. Omwancha had written to the Plaintiffs.
18. While conceding that Mr. Omwancha was his Advocate, DW1 refuted any claims that the Advocates received any money on his behalf. He told the Court Mr. Omwancha never gave him any coin in regard to the sale and that he had never asked the Advocate for any money.

Analysis and Determination

19. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have equally considered the written submissions placed before me by the Learned Advocates for the parties.
20. The Plaintiffs who are sisters pray for an order of specific performance to compel the Defendant to perform his part of an agreement dated 1st September 2009. They also urge the Court to grant an order of permanent injunction restraining the Defendant from interfering and/or dealing with two plots of land both measuring 30 x 40 square metres being part of that parcel of land known as Block II/118 India-Village/Lamu.
21. It is the Plaintiffs' case that by the said agreement, they did purchase the two plots of land from the Defendant at a consideration of Kshs 80,000/- per plot. To their shock and dismay, the Defendant has in June 2013 re-entered the two plots and commenced the construction of some permanent structure thereon. It is their case that all manner of efforts to have the Defendant honour his part of the bargain have failed to bear fruits.
22. On his part, the Defendant denies having entered into any agreement with the Plaintiffs wherein he sold to them the two plots. It is his case that he had only leased the two plots to the Plaintiffs but he terminated the same after the Plaintiffs failed to enter into a contract for the

purchase thereof after he gave them an offer to do so. He denies having authorized any person to sell the land to the Plaintiffs and/or receiving any amount of money from the Plaintiffs as the purchase price for the two plots of land.

23. From the material placed before me, it is indeed evident that the plaintiffs had by two undated agreements leased two separate parcels of land both measuring 30 x 40 feet from the Defendant at a consideration of Kshs 700/- per plot per year. It is also apparent that at some point in time, the Defendant who had sub-divided his ten acre parcel of land into various portions decided against leasing the same and instead opted to sell the various sub-divisions to the occupants thereof.

24. Accordingly and by a long two-page letter dated 3rd August 2009, the Defendant wrote to all the occupants through Messrs Omwancha & Mukiri Advocates as follows:-

“Re: Portion of Plot No.....on Original Land Parcel No. Block II/118/India-Village/Lamu

Our Client: Abbas Abubakar Alwi

Duly instructed by our above named client we wish to write and address you as hereunder;

That you leased the said plot on Land No. Block II/118/India-Lamu paying ground rent per month with an option of buying the same on first preference or on priority upon entering a fresh written agreement with our client. Full particulars whereof are well within your own knowledge.

Our client informs us that you have severally been asked and or requested to buy the plot as a first preference but you have refused to do so and you do not want to make any effort of payment at all thus subjecting our client to unnecessary inconveniences, loss and damage.

Our peremptory instructions are therefore to demand from you which we hereby do the immediate payment of the outstanding arrears of the ground rent and a written acceptance or offer to buy the plot. Failure to which our client shall repossess the plot at your own risk.

We are further informed that despite having the knowledge that you do not own the plot, you have either dug a foundation, commenced construction and/or completed construction of a permanent building without our client's consent and the mandatory required consent from the County Council with an approved plan as provided for by the Country Council by-laws.

TAKE NOTICE that unless you make prompt arrangements and clear the outstanding arrears of the ground rent due, owing and payable from you and do make a written acceptance to buy the Plot within (a) period of THIRTY (30) DAYS from the date of this letter, we have strict instructions to institute appropriate legal proceedings in Court against you for such orders compelling you to do so and/or evict you from the plot without any further notice or reference to you and entirely at your own peril as to costs and other consequences attendant thereto....”

25. It is this letter that according to the Defendant, the Plaintiffs herein failed to comply with leading to his termination and repossession of the suit properties herein. By his personal letters written a year later dated 26th August 2010, the Defendant wrote separately to the two Plaintiffs as follows:-

“Dear Madam,

RE: Portion of Plot within Land Parcel No. Block II/118/India Village Lamu

This is to inform you that following your failure to pay for the rent arrears and your failure to write an acceptance letter to buy the plot, and despite receiving a warning letter from Omwancha & Mukiri Advocates dated 3rd August 2009, I have decided to repossess my plot and sell the same to a willing buyer who will (be) ready to pay. I have also reported this matter to the Police and if you feel aggrieved you can proceed to seek legal redress.”

26. It was not clear to me why the Defendant waited for another one year after giving a 30 days notice to the Plaintiffs to inform them that they had failed to write an acceptance letter to buy the plot. What was however clear to me was that the Plaintiffs responded to the letter from the Defendants Advocates by going to see the said Advocates within the 30 days stipulated in the demand letter.

27. Consequently and by separate agreements dated 1st September 2009 executed at the Advocates' office, titled “Commitment and Undertaking for Payment of the Sum consideration for the Purchase of Plot No. –situated at India Area within Lamu Island,” it was stated as follows:-

“THAT pursuant to an undertaking between (the Plaintiffs name) of Post Office Box No. 89 Lamu and holder of National Identification No. – (herein called “the Intended Purchaser” of the one part) and Abbas Abubakar Alwi (hereinafter called “the Intended Vendor”).

AND WHEREAS the said Abbas Abubakar Alwi is the registered owner of all that parcel of land situated at India within Lamu Island and he has caused the said parcel of land to be sub-divided into portions and he is desirous of selling to the intended purchaser a portion measuring 30 sqm by 40sqm at agreed sum consideration of Kshs 80,000/- the intended purchaser now

covenants and undertakes as hereunder:

- 1. That the intended purchaser has so far paid the intended vendor the sum of Kshs 7,500/-*
- 2. That the intended purchaser shall today at the signing of this undertaking pay a sum of Kshs 12,500/- being part of the purchase price making a total of Kshs 20,000/-*
- 3. That the intended purchaser shall pay the purchase price in installments of Kshs 3,000/- per month on or before each 10th day of each succeeding month until payment in full.*
- 4. That the intended purchaser shall be at liberty to add or increase the installments at any given time depending on the availability of funds.*
- 5. That upon completion of the purchase price, the vendor shall immediately issue the purchaser with a Title Deed in respect of the plot.*
- 6. That the intended purchaser is at liberty to erect, construct or put up a permanent or temporary structure on the plot and shall cease to pay the ground rent of Kshs 700/- per month.*
- 7. That during the payment of the installments the Vender shall not whatsoever interfere with the quiet and peaceful possession of the plot by the intended purchaser.*

28. Arising from the foregoing, it was clear to me that by his letter dated 3rd August 2009, the Defendant had given the Plaintiffs an offer to purchase the two plots of land. That offer gave the Plaintiffs 30 days within which to make a written acceptance to buy the concerned plots of land. It was also clear to me that by the "Commitment and Undertaking" dated 1st September 2009, the Plaintiffs accepted the offer within the prescribed time and proceeded to make payments towards the acquisition of the plots of land.

29. While it was true that the said "Commitment and Undertaking" was only executed by the Plaintiff and Alfred M. Omwancha Advocate, it was clear to me that the Plaintiffs had initially been dealing directly with the Defendant and only shifted to dealing with the said Advocate on the instructions of the Defendant. In that respect, the Plaintiff produced numerous receipts confirming that they made the necessary payments for the subject plots. The receipts which were issued by the Law Firm Omwancha & Mukiri Advocates were for the purchase of the plots to be carved from the Defendant's said parcel of land.

30. In this respect, it was evident to me that the Plaintiffs paid the instalments on the understanding that Messrs Omwancha & Mukiri Advocates were all along the disclosed agent acting on behalf of the Defendant. While the said Alfred Omwancha Advocate was not called as a witness before me, it was apparent that the preparation of the undertaking and the acceptance of the deposits fell within the scope of his actual or apparent authority deriving from his letter to the Plaintiffs dated 3rd August 2009 written on the admitted instructions of the Defendant.

31. By asking the Plaintiffs to make arrangements to make a written acceptance or offer without specifying that the same was to be strictly made to himself in person and not the Advocate issuing the demand, the Plaintiffs could not be faulted for dealing with the said Advocate. While it would appear that the Defendant eventually fell out with the said Advocate, there was no evidence that he brought it to the attention of the Plaintiffs that he had terminated the services of the Advocate.

32. Indeed it was not until one year later that he purported to make a follow up with the Plaintiffs on whether or not they had accepted to purchase the subject plots. By then the Plaintiffs, from the receipts produced herein were on the verge of concluding the payments.

33. The understanding executed with the Defendant's Counsel bound the Defendant to process titles for the Plaintiffs and it was clear that upon conclusion of the payments, the Plaintiffs were waiting for the title deeds only to find that the Defendant had re-entered the land and commenced constructions thereon.

34. In the premises, I was satisfied that the Plaintiffs had proved their case to the required standard against the Defendant and that any issues as to payment that may arise were as between the Defendant and his said Advocate.

35. Accordingly, Judgment is hereby entered for the Plaintiffs as prayed in the Plaint with costs.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE