



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MALINDI ELC CASE NO. 285 OF 2016**

**RAKESH RAJSPAL.....PLAINTIFF**

**VERSUS**

**PAOLA GIACOSA.....DEFENDANT**

**JUDGMENT**

**Background**

1. By a Plaint dated 25<sup>th</sup> October 2016 as filed herein on 26<sup>th</sup> October 2016, Rakesh Rajpal (the Plaintiff) prays for Judgment against Paola Giacosa (the Defendant) for: -

***a) A refund of Euros 30,000 plus interest thereon at 20% per the agreement from the date of recession of the agreement being monies had and received under the agreement until payment in full;***

***b) Salaries for workers of Kshs 85,000/-***

***c) Damages for breach of contract and misrepresentation;***

***d) Costs of this suit together with interest at such rate and for such period as the Court may deem fit to grant.***

2. Those prayers arise from the Plaintiff's contention that by an agreement in writing dated 28<sup>th</sup> August 2015, it was agreed that the Defendant would sell and the Plaintiff would purchase the Defendant's parcel of land number 624/711(CR 24711) comprising a four bedroomed fully furnished villa at Mambui, Malindi at a consideration of Euros 30,000/=.

3. At the execution of the agreement, the Plaintiff avers that he paid a 10% deposit of the purchase price on the understanding that the suit premises was 1.898 Ha in size and all the title documents were true and correct. Upon a search being carried on the land by the Plaintiff, he discovered that the acreage shown on the title was larger than the original mother title from which the property had been sub-divided. When he brought this to the attention of the Defendant, she proceeded to take back possession of the property on the purport that she would refund the monies received.

4. The Plaintiff asserts that in flagrant breach of the agreement, the Defendant has failed to furnish proper title documents to himself and or to refund the monies received by herself and hence this claim.

5. But in her Statement of Defence and Counterclaim dated 6<sup>th</sup> March 2017, the Defendant asserts that the title documents she presented to the Plaintiff were the very same documents they had been presented with when she and her sister Cristina Giacosa acquired the property on 11<sup>th</sup> November 1993. She avers that it was therefore incumbent upon the Plaintiff to carry out due diligence and confirm all information about the land before entering into the sale agreement.

6. The Defendant avers that if indeed the measurements on the title were incorrect then the person responsible for the distortion was the Director of Survey and or the Registrar of Lands who had issued her with the said documents.

7. The Defendant therefore avers that if anything, it is the Plaintiff who is in breach of the agreement of sale having refused and or failed to complete the balance of the purchase price as required under Clause 4 of the agreement. She therefore denies that the Plaintiff is entitled to any refund of the monies paid or to specific performance of the agreement.

8. By way of her Counterclaim, the Defendant prays that the Plaintiff's suit be dismissed and that instead, Judgment be entered in her favour as against the Plaintiff for: -

***i) A declaration that the Plaintiff is in breach of the sale agreement and therefore not entitled to a refund of the monies paid to the Defendant or to an order of specific performance; and***

***ii) Costs of the suit and the Counterclaim.***

### **The Plaintiff's Case**

9. At the trial herein, the Plaintiff called three witnesses in support of his case.

10. PW1- Dr. Rakesh Rajpal is the Plaintiff himself and a General Medical Practitioner in Malindi. He told the Court that he saw an advertisement of the suit property for sale and upon calling the number indicated found that it was the Defendant's number. The property is registered in the joint names of the Defendant and her sister Cristina.

11. PW1 testified that when they subsequently executed a sale agreement on 28<sup>th</sup> August 2015, the Defendant assured him that she would get a power of attorney from her sister to deal with her portion of the property. Cristina was to come to Kenya to execute the power of attorney.

12. PW1 further testified that upon execution of the agreement, he paid the Defendant a deposit of 30,000 Euros through a Bank transfer. At that time, the Defendant was in a hurry to go back to Italy and PW1 did not do a search on the property. PW1 told the Court he knew the Defendant's father as his client and he therefore trusted the Defendant.

13. PW1 further testified that while he was not given possession of the land, he started paying the workers on the land. However, when he finally did a search on the land, the Registrar asked him to produce the original title for verification. When PW1 saw the original title, it had some alterations and the Reference Number and the Deed Plan Number were different. The acreage was equally different. While the property being sold was a sub-division, the mother title was smaller than the suit property.

14. PW1 told the Court that he then became suspicious and asked the Defendant to refund his money. The Defendant told him that she would keep the deposit. On 21<sup>st</sup> October 2015, PW1 issued the Defendant with a Notice terminating the agreement as per Clause No. 18 thereof. The deposit was required then to be refunded within 30 days with 10% interest. The same has however never been refunded.

15. On cross-examination, PW1 conceded that he had been shown the land before he agreed to purchase it. He did not however do a search at the time. He further conceded that the Advocate before whom they executed the Agreement was acting for both parties and that he never completed payment of the balance of the purchase price.

16. PW1 further told the Court that when the Registrar asked for the original title documents, he did not ask the Defendant for the same and that he has never seen the original title. He further conceded that under the agreement, he was to forfeit the deposit where he breached the agreement.

17. PW2-Luke Omondi Achando is a Civil Servant employed as a Surveyor at the Kilifi County Lands Office. PW2 testified that he was instructed by PW1 to carry out a survey on the piece of land No. 624/711, Mambrui. PW1 gave him a copy of the Deed Plan and a Copy of the title. He surveyed the property and prepared a Report dated 28<sup>th</sup> August 2015 with a Sketch Plan.

18. PW2 told the Court that the measurement on the ground did not correspond to those shown on the Deed Plan. From his analysis, the said Plot No. 624/42 was extended after the ocean land changed thus creating more land. There was however no Deed Plan for the extension.

19. On cross-examination, PW2 conceded that he had not indicated in the Report that the Plaintiff gave him a Copy of the Title Deed and the Deed Plan. He told the Court his Report was to establish the boundary of the sub-division that the Plaintiff was buying. He further told the Court he was unable to get the Survey Plan from the Survey of Kenya office even though he had not indicated in his Report that he had made any request to the Director of Survey to produce the Plan.

20. PW2 conceded that his Report erroneously referred to the acreage of the original area as 2.719 Ha while in actual sense it was 1.719 Ha. PW2 told the Court that ordinarily, the Deed Plan corresponds with the Survey Plan and that the Survey Plan would have shown the coordinates of the land.

21. PW2 further told the Court the suit property is marked by a Perimeter Wall although he did not get the approval plans for the wall. He told the Court the title deed he was given by the Plaintiff indicates that the land is 1.898 Ha same as what is on the attached Deed Plan. There was no indication that the Deed Plan was incorrect.

22. PW3-Samuel Kariuki Mwangi is the Registrar of Titles, Mombasa. He told the Court that from their records, the current registered owner of the property is the Defendant together with her sister Cristina. Those records show that while the Survey Plan is No. 177786, the Deed Plan reads a different number of 17787. The Registered owner had however not produced the original mother title to enable them confirm what may have happened and the error is yet to be rectified in their records.

23. On cross-examination, PW3 told the Court that the title is genuine as per the records held at their office. The documents held by the Defendant are the same ones in their office. On being shown the Search Certificate done by the Plaintiff on 7<sup>th</sup> September 2015, PW3

further confirmed that the particulars given thereon are correct and that the details thereon came from the documents in their custody. He conceded that his office may have typed the wrong Deed Plan Number and hence the discrepancy in the numbers.

### **The Defence Case**

24. The Defendant testified as the sole witness in her case. Testifying as DW1, she testified that she did indeed enter into a sale agreement with the Plaintiff. She however denied that she gave the Plaintiff false documents in regard to the transaction. She told the Court the documents she gave to the Plaintiff had been given to her by Government Officers when she acquired the property.

25. DW1 further testified that she gave a copy of the title deed and the Deed Plan to the Plaintiff before they drew the sale agreement. The Plaintiff was represented by an Advocate during the execution of the agreement and no objection was raised to the documents. The size of the suit property was shown on the title deed and the other documents.

26. DW1 further told the Court that it was the Plaintiff who breached the agreement. She sent the Plaintiff a letter asking him to comply but he did not do so. She denied that the Plaintiff wrote to her terminating the agreement although he received a complaint letter from the Plaintiff's Advocates in which he complained about the roof and the general state of the house.

27. On cross-examination, DW1 conceded that one Advocate had represented both sides in the sale transaction. At that time, she did not have a power of attorney from her sister Cristina. She got the power later as the sister did not visit Kenya for some time.

28. DW1 further told the Court that she left the Country a week after executing the agreement on 28<sup>th</sup> August 2015. She conceded she received 30,000 Euros from the Plaintiff and further that she has never refunded the same. She told the Court she was unaware the title had an error although she came to hear about it later on.

29. DW1 further conceded that while she blamed the Government for the errors on the title, she had not enjoined the Government in the suit.

### **Analysis and Determination**

30. I have perused and considered the pleadings filed by both the Plaintiff and the Defendant herein. I have also considered the oral testimonies of the witnesses who testified before me, the evidence adduced by the parties as well as the submissions and authorities placed before me by the Learned Advocates for the parties.

31. The Plaintiff before me craves a refund of Euros 30,000/- paid as a deposit for the purchase of the suit property plus interest thereon at 20% per annum. He also prays for the sum of Kshs 85,000/- which he says he paid to the workers on the suit property after he executed a sale agreement for the purchase of the property with the Defendant on 28<sup>th</sup> August 2015. In addition, the Plaintiff urges this Court to award him damages for breach of contract and misrepresentation as well as the costs of this suit.

32. According to the Plaintiff, he paid the said monies and entered into the sale agreement with the Defendant on the understanding that the title documents in possession of the Defendant were true and correct and that the suit property was 1.898 Ha or thereabouts. The Plaintiff told the Court that subsequent to the execution of the agreement, he discovered that the original mother title of the suit property being Portion No. 624/42 measured only 1.719 Ha and that therefore it was smaller than the suit property which was said to be a sub-division thereof.

33. It was the Plaintiff's case that on discovering this anomaly, he instructed a Land Surveyor (PW2) to verify and confirm the measurements and the irregularities on the title. As it turned out, the Surveyor confirmed the discrepancies but when the Plaintiff informed the Defendant of the same, she stripped the Plaintiff of possession of the suit premises and thereafter refused to refund the monies that had been so far spent by the Plaintiff on purchase and maintenance of the suit premises.

34. On her part, the Defendant does not deny having entered into the sale agreement dated 28<sup>th</sup> August 2015 with the Plaintiff. It is however her case that she showed the Plaintiff the suit property prior to the purchase and he was satisfied therewith. It is also her case that the title documents she presented to the Plaintiff were the same ones she and her sister Cristina were presented with when they acquired the suit property and she denies falsifying the same.

35. While admitting that she had not refunded the monies paid to herself by the Plaintiff, the Defendant asserts that it is the Plaintiff who breached the Sale Agreement and as such he is not entitled to any refund or any other orders sought in the suit herein.

36. The sale agreement dated 28<sup>th</sup> August 2015 was produced by the Plaintiff herein as Plaintiff's Exhibit No. 2. It describes the Defendant (referred to therein as "the Vendor") as one of the registered owners of land parcel number 624/711 (CR 24711) as delineated on land survey Plan Number 177786 within Mambui, Malindi. I have perused the entire agreement and I was unable to find anywhere in its 19 clauses where the measurements of the suit property were given and or where the parties made any commitments as to its measurements.

37. The Certificate of Title transferred to the Defendant and her sister on 11<sup>th</sup> November 1993 (Pex 8) however describes the land to be containing by measurement 1.898 Ha. That was the same measurement which is reflected in the Certificate of Postal Search carried out by the Plaintiff on 7<sup>th</sup> September 2015 (Pexh 7).

38. That being the case, I was unable to find any basis for the accusation leveled against the Defendant that she had falsified the documents. The facts concerning the suit property were clearly discernible from the documents of title presented to the Plaintiff which documents were in consonance with the official documents held by the relevant land registry.

39. That fact was indeed confirmed by the Plaintiff's own witness- the Registrar of Titles Mombasa(PW3). In his testimony before this Court, PW3 was clear that the Title Deed and the Deed Plan presented by the Defendant to the Plaintiff were genuine documents according to the records held in their Registry.

40. Noting that the Deed plan was indicated on the Title Deed as 177787 and not 177786 as it ought to have been, PW3 told the Court that the error may have emanated from their office during the preparation of the Title. He however confirmed that it was his registry that gave the Defendant the Title Deed and the Deed Plan which had been presented to the Plaintiff.

41. As it were, the Plaintiff admitted that prior to the execution of the agreement, he had been shown the land. He was not a stranger to the Defendant as he told the Court the Defendant's father had been his patient. He also had an Advocate even though shared with the Defendant who conducted a search on the property and confirmed the details reflected in the sale agreement.

42. As the person buying the property, there was a clear duty on his part to conduct appropriate due diligence and inform himself on all the relevant aspects concerning the property he was purchasing. If he did not do so, he cannot turn around at this stage, and accuse the Defendant of making representations on facts that were not captured in the agreement executed by themselves.

43. Indeed, while the Plaintiff also accuses the Defendant of misrepresenting to himself that she would secure a power of attorney from her sister as the co-owner in regard to the suit premises, it was clear to me from a perusal of Clause One of the agreement that the Plaintiff executed the same in the full knowledge that the Defendant had the sister's authority and consent to transact and deal with the property. There was no evidence placed before me that the Defendant's sister had repudiated and or disowned the transaction in any manner whatsoever.

44. Regarding the obligations of the parties, Clauses 18 and 19 of the Sale Agreement provided as follows:

***“18. Should “the Vendor” in anyway breach the said agreement and should ‘the purchaser’ decide that he does not want to pursue the acquisition of the property, “the Vendor” shall refund to “the Purchaser” all the monies paid to her within 30 days of demand by “the purchaser” together with 10% interest. If “the Vendor” does not pay the amounts demanded together with 10% interest within 30 days from the date of demand, the principle sum (Purchase price paid) shall continue to attract additional 20% interest per annum till payment in full.”***

***19. Should ‘the purchaser’ breach the said agreement by failing to undertake his obligations as stipulated herein more specifically by failing to pay any one instalment as set out herein, the “the Vendor” shall give a 30 days demand notice to “the purchaser” as to why he should not forfeit his 10% purchase price deposit and should he not make up by paying the instalment amount that is due as demanded, “the Vendor” shall be at liberty to render this agreement null and void and retain 10% purchase price deposit and refund the remainder of any money in excess thereof already paid to her as purchase price to “the purchaser”.***

45. My reading of Clause 18 of the agreement as cited hereinabove was that the Plaintiff was entitled to a refund of the 10% deposit where the Defendant was in breach of the agreement and the Plaintiff decided not to proceed therewith. It goes without saying from my findings hereinabove that I was unable to find how and where the Defendant had breached the said agreement.

46. According to the Plaintiff, when he informed the Defendant of the alleged irregularities on the title, the Defendant had responded by stripping him of the possession of the suit property by taking over possession of the property and promising verbally to refund the Plaintiff monies. The Plaintiff then responded by giving a notice of repudiation or rescission of the agreement and elected to sue for the refund of the said monies.

47. It was however not clear to me how the Plaintiff had come into possession of the premises. I so say because while the Plaintiff was required to pay workers on the property from September 2015, from the material presented before me, the Plaintiff had as at the time of filing this suit only paid 10% of the purchase price. For him to take possession of the premises, Clause 12 of the agreement provided as follows: -

***“12. Full possession of the property shall be taken over by “the purchaser’ immediately on payment of the purchase price herein in full.”***

48. As it were, Clause 4 of the agreement defined the purchase price to be the sum of Euros 300,000/- and in the absence of any evidence of full payment, the Plaintiff could not be heard again to accuse the Defendant of dispossessing him of property whose possession he was yet to rightfully assume.

49. Under the same Clause 4 of the agreement, the Plaintiff was required to pay a further 30,000/- Euros on 30<sup>th</sup> October 2015, 90,000 Euros on 31<sup>st</sup> December 2015 and a final 150,000/- Euros on 30<sup>th</sup> June 2016. There was however no evidence that the Plaintiff paid these additional instalments. That failure in my view amounted to a breach of Clause 19 of the agreement as cited above which Clause required the Plaintiff to pay the instalments as provided under Clause 4 of the agreement.

50. Having so breached the agreement, the Plaintiff did not wait for the Defendant to demand compliance. Instead by a letter dated 21<sup>st</sup> October 2015, he wrote to the Defendant terminating the agreement and demanding a refund of his deposit and other expenses. Having breached the agreement and repudiated the same, I did not think the Plaintiff was entitled to any such refund on the deposit. By repudiating the agreement, for no apparent breach on the part of the Defendant, he had thereby forfeited the deposit paid and I did not find any Clause in the agreement allowing a refund of the expenses incurred in securing the premises as demanded by the Plaintiff.

51. In the premises, I was not satisfied that there was any merit in the Plaintiff's suit herein. On the contrary, this Court was satisfied that the Defendant had proved her case on a balance of probabilities.

52. Accordingly, the Plaintiff's suit is hereby dismissed in its entirety and Judgment is hereby entered for the Defendant as prayed in the Counterclaim.

53. The Defendant shall have the costs of the Plaintiff's suit and of the Counterclaim.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of September, 2020.**

**J.O. OLOLA**

**JUDGE**