



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 52 OF 2014

SAID AHMED MAHMUD.....PLAINTIFF

VERSUS

MERCY CASSANDRA M'MBOGA.....DEFENDANT

RULING

1. By a Chamber Summons application dated and filed herein on 6th April 2018, Said Ahmed Mahmud (the Plaintiff/Applicant) prays for an order directing Jacqueline Waihenya Maina Advocate to honour the undertaking contained in the Order dated 21st April 2015 and the letters dated 12th May 2015 and 22nd May 2015.

2. The Application which is supported by an affidavit sworn by the Plaintiff on the same day is premised on the grounds inter alia that:

i) The Plaintiff sold to the Defendant a house in Watamu erected on a Portion of land known as Kilifi/Jimba 1323.

ii) The Defendant took vacant possession upon payment of the deposit as was provided by Paragraph 2 of the agreement. The Defendant did not pay the balance of the purchase price and as a result, the Plaintiff instituted this suit seeking:

a) Vacant possession and mesne profits at the rate of Kshs 50,000/- per month from August 2012 until the date of vacant possession.

b) In the alternative and without prejudice to the foregoing, a declaration that due to the failure by the Defendant to pay the balance of the purchase price and the failure by the parties to apply for Land Control Board consent and or seek for the extension of time within which the application would have been made for the transfer of the suit premises, the agreement between the Plaintiff and the Defendant has been terminated by operations of the law.

c) In the alternative and without prejudice to the foregoing, a payment of the sum of Kshs 1,000,000/- in lieu of (a) above.

d) Costs and interest thereon at Commercial rates.

iii) That with the assistance of advocates, the parties entered into an agreement that was reduced into a consent that was recorded on 21st April 2015.

iv) That by a letter dated 12th May 2015 received by the Defendant's Advocates, all the completion documents were delivered to the Defendant who acknowledged receipt of the same.

v) In the said letter, documents were released to the Defendant's advocate on her professional undertaking to release the balance of the purchase price to the Plaintiff's advocate on the terms contained therein. This undertaking was confirmed by the Defendant's advocate in her letter dated 22nd May 2015.

vi) That there was a delay in the finalization of the registration of the transfer but the same was eventually registered.

vii) On 28th September 2016, the Defendant's advocate wrote to the Plaintiff's advocate claiming that her client had encountered challenges with the property that she had been occupying for more than five years. There is however absolutely no truth in the

claim that the house was faulty.

viii) The Plaintiff has fully performed his part of the consent and the Defendant is now registered as the owner of the property without payment of the balance of the purchase price as well as costs of the suit and the Defendant's Advocate has unreasonably refused to honour the terms of the undertaking as well as the consent order.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 7th May 2018, Ms Jacqueline Wanjiku Waihenya Advocate (the Respondent) avers that her Client Mercy Cassandra M' Mboga (the Defendant) and the Plaintiff herein entered into a Sale Agreement dated 31st May 2011 and she verily believes it to be true that her client paid the purchase price in full.

4. Counsel further avers that the Plaintiff demanded Kshs 600,000/- being the balance due and outstanding and eventually filed this suit praying for Kshs 1,100,000/- and sought to avoid the sale on grounds that the Land Control Board consent had not been obtained. The Defendant opposed the suit as the Plaintiff had deliberately obstructed the procuring of the Land Control Board Consent.

5. The Respondent Counsel further states that in the cause of the pendency of the suit, the Plaintiff and the Defendant re-negotiated the terms of the sale and entered into a Deed of Variation of the Sale Agreement which was to take effect on 1st May 2014 and a consent was recorded in Court to facilitate the same.

6. The Respondent conceded that the Deed of Variation together with the completion documents were forwarded to herself vide the Plaintiff's Advocates' letter dated 12th May 2015 and her Law Firm confirmed receipt of the same. She avers that as they followed up on Land Control Board Consent, the Defendant proceeded to engage professionals to attend repairs of the house which had by then become apparent.

7. The Respondent avers that they eventually managed to register the transfer and that by their letter dated 28th September 2016, they notified the Plaintiffs' Advocates of the same as well as on the challenges to the structural integrity of the house for which her client had further instructed her to hold lien on the funds to cater for the costs of the repairs which they had quantified at Kshs 1,300,000/-.

8. The Respondent avers that they thereafter went out of their way to seek the Vendor's Advocates account details to remit the uncontested amounts as set out in a letter dated 28th September 2016 but were unsuccessful. She asserts that each party was to fulfil its obligations per the Deed of Variation including the Vendor providing a structurally sound house to the Purchaser and that she proceeded to deposit the funds they held into Chase Bank which went under receivership in the course of the transaction although she has received assurance that the same would be released.

9. I have carefully considered the application and the response thereto. I have also perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

10. As conceded by all parties to the dispute, the Plaintiff and the Defendant herein entered into a Sale Agreement dated 31st May 2011 wherein the Plaintiff sold to the Defendant his property erected on all that parcel of land measuring 0.1 Ha situated at Watamu and more particularly known as Kilifi/Jimba/1323. It is apparent that the Defendant took possession of the property shortly after the sale agreement even though the Plaintiff was of the view that certain issues remained pending.

11. Accordingly, and by a Plaint lodged herein dated 20th March 2014, the Plaintiff sought against the Defendant inter alia, orders of vacant possession and mesne profits, as well as a declaration that the agreement between himself and the Defendant had been terminated by operation of the law. In the alternative, the Plaintiff sought payment of Kshs 1,100,000/- as the balance due and outstanding from the sale.

12. In the course of time however, the two parties met, re-negotiated the terms of the sale and entered into a Deed of Variation of the Sale Agreement which was to take effect on 1st May 2014. Accordingly, and by a consent recorded herein before the Honourable Angote J on 21st April 2015, the parties agreed as follows: -

"By consent, the Defendant shall pay the Plaintiff the sum of Kshs 1,742,038/75 comprising the principal amount plus interest at 14% per annum compounded between August 2012 and April 2015.

The parties shall execute the following documents: -

(1) A Deed of Variation of Sale Agreement.

(2) The Transfer

(3) Application of Land Control Board Consent.

(4) The Affidavit by the Plaintiff in confirmation of his name. The Plaintiff will provide the documents and consent as set out in the Deed of Variation.

(5) The Defendant will pay the decretal amount within 14 days of registration of the transfer in her favour. The costs herein shall be agreed upon by the parties and in default of an agreement the costs shall be taxed by the Taxing Master."

13. It is apparent that following the recording and adoption of the consent order in Court, the parties exchanged a number of correspondences. By a letter dated 12th May 2015, Messrs Muli & Ole Kina Advocates for the Plaintiff wrote to the Respondent Counsel as follows:

“RE: MALINDI HELC NO. 52 OF 2014 SAID AHMED MAHMUD –VS- MERCY CASSANDRA M’ MBOGA

We refer to the above matter and enclose herewith the following documents for your attention: -

a) Deed of Variation of Sale Agreement in respect of Kilifi/Jimba/1323 in quadruplicate signed by Vendor.

b) Spousal consent in triplicate signed by the spouse.

c) Transfer form in triplicate signed by the Vendor.

d) Application for consent of Land Control Board in triplicate signed by the Vendor.

e) Affidavit for Said Ahmed Mahmud duly commissioned in triplicate.

f) Requisition for Valuation for Stamp Duty.

These documents are released to you upon your professional undertaking to release the balance of the purchase price which we shall hold to your order and only release the same to my client upon successful registration of the transfer in favour of your Client.”

14. In response to the said Letter, the Respondent Counsel wrote to the Plaintiff’s Advocates on 22nd May 2015 acknowledging receipt of the documents and stating inter alia as follows: -

“We confirm that the aforesaid documents are released to us upon our professional undertaking to release the balance of the purchase price outlined in the deed of variation of (the) sale agreement upon successful registration of the transfer in our Client’s favour.”

15. In the application before me, the Plaintiff now asserts that he has fully performed his part of the consent and the Defendant is now registered as the proprietor of the suit property yet he is yet to receive the balance of the purchase price and the costs of the suit as agreed in the consent recorded in Court.

16. The Respondent Counsel does not deny that the property has since been registered in the name of her Client. She infact confirms that they managed to register the transfer and that on 28th September 2016, they not only notified the Plaintiff’s Advocates of the same but also informed them of certain structural defects in regards to the property. She avers that on account of those defects, her client has instructed her to hold lien on the funds to cater for the costs of repair which they have quantified at Kshs 1,300,000/-.

17. As was stated by Warsame J (as he then was) ***in Equip Agencies Ltd –vs- Credit Bank Ltd (2007) eKLR: -***

“An undertaking is usually given to ease and smoothen the path of transactions carried out by advocates. It is a convenient method or tool to circumvent delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between Advocates. It is a contract between Advocates after an offer and acceptance with a resulting consideration which follows from one Advocate to another. It is a promise to do or refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an Advocate either personally or through the name of the firm he usually practices under.”

18. As it were, I have no doubt in my mind that the professional undertaking given herein was enforceable. The documents used to register the Defendant were obtained on the undertaking that the balance of the purchase price was to be released upon successful registration. The Defendant had been residing on the property for about five years by the time of the registration of the transfer and the alleged structural defects had neither been brought to the attention of the Plaintiff earlier, made part of the undertaking nor had they been incorporated in the consent recorded by the parties in Court.

19. It was clear to me that under Section 7 of the Land Act, 2012, a ‘transfer’ is one of the methods of acquisition of title to the land. Section 43(2) of the said Act stipulates that a transfer shall be completed by the registration of the transferee as proprietor of the land, lease or charge. The Respondent herein concedes that the suit property has been effectively transferred to her Client and she cannot at this late stage be allowed to introduce new conditions on the purport of instructions being received from the Defendant.

20. In this respect, I concur with the findings of Gikonyo J. ***in Havi & Company Advocates –vs- Jane Muthoni Njage t/a J.M. Njage & Company Advocates (2015) eKRL*** where the Learned Judge observed as follows: -

“.....circumstances, where the advocate did not honour the undertaking until after a suit had been filed and did not seek the consensus of the other Counsel to vary the terms of the undertaking constitute special reasons on which the Court may issue a coercive order of enforcement especially given that the Defendant was in funds all this time but just did not honour the undertaking. To hold otherwise would encourage a practice where advocates will give an undertaking without the intention of

honouring them as stipulated. Such conduct would undermine the noble purpose of professional undertaking in conveyancing and the effect would be that conveyancing would be made extremely difficult if the trust in professional undertaking is lost.”

21. I agree with that approach as it is also the only other way to prevent unscrupulous Advocates from keeping money entrusted to them for completion of a transaction for their own use.

22. The upshot of all this is that I find merit in the Chamber Summons dated and filed herein on 6th April 2018. Accordingly, Jacqueline Waihenya Maina Advocate is hereby directed to honour the undertaking referred to herein within 30 days from today.

23. The Respondent shall also meet the costs of this application.

Dated, signed and delivered at Malindi this 2nd day of October, 2020.

J.O. OLOLA

JUDGE