



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 150 OF 2011

PAUL NDIRITU NDUNGU.....PLAINTIFF

VERSUS

RENATO PIEIA.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Plaint dated 14th September 2011 and filed herein on 14th October 2011, the Plaintiff prays for Judgment against the Defendant for the sum of Kshs 1,000,000/- plus costs and interest.
2. It is the Plaintiff's case that on or about 9th October 2008, he and the Defendant Renato Piea (who was the duly constituted attorney of one Enrizo De Verolli) entered into a Sale Agreement for Apartment No. C104 erected on LR No. 1862 Malindi. The said Apartment was registered in the name of the Defendant's principal Enrico De Verolli and it was agreed that the Plaintiff would purchase the same for the sum of Kshs 5,000,000/-. The Plaintiff deposited a sum of Kshs 1,000,000/- towards the purchase price on the date of the Agreement.
3. It is further the Plaintiff's case that sometime in December 2008, they mutually agreed with the Defendant to terminate the Agreement and the Defendant was to refund the deposit paid of Kshs 1,000,000/-. The Defendant however refused to refund the money hence the suit herein.
4. But in a Statement of Defence and Counterclaim filed herein on 10th November 2011, Renato Pieia (the defendant) denies the Plaintiff's claim. Instead he accuses the Plaintiff of unilaterally and unreasonably attempting to change the terms of the Agreement dated 9th October 2008 in regard to payment of the balance of the purchase price.
5. The Defendant further contends that he was acting as an agent for a disclosed principal and hence he has been wrongly joined as a party to this suit.
6. In his Counterclaim, the Defendant accuses the Plaintiff of failing to pay the balance of the purchase price and therefore urges this Court to grant an order of specific performance to compel the Plaintiff to perform his part of the contract and/or to pay general damages for the breach thereof.

The Plaintiff's Case

7. The Plaintiff testified as PW1 and the sole witness in his case. It was his testimony that on 9th October 2008 he entered into an agreement for sale with the Defendant for the Sale of Apartment No. C104 comprised in a residential development known as Policino OasisVillage erected on Land Reference No. 1862 Malindi Municipality for the sum of Kshs 5,000,000/-
8. PW1 told the Court that it was a term of the Sale Agreement that he would pay a deposit of Kshs 1,000,000/- and the balance of Kshs 4,000,000/- would be paid at equal monthly instalments of Kshs 800,000/-. PW1 testified that before signing the Sale Agreement, he satisfied himself that Enrico Di Verolli was the registered owner of the Apartment and that the Defendant herein was his duly constituted Attorney. He was supplied with and studied copies of the sub-lease over the Apartment and the registered Power of Attorney appointing the Defendant as such.
9. It was PW1's testimony that as required in the Agreement of Sale, he paid a deposit of Kshs 1,000,000/- on 9th October 2008. Thereafter on or about 2nd December 2008, the Plaintiff called the Defendant's Assistant, one Mr. Gatuu and informed him that due to unavoidable circumstances, he could not proceed with the purchase of the Apartment. Accordingly, he requested the Defendant to refund the down

payment of Kshs 1,000,000/-.

10. PW1 told the Court that he followed the verbal withdrawal with a letter addressed to the Defendant dated 9th March 2009 in which he confirmed the decision to withdraw from the purchase. They mutually agreed to terminate the sale and the Defendant was to refund the Plaintiff's money. Later, the Plaintiff sent to the Defendant reminder letters on 23rd March 2009 and 27th May 2009.

11. PW1 testified that on 4th June 2009 the Defendant sent him an email confirming the termination of the sale and he promised to refund the deposit once the Apartment had been sold. The Defendant however failed, refused and/or neglected to refund the money thereby making it necessary for the Plaintiff to file this suit.

The Defence Case

12. Even though the Defendant filed an elaborate Statement of Defence and Counterclaim, he failed to appear on the date of the hearing hereof and did not therefore call any oral witness in support of his Defence and Counterclaim.

Analysis of the Evidence and Determination

13. I have considered the pleadings herein, the Plaintiff's sole testimony and the evidence placed before me. I have also considered the submissions filed herein by Mr. Kishore Nanji, Learned Counsel for the Plaintiff.

14. From the material placed before me, it was not denied that the Plaintiff and the Defendant had entered into an Agreement of sale dated 9th October 2008 with the Defendant herein for the purchase of an apartment located at Policino Oasis Village Malindi pursuant to which he made a down payment of Kshs 1,000,000/-. Paragraph 2(b) of the said Agreement required the purchaser to liquidate the balance of the purchase price by an equal monthly- instalment at Kshs 800,000/- which sum of money was to be deposited with M/s Mouko & Company Advocate for safe keeping pending registration and assignment of the lease.

15. As it were, the Plaintiff changed his mind and on 2nd December 2008, he informed the Defendant that due to unavoidable circumstances he would not proceed with the purchase of the said Apartment No. C104. From the documents produced by the Plaintiff herein, he kept on reminding the Defendant either by letter or emails to refund the down payment. By an email sent to the Plaintiff by the Defendant on 4th June 2009, the Defendant wrote as follows:-

“Mr. Paul N. Ndungu

Ref: Apartment No. C104 Policino Oasis Village Malindi

I refer to your letter dated 27th May 2009. As I have told you that (sic) at the moment I am waiting for someone to buy the apartment either from your side or my side.”

Regards

Renato Piea

16. This email correspondence in my view corroborates the Plaintiff's contention that they had agreed with the Defendant for a refund of the down payment save that the Defendant was to look for a new purchaser for the apartments. The same also casts doubt upon the Defendant's claim in his Statement of Defence and Counterclaim that the Plaintiff had unilaterally and unreasonably changed the terms of the Sale Agreement.

17. While I was prepared to consider the Defendant's contention that he was a mere agent acting for a disclosed principal in the Sale transaction, the Plaintiff was able to demonstrate vide a Certificate of Search that while the Defendant executed the Sale Agreement as an agent, he proceeded to transfer the suit property to himself shortly after the execution of the Agreement.

18. From the Certificate of Search produced as Plaintiff Exhibit 3, it was evident that Apartment No. C104, Policino Oasis Village was on 9th March 2010 transferred from the name of Enrico Diverolli to that of the Defendant at a consideration of Kshs 3,000,000/= . That was sometime before this suit was filed on 14th October 2011 and the Defendant's counterclaim against the Plaintiff for specific performance of the executed contract is therefore grounded on quacksand and without basis.

19. In the circumstances herein, I am satisfied and I do find and hold that the Plaintiff has proved his case against the Defendant to the required standard. The Defendant did not produce any evidence in support of the counterclaim.

20. Judgment is accordingly entered for the Plaintiff against the Defendant in the sum of Kshs 1,000,000/- with interest thereon at Court rates from the date of filing this suit until payment in full.

21. The Plaintiff shall also have the costs of this suit and the Counterclaim.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

J.O. OLOLA

JUDGE