



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 129 OF 2017**

**ROHO YA DIANI LTD.....PLAINTIFF**

**VERSUS**

**JUDITH KEMUNTO NYAUMA.....1<sup>ST</sup> DEFENDANT**

**IVICS BRALIC.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The plaintiff which is a limited liability company brought this suit against the two defendants vide its plaint dated 12<sup>th</sup> April 2017. It pleaded that it was the registered owner of Plots Nos. 3285 and 3286 which was sold to the defendants. That pursuant to the terms and conditions of the sale agreement, the plaintiff did its part by transferring the plots to the defendants names.

2. The plaintiff pleaded that the transfer was made before the purchase price was paid in full. That the plaintiff has made several requests for payment of the balance which has not been heeded hence this suit. The plaintiff therefore prays for judgement against the defendants jointly and severally as bellow;

- a. A mandatory order restraining the defendants by themselves, their agents, servants, employees and/or assigns from selling, disposing, dealing, developing and/or interfering with the property known as plot No. KWALE/DIANI S.S 3286 in any other manner.
- b. An order directing the Land Registrar Kwale to cancel and/or revoke entries number 2, 4, 5 and 6 on title for Plot No KWALE/DIANI S.S 3286.
- c. Orders declaring the plaintiff to be the owner of the property known as Plot No. KWALE/DIANI S.S 3286.
- d. The Lands Registrar, Kwale Lands Registry be and hereby be ordered and/or directed to re-issue a title document for the property known as Plot No. KWALE/DIANI S.S 3286 in favour of the plaintiff, without gazettement.
- e. The Deputy Registrar be and is hereby ordered and/or directed to dispense with the production of the original title document in compliance with the orders sought herein.
- f. Costs of this suit with interest thereon.
- g. Any other order the court may deem fit to grant.

3. The defendants have denied the claim in their separate statement of defences filed on 29<sup>th</sup> August 2017. The 1<sup>st</sup> defendant pleaded that she entered into an agreement of purchase for a consideration of Kshs3,000,000/= and not Kshs6,000,000/= as pleaded. That she has paid the whole amount that was agreed. The 1<sup>st</sup> defendant denied receiving any demand before the filing of this suit. The 2<sup>nd</sup> defendant's defence also denied the contents of the plaint and put the plaintiff to strict proof. Both defendants urged the court to dismiss the plaintiff's suit with costs.

4. The plaintiff gave her testimony through the evidence of Patricia Mwaranya Muthami. Ms Patricia adopted her witness statement dated 12<sup>th</sup> April 2017 and filed on the same date as her evidence together with the list of documents also filed on the 12<sup>th</sup> April. It is stated by the plaintiff that the agreed price for the two parcels was Kshs6,000,000/= of which the defendants paid Kshs5,000,000/=. That the defendants have never paid the balance of Kshs1,000,000/=.

5. The plaintiff produced the sale agreement made on 25<sup>th</sup> February 2016 in support of her case. The sale agreement provided that the purchase price was Kshs6,000,000/= and is executed by the plaintiff's directors and initialled by the 1<sup>st</sup> defendants. During cross-examination PW1 admitted that the amount indicated on the transfer form, valuation report and Land Control Board consent was Kshs500,000/=. She denied that the properties were sold at Kshs500,000/= each. PW1 also said she does not agree with the 1<sup>st</sup> defendant by him disowning the sale agreement.

6. The 1<sup>st</sup> defendant gave her evidence on 30<sup>th</sup> October 2018. She deposed that she purchased the two properties at Kshs500,000/= each. She denied signing any sale agreement. DW1 produced the transfer forms and the letter of consent signed by the plaintiff which showed that the consideration was Kshs500,000/= each. It is the defendants evidence that they paid the entire purchase price.

7. In cross-examination, DW1 said that MS. Kemosi Mogaka & Company Advocates prepared all the paper work. She denied signing the replying affidavit dated 29<sup>th</sup> August 2017 but admitted the signature on that affidavit was hers. She asked the court to ignore the sale agreement dated 25<sup>th</sup> February 2016. That there was no valuation of the properties done. This marked the close of defendant case.

8. The parties advocates filed written submissions on 4<sup>th</sup> February 2019 and 5<sup>th</sup> March 2019 respectively. Both submissions have only given a summary of the evidence adduced. From the evidence, it is not in dispute that both the plaintiff and the defendants were engaged in a sale transaction over the suit properties. The only dispute and which forms the question for my determination is;

**i. What was the purchase price that was agreed; and**

**ii. Whether there is any unpaid balance.**

9. The plaintiff in cross-examination referred to paragraph 4 of the 1<sup>st</sup> defendant's replying affidavit of 29<sup>th</sup> August 2018. In that paragraph, the 1<sup>st</sup> defendant referred to paying a sum of Kshs5,000,000/= paid for the two plots in dispute. Under Section 107 & 108 of the Evidence Act Cap 80 Laws of Kenya, the burden is upon the plaintiff to discharge to prove her case. The 1<sup>st</sup> defendant denied signing the sale agreement presented by the plaintiff. She denies that the purchase price for both plots was Kshs6,000,000/= . The plaintiff pleaded and gave oral evidence that she has been paid Kshs5,000,000/= leaving a balance of Kshs1,000,000/= . The plaintiff put reliance on the sale agreement produced as exhibit. The plaintiff did not however present evidence to show receipt of payment by the defendants for the sum of Kshs5,000,000/=.

10. Under the deposit clause in the contested sale agreement it is stated in part thus; "The purchaser shall on or before the date of this agreement pay a deposit of Kshs3,000,000/= to the vendor. That Kshs2,000,000/= was to be paid after successful transfer and the balance of Kshs1,000,000/= within 30 days from the date of signing the agreement or as the parties may agree in writing."

11. The 1<sup>st</sup> defendant in a replying affidavit to the plaintiff's application filed on 29<sup>th</sup> August 2017 at paragraph 5 deposed thus; **"That I already paid Kshs5,000,000/= to the plaintiff through a deposit made in account held at DTB No. 0200009123001 Diani Branch."**

**At paragraph 6; "That on 12<sup>th</sup> April 2016 when I went to pay the balance I found the said account closed."**

**At paragraph 8; "That I was left with money in my hands."**

12. The 1<sup>st</sup> defendant has admitted the signature on this affidavit as hers although she disowned the contents of paragraph 4 of the said affidavit. The signature on this document and other documents filed in court by the 1<sup>st</sup> defendant looks similar to the signature appearing on the sale agreement. The 1<sup>st</sup> defendant has not produced any expert report to state that the signature is not hers for the court to believe that the agreement is a forgery.

13. Although the plaintiff did not present evidence of payment, the admission by the 1<sup>st</sup> defendant confirms that the money payable to the plaintiff was indeed Kshs6,000,000/=. Out of this Kshs5,000,000/= was already paid in the plaintiff's account at Diamond Trust Bank and the outstanding balance is yet to be paid. The 1<sup>st</sup> defendant put reliance on the transfer form and the letter of consent to state that the purchase price was Kshs500,000/=. However the value assigned to a property for purposes of transfer does not necessarily bind parties to a sale. The purchase price is generally negotiated between a vendor and a purchaser and the same can be higher or lower than the valuation assigned by the government. I am therefore satisfied that the plaintiff has proved her case on a balance of probabilities.

14. Although the plaintiff has proved that the balance owing to her is Kshs1,000,000/=; my view is that she is not entitled to orders of cancellation of the defendants title as there was no such clause in their sale agreement. Consequently I won't enter judgement for cancellation as prayed in the plaint. It is my finding that the plaintiff is only entitled to an order for payment of the balance of Kshs1,000,000/=. Thus under paragraph (g) of the plaint on any other order the court deems fit to grant, I make an order that the defendants shall jointly and severally pay to the plaintiff the balance of the purchase price of Kshs1,000,000/= within 30 days of this judgement together with costs and interest at court rates from date of filing case upto when payment is made in full.

**Dated, Signed and Delivered at Mombasa this 27<sup>th</sup> day of June 2019.**

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**A. OMOLLO**

JUDGE.