



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 28 OF 2014

GABRIELA SUSAT.....PLAINTIFF/APPLICANT

VERSUS

COSIMO ROSAFIQ.....1ST DEFENDANT/RESPONDENT

BAY OCEAN LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 22nd May 2018 as filed herein on 23rd May 2018, Gabriella Susat (the Plaintiff) prays for orders as follows:-

2. That the Honourable Court be pleased to issue summons against the 1st Defendant Cosimo Rosafiq to show cause why he should not be arrested and/or committed to civil jail for a term not exceeding six months for disobeying and/or breaching a Court order issued on 25th September 2017 by way of consent.

3. That this Honourable Court be pleased to order that the said Cosimo Rosafiq be detained in prison for a term not exceeding six months for disobeying and/or breaching a Court order issued on 25th September 2017 and/or alternatively (sic).

4. That this Honourable Court be pleased to order the 1st Defendant to pay a sum of Kshs 501,627.45/- being accrued maintenance and service charges in respect to the apartment to be transferred to the Plaintiff/Applicant, failing to which he be arrested and detained in prison for a term not exceeding six months for disobedience of the Court's orders or be given such other sentence as the Honourable Court may deem just.

5. That the costs of this application should be paid by the 1st Defendant.

2. The Application which is supported by an Affidavit sworn by the Plaintiff is based on the following grounds:-

i) That the Plaintiff filed this suit claiming Kshs 4,500,000/- with interests and costs from the 1st Defendant. On 25th September 2017, the parties recorded a consent settling this matter. By the said consent, the Plaintiff was to transfer ten shares in Bay Ocean Ltd(the 2nd Defendant) to the Plaintiff;

ii) That while the Applicant is ready and willing to comply with the said consent especially on the requirement to pay stamp duty, legal fees and other charges arising from the transfer, the 1st Defendant has to-date refused to sign and/or execute the transfer of shares as agreed in favour of the Plaintiff;

iii) That the said refusal to execute the documents is an affront on the honour and dignity of this Court and the 1st Defendant should be directed to purge his contempt and/or be committed to civil jail as the Court considers appropriate.

3. In a Replying Affidavit filed herein on 18th June 2018 in response to the said application, the 1st Defendant denies that he has received any Share Transfer Documents for his signature. He asserts that he is ready and willing to sign such documents as soon as the Plaintiff supplies him with the same. The 1st Defendant however denies that the said consent required him to pay service or other maintenance charges and asserts that the same were expressly the obligation of the Plaintiff.

4. I have considered the Plaintiff's application, the response by the 1st Defendant, the submissions filed by the Plaintiff and the authorities to

which I was referred. The facts giving rise to the application are not in dispute. The Plaintiff herein had sued the Defendants seeking payment of various sums of money arising from a Sale Agreement dated 18th May 2010.

5. On 25th September 2017, following out-of-Court negotiations, the parties filed a consent in Court in the following terms:-

i) That the 1st Defendant, Cosimo Rosafiq will transfer ten shares in Bay Ocean Ltd to the Plaintiff, Gabriella Susat representing the ground floor apartment. The Plaintiff, Gabriella Susat will be responsible for Stamp duty, legal fees and other Charges on that transfer. The transfer of shares and delivery of possession of that ground will be in full claim and the Defendant will not be required to pay the Plaintiff a sum of Kshs 4,500,000/- and Euros 60,000/- sued for in the Plaintiff;

ii) That the Plaintiff, Gabriella Susat to pay service Charge;

iii) That each party to bear its Advocates costs;

iv) That upon compliance with Order (1) above, this matter be marked as settled.

6. It is now the Plaintiff's case that despite the consent Judgment endorsed by this Court on 19th September 2017, the 1st Defendant has failed, refused and/or neglected to comply therewith thus rendering this application necessary. On his part, the 1st Defendant denies any wrong doing on his part. Instead, it is his case that the Plaintiff has never submitted any transfer documents for his signature and that he is ready to sign the same the moment he receives them from the Plaintiff.

7. Section 38 of the Civil Procedure Act provides as follows:

“38. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

a)...

b)...

c)...

d) by arrest and detention in prison of any person.

8. As it were therefore, Section 38 of the Act allows the arrest and detention of a debtor in prison provided the conditions set out under Section 40 of the said Act in regard to the process of arrest are adhered to. In the matter before me, I did not hear the 1st Defendant to say that there was any failure on the part of the Plaintiff to follow the process mandated by law in executing for the Judgment debt under the provisions of Section 38 and 40 of the Civil Procedure Act.

9. It is a matter of fact that as at the time the application before me was filed, he was yet to comply with the terms of the consent Judgment as endorsed by this Court on 25th September 2017. I have perused the consent Judgment as recorded and I did not see anything requiring the Plaintiff/decree holder to supply the 1st Defendant with any transfer documents for his signature.

10. In the circumstances of this case, I am satisfied that there is merit in the application before me. Accordingly summons shall issue against the 1st Defendant to appear in Court to show cause why he should not be jailed as sought under Prayer No. 2 of the Motion dated 22nd May 2018.

11. The Plaintiff shall have the costs of this application.

Dated, signed and delivered at Malindi this 26th day of June, 2019.

J.O. OLOLA

JUDGE