



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL SUIT NO. 103 OF 2007

MOHAMED OMAR SONGORO.....PLAINTIFF

VERSUS

EMMANUEL CHARO TINGA.....1ST DEFENDANT

SULTAN FADHIL.....2ND DEFENDANT

MAURICE KILONZO.....3RD DEFENDANT

NICONORY A. AKANGA.....4TH DEFENDANT

JUDGMENT

BACKGROUND

1. By a Complaint dated 30th November 2007 and filed herein on 6th December 2007, Mohamed Omar Songoro (the Plaintiff) prays against the Defendants jointly and severally for:-

i) Payment of Kshs 4.9 Million

ii) Costs of this suit; and

iii) Interest on (i) and (ii) above at Court rates.

2. Those prayers are premised on the Plaintiff's assertion that on or about 28th July 2005 he facilitated the sale and transfer of a parcel of land from one Fatuma Ali to Emmanuel Charo Tinga (the 1st Defendant). It is the Plaintiff's case that as the 1st Defendant's agent in the said transaction, he became entitled to an agreed commission of Kshs 5 Million. The 1st Defendant has since only paid Kshs 100,000/- leaving an outstanding balance of Kshs 4.9 Million which the Plaintiff claims herein.

3. The 1st Defendant did not enter appearance for some time and on 1st February 2008, a default Judgment was entered. The Plaintiff thereafter extracted a decree on 7th March 2008 requiring the 1st Defendant to pay Kshs 5,043,945/-. However following an application made to Court, the interlocutory Judgment was on 20th May 2009 set aside by the Honourable Lady Justice Hellen Omondi who was then seized of the matter.

4. In the Ruling setting aside the Interlocutory Judgment against the 1st Defendant, the Court also allowed the Memorandum of Appearance and Defence filed earlier out of time by the 1st Defendant on 4th February 2008 to be deemed as properly on record on condition that the requisite Court Charges were paid.

5. In that Statement of Defence dated 25th January 2008 on behalf of all the four Defendants, the 1st Defendant denies that the Plaintiff was his agent in the sale transaction as alleged or at all. While admitting that the 1st Defendant initially signed some documents accepting to pay the Plaintiff the sum of Kshs 4.9 Million, the Defendants aver that those documents were revoked and notice of the revocation was given to the Plaintiff. It is accordingly their case that the Plaintiff has no claim against any of the Defendants herein.

The Plaintiff's Case

6. At the trial herein, the Plaintiff testified as the sole witness in his case. He told the Court that his mother Fatuma Ali who has since died sold LR No. Kilifi/Jimba/1146 to the 1st Defendant for Kshs 10 Million. Before her mother's death, she had received payment of Kshs 5 Million. Thereafter, the Plaintiff went to the 1st Defendant who in turn gave him Kshs 100,000/- towards her burial expenses. The balance of Kshs 4.9 Million remained outstanding but he has since been paid a further Kshs 4 Million.

7. On cross examination, the Plaintiff stated that what he was claiming was a balance of the payments and not the parcel of land that was sold by his mother. He acknowledged that he had together with his brother filed Malindi ELC No. 62 of 2006 seeking payment of Kshs 5 Million. That matter was however settled by consent and had nothing to do with the present suit.

8. He told the Court that he had received a total of Kshs 4.1 Million after his mother's death and admitted that other than the 1st Defendant, he had no other claim against the rest of the Defendants.

The Defence Case

9. The Defence equally called one witness. Testifying as DW1, the 1st Defendant told the Court that on or about 13th February 2001, he bought land from the late Fatuma Ali Bonia for Kshs 10,000,000/-. The 1st Defendant told the Court that the late Fatuma was an aunt and not the mother of the Plaintiff. When she passed away on 15th July 2005, the entire purchase price had not been settled.

10. The 1st Defendant testified that the Plaintiff herein and his brother one Athman Ali Songoro then filed Malindi Succession Cause No. 3 of 2006 and obtained Letters of Administration on 29th March 2006. Prior to the issuance of the Letters of Administration, the 1st Defendant entered into an agreement with the Plaintiff and his brother on the outstanding balance of Kshs 5 Million as well as on the mode of distribution thereof among the beneficiaries of the estate.

11. The 1st Defendant further told the Court that he did not manage to pay the balance within the timelines agreed with the beneficiaries of the estate of the late Fatuma Ali Bonia and the Plaintiff and his brother aforesaid as the Administrators filed Malindi HCCC No. 62 of 2006 seeking an injunction to restrain the 1st Defendant from disposing off the concerned parcel of land. As at that time, the outstanding balance was Kshs 4,195,000/-.

12. The 1st Defendant further testified that they subsequently agreed to compromise the said suit after he agreed with the Plaintiff on payment of Kshs 4.9 Million inclusive of Kshs 900,000/- as legal costs incurred. To that effect the 1st Defendant executed an acknowledgment of debt on 16th October 2006 but thereafter, the Plaintiff refused to compromise the matter as agreed. The 1st Defendant told the Court that even though the acknowledgment mentioned the figure as a 'commission' due to the Plaintiff that was only to disguise the reasons for the payment as the Plaintiff wanted all the money paid to himself and not to the other beneficiaries of the estate.

13. It was the 1st Defendant's case that a consent order was eventually recorded in Court and he paid the outstanding balance as well as the legal costs. On 1st January 2008, the Plaintiff's Advocates in the said HCCC No. 62 of 2006 thereafter acknowledged receipt and stated there was no balance owed. It is therefore the 1st Defendant's case that the present suit has no basis and ought to be dismissed with costs.

Analysis and Determination

14. I have perused and considered the pleadings filed by the parties herein. I have also considered the testimony of the two witnesses, the evidence produced before me as well as the submissions and authorities to which I was referred by the Learned Advocates for the parties.

15. The Plaintiff filed this suit against the four Defendant's jointly and severally on 6th December 2007- claiming a sum of Kshs 4.9 Million. The basis of the suit can be discerned at paragraphs 4, 5, 6 and 7 of the Plaintiff in which he states as follows:-

4. On or about 28th day of July 2005, the Plaintiff on facilitating the sale and subsequent transfer of land Parcel No. Kilifi/Jimba/1146 from Fatuma Ali Bonia to the 1st Defendant, as his agent, became entitled to an agreed commission of Kshs 5 Million and the Defendant made part payment of Kshs 100,000/- leaving a balance of Kshs 4.9 Million.

5. On or about the 16th day of October 2006 the 1st Defendant acknowledged in writing owing the Kshs 4.9 Million and undertook to pay it in an acknowledgment drawn and witnessed by the 3rd Defendant.

6. On or about the 23rd day of October 2006 another acknowledgment was executed by the 1st Defendant whereby the 2nd, 3rd and 4th Defendants were expressly authorized by the 1st Defendant to effect payment to the Plaintiff in the sum of Kshs 4.9 Million upon transfer of land Plot No. Kilifi/Jimba/1146 to Four islands Bay Ltd by Kalumass Company Ltd; and

7. Land Parcel No. Kilifi/Jimba/1146 was on 24/8/07 duly transferred to Four Islands Bay Ltd by Kalumass Company Ltd but the Defendants have refused, neglected and/or failed to pay the Plaintiff the said sum of Kshs 4.9 Million.

16. Sultana Fadhil, Maurice M Kilonzo and Nicanory A. Akanga, the 2nd, 3rd and 4th Defendant's herein are all Advocates of this Court then practicing as Fadhil & Kilonzo Advocates and other than the fact that their Law Firm represented the 1st Defendant, it was not clear from a perusal of the Plaintiff why they had been enjoined as parties in this suit.

17. My fears that there was no basis of enjoining the three Advocates in this suit were indeed confirmed by none other than the Plaintiff

when during his cross-examination at the trial herein, he repeatedly told the Court that other than the 1st Defendant, he had no claim against anyone else in these proceedings.

18. That was however not the only instance in which the Plaintiff would appear to have a change of mind. From a perusal of his claim as demonstrated at paragraphs 4, 5, 6 and 7 of the Plaintiff cited hereinabove, the Plaintiff was claiming the sum of Kshs 4.9 Million as a Commission agent being the sum that was due and owing to himself after he facilitated a sale transaction and subsequent transfer of LR No. Kilifi/Jimba/1146 from one Fatuma Ali Bonia to the 1st Defendant.

19. At the trial herein, it turned out that the said Fatuma Ali Bonia was either the Plaintiff's mother (according to the Plaintiff) or his aunt as per the Defendant's account). Be that as it may, according to the Plaintiff, his entitlement to the Commission came about when he facilitated the transaction on or about 28th July 2005.

20. From the material placed before me however the transaction between the 1st Defendant and the said Fatuma was executed in February 2001. Indeed, Fatuma passed away on 15th July 2005 about two weeks before the date the Plaintiff claims to have become entitled to the Commission.

21. Indeed when he testified before me, the Plaintiff abandoned his pursuit of the commission. He told this Court that his mother Fatuma Ali who has since died sold her parcel of land to the 1st Defendant for Kshs 10 Million. Before her death, her mother had received Kshs 5 Million. Subsequently, the Plaintiff went to the 1st Defendant and the 1st Defendant in turn gave him a sum of Kshs 100,000/- to be used towards his mother's burial expenses.

22. According to the Plaintiff, that payment is what left a balance of Kshs 4.9 Million which he claims in this suit. In the course of his testimony however, the Plaintiff was shown a number of cheques and he conceded he had been paid a further sum of Kshs 4 Million.

23. I think it is settled law that parties are bound by their pleadings. It is not for the Courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties brought before it.

24. The case that the Plaintiff instituted before this Court was that the Defendants had failed to pay him his commission of Kshs 4.9 Million arising from his facilitation of the sale and transfer of LR No. Kilifi/Jimba/1146. He did not bring any evidence to demonstrate that he was entitled to any such commission from any of the Defendants before me.

25. Indeed from the material placed before me, even his claim before this Court that the sum of Kshs 4.9 Million was the balance of the purchase price for his mother's parcel of land cannot withstand scrutiny. As it were, he is a Co-administrator of the estate of the late Fatuma Ali Bonia with his brother Ali Athman Songoro. This suit is neither stated to have been brought on behalf of the estate nor with the consent or knowledge of the Co-administrator.

26. That would lend credence to the 1st Defendant's testimony before the Court that the Plaintiff wanted to exclude the other beneficiaries of the estate from the balance of the purchase price of Kshs 5 Million hence the pressure he applied to have the 1st Defendant execute an undertaking that he was owed a commission and not the balance of the purchase price which the Plaintiff would be compelled to share with other beneficiaries of the estate.

27. As it were, all matters regarding the balance of the purchase price were settled in Malindi ELC Case No. 62 of 2006; **Mohamed Omar Songoro & Another –vs- Emmanuel Charo Tinga**. The Plaintiff himself confirmed at the trial herein that the said matter was settled by consent and his advocate wrote a letter confirming that no balance was outstanding.

28. In the result, I did not find an iota of merit in the Plaintiff's case. The same is dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE