



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
HCC CASE NO.143 OF 2018

1. NARDIELO MAURIZIO
2. MAURIZIO CAPORDARCA
3. TESTA GIANCARLO
4. FREDRIGA GIANCARLO.....PLAINTIFFS

VERSUS

TROPICANA HOTELS LIMITED.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 18th June 2018. By the said application, the Plaintiffs/Applicants pray for Orders-

1.

2. *That the Defendant and its directors be compelled to surrender the original certificate of Title being Portion No. 775 (Original No. 703/18) CR 9775/25 of approximately 7.50 acres to enable the Applicant to apply for sub-division and hip out (sic) a portion occupied by Club 28 which was purchased by the applicants by a Sale Agreement dated 26th July 2003 and the entire purchase price of Euro 150,000/- has been paid fully.*

3.

4. *That the Applicants be allowed to carry out sub-division on Portion No. 775(Original No. 703/18) (CR 9775/25) and hip out (sic) a portion occupied by Club 28 which Applicants paid for without the Mother of the Certificate of Title.*

5. *That the Applicants to continue in occupation and be allowed to carry out major and minor repairs.*

2. The application which is supported by an affidavit sworn by Maurizio Nardiello (the 1st Plaintiff/Applicant) is premised on the grounds: -

a) That the Applicants purchased the said property which is occupied by Club 28 along Malindi road vide a Sale Agreement dated 26th July 2003 at an agreed purchase price of Euro 150,000/-

b) That the Defendants received the entire purchase price by the year 2008 but to-date, they have refused, neglected and/or declined to surrender the original Certificate of Title to enable the Applicants to apply for the sub-division of their portion;

c) That even though the Applicants are in occupation, they are unable to carry out any meaningful repairs and/or renovations to the benefit of their customers and they are therefore suffering huge losses as a result.

3. The application is opposed. By a Replying Affidavit sworn by Kamal Bhatt, a shareholder and Director of the Defendant Tropicana Hotels Ltd and filed herein on 19th September 2018, the Defendant avers that the Agreement dated 26th July 2003 is invalid and null and void. They aver that the Agreement was not executed by the 2nd, 3rd and 4th Plaintiffs and that the 1st Plaintiff has to-date failed to demonstrate that he held a duly registered Power of Attorney from the other Plaintiffs giving him legal capacity to execute that Agreement

on their behalf.

4. The Defendant further avers that the persons described as purchasers in the agreement were the promoters of a company known as Na.Mi Ital Ltd and that the Plaintiffs misrepresented to the Defendant that Na.Mi Ital Ltd was in the process of being incorporated in Kenya. The Defendants aver that at the time of the Agreement, the said Na.mi Ital Ltd had already in fact been incorporated and the Agreement ought to have been executed by the Directors of that Company but was not.

5. The Defendants further denies that the purchase price was paid in full. It is their case that part of the money was paid in Court and ended up being misappropriated by officers of the Court. The Court having lost the money referred the matter to the Police for investigations and the Defendant has to-date never been informed by the Court of the outcome of those investigations.

6. The Defendant further asserts that the property in issue is charged to SBM Bank Ltd(formerly Fidelity Commercial Bank Ltd) and the Defendant does not have the Certificate of Title. It is further their position that the Agreement was rescinded and the sums paid thereunder were forfeited when the purchase price was not paid in terms of the Agreement.

7. I have considered the application and the response thereto. I have equally considered the written and oral submissions made before me by the Learned Advocates for the parties.

8. According to the Plaintiffs they entered into a Sale Agreement with the Defendant to purchase a Portion of Plot No. 775(Original No. 705/18) which portion is occupied by what is known as Club 28 and Casino situated along Malindi-Lamu Road, at an agreed price of Euro 150,000/-.

9. It is the Plaintiffs case that in terms of the said Agreement they completed payment of the purchase price in the year 2008 but to-date the Defendants have refused, neglected and failed to hand over the Original title documents to enable them carry out a sub-division of the said Plot of land.

10. However, in the Replying Affidavit of Kamal Bhatta filed herein on 17th September 2018, the Defendants assert that the said Agreement is invalid null and void as the same was not executed by some of the Plaintiffs and that the 1st Plaintiff Maurizio Nardiello has to-date failed to demonstrate that he held a Power of Attorney from the Co-Plaintiffs.

11. The Defendants further aver that the Agreement was executed by the Plaintiffs on behalf of a company known as Na.Mi Ital Ltd and that given that the said company had by then been incorporated a few months earlier, its directors ought to have been the ones executing the Agreement and not the Plaintiffs.

12. The Defendants also deny receiving the entire purchase price of Euro 150,000/- and aver that part of the purchase price was deposited in Court by the Plaintiffs and the Court officials misappropriated the same.

13. The Agreement in contention is annexed to the 1st Plaintiffs' Supporting Affidavit as annexure "MN1". A perusal thereof reveals that it was executed between the Defendant as "the Vendor" and the Plaintiffs as "the Purchaser" before one B.O. Ochieng Advocate. The 1st Plaintiff signed on behalf of Na.Mi Ital Ltd while one Bernd H. Graff signed on behalf of Tropicana Hotels Ltd (the Defendant herein).

14. Clause 1 of the Said Agreement provided as follows: -

"The Vendor hereby agrees to sell to the Purchaser and the Purchaser hereby agreed to purchase a portion of piece or parcel of land known as Plot No. 775(Original No. 701/18) Malindi Municipality(hereinafter called "the Parent Property") together with all buildings, improvements and erections erected thereon comprising of the Club 28 and Casino and which portion is more particularly demarcated, delineated and bordered in red on the site plan annexed hereto and marked as 'A'(hereinafter called "the Subject Property") for the price and upon the terms and conditions hereinafter appearing."

15. Under Clause 3 thereof, the purchase price is given as Euros 150,000/- which amount was to be paid as per clause 4 of the Agreement on or before the 5th day of July 2008. Clause 6 of the Agreement then provides as follows: -

"6. On or before the completion date the Vendor undertakes at the expense of the Purchaser to complete the sub-division of the Subject property from the parent property and to deliver to the Purchaser the following documents: -

6.1 The Original Certificate of Title to the Subject property with the Original Deed Plan thereof attached thereto;

6.2 A transfer of the Subject property in favour of the purchaser or their nominee NA.MI ITAL LTD duly executed by the Vendor."

16. According to the Plaintiffs, they have since met their part of the bargain as stipulated in the Agreement of Sale but the Defendant has failed to deliver as provided under Clause 6 cited hereinabove.

17. The Defendants do not deny that they have refused to comply with the said Clause 6. It is however their case that the Plaintiffs and/or the 1st Plaintiff who executed the Agreement had no authority to do so and that the document ought to have been executed solely by the Directors of the nominee-Na.Mi Ital Ltd and no one else.

18. I have looked at the reasons being put forward by the Defendant to deny the validity of the Agreement. For lack of a better word, I think I can only call them excuses being thrown around by the Defendant to avoid its obligations under the Contract. Indeed the Defendant appears to me to conjure up imaginary disputes between the Plaintiffs as themselves and/or as directors of their Nominee Company-Na.Mi Ital Ltd.

19. From the material placed before me, the Applicants have made full payment of the purchase price to the Defendants. Those payments were made between the year 2003 and 2008, a span of five years. At no time did the Defendants refuse to accept the payments on account that those making the payments lacked the authority to do so and/or that they were not the proper purchasers of the land.

20. It is clear to me from a perusal of the documents that a contract existed between the Applicants and the Respondent. That contract was properly executed and the purchase price was remitted to the Respondent/Defendant pursuant thereto. It is also clear that at some point in time, the parties had a dispute and the matter moved to the High Court where the parties agreed on the settlement of the balance of the purchase price.

21. According to the Defendant, part of the money that was paid through the Court got misappropriated by Court Officials. The Defendant does not say how much money was misappropriated and thus never reached them. Even if that were so, I did not think that would be a valid reason to negate the contract. If indeed some of the money paid through the Court got misappropriated as alleged, the Defendant must have recourse somewhere.

22. In the circumstances I am persuaded that there is a merit in the Plaintiffs' application. The same is allowed in terms of Prayers 2, 4, and 5 thereof.

23. The Plaintiffs will also have the costs of this application.

Dated, signed and delivered at Malindi this 20th day of September, 2019.

J.O. OLOLA

JUDGE