



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 167 OF 2014

(FORMERLY MOMBASA HCCC NO 247 OF 2007)

GERANIUM INVESTMENT LTD.....PLAINTIFF

VERSUS

BRUNO VALBONESI

GENESSIO VALBONESI.....DEFENDANT

JUDGMENT

BACKGROUND

1. This matter was initially filed at the High Court at Mombasa as Civil Suit No. 485 of 1998. By a Plaint dated 30th November 1998 and filed in that Court on 1st December 1998, Geranium Investment Ltd(the Plaintiff) prays for:-

a. An order of temporary injunction restraining the defendants, their servants or agents from continuing any construction on the said property;

b. The Defendants (their) servants or agents be restrained by(an) order of injunction from dumping and or continuing to dump garbage on the remainder of Portion No. 4151 Malindi;

c. A mandatory injunction requiring the Defendants,(their) servants and or agents to demolish and remove from the Plaintiff's property aforesaid all the illegal walls, parkings and galena floors and further to remove the garbage dumped thereon within seven(7) days of service of the Honourable Courts order failure to which the Plaintiff be at liberty to remove the same and the costs incurred thereby be treated as costs in the suit herein payable by the Defendants in any event;

d. Mesne profits;

e. (i) Vacant possession of the suit premises (or in the alternative Italian Lira 358, 943,500/=).

(ii) Interests on (b) at the rate of 15%;

(iii) Costs and Interest thereon;

f. Such other or further relief as this Honourable Court may deem fit to grant.

2. Those prayers arise from the Plaintiff's contention that at all times material, it was the owner of all that property known as Portion No. 4151/3 Malindi upon which it had developed two houses which formed part of a residential unit called "Geranium". By a Written Agreement dated 5th July 1995 the Plaintiff agreed to sell one of the residential units to the two Defendants at a consideration of Italian Lira 500,000,000/= which was to be paid in agreed instalments.

3. The Plaintiff avers that subsequent to the Agreement, it was mutually agreed that the Defendants would offer the Plaintiff a house in Italy at the value of Italian Lira 42,000,000/- in part payment. The Plaintiff further accepted Motor vehicle No. TZJ 400, Land Rover which the Defendants alleged to have imported as part payment. That Motor vehicle was however seized by the Customs and Excise Department before again being released to the 1st Defendant.

4. The Defendants thereafter took over the suit premises and caused other constructions thereon but the Plaintiff avers that only the 1st instalment of Italian Lira 15,000,000/- was honoured by their bank. All subsequent bank drafts commencing 28/2/1996 have all been dishonoured upon representation for payment. As a result the Plaintiff has suffered loss and damage and hence this suit and the orders sought herein.

5. But in a lengthy Written Statement of Defence and Counterclaim dated and filed herein on 26th January 1999, Bruno Valbonesi and Alessio Balbonesi (the Defendants) jointly deny the Plaintiff's averments. The Defendants aver that prior to entering into the Written Statement, the Plaintiff Company's representative one Giovanni Trezzi duly confirmed that the suit property was complete and in compliance with the Agreement entered into.

6. The Defendants further aver that the Agreement signed was subject to certain conditionalities in terms of transfer of ownership and possession, mode of payment as well as residential site operating costs. Pursuant to the said Agreement, the Defendants paid to the Plaintiff's representative Italian Lira 140,000,000/= in cash and also delivered to them 28 bills of exchange payable respectively on the last day of the month commencing on 31st January 1996.

7. Contrary to the Agreement, on 1st August 1995 when the Defendants moved into the premises, they observed that they were incomplete and unfit for habitation and were in a totally dilapidated state. As a result, the Defendants contend that they had to themselves supply much of the work, labour and materials required in the tune of Kshs 2,800,000/= to complete the premises and make them suitable for the Defendants' personal accommodation.

8. The Defendants assert that as a result, and by an oral agreement made in August 1995 between the Plaintiff's said representative and the Defendants, it was agreed that the Plaintiff shall thereafter reimburse the money spent in completing the suit property to the Defendants.

9. The Defendants further aver that in July 1996, the initial agreement was altered by the consent of both parties whereupon it was agreed that:-

a. The Plaintiff accepted the 1st and 2nd Defendants' offer as part payment, a house in Lido di Camaiore Italy and;

b. The Plaintiff accepted the Defendants offer as part payment a Motor vehicle registration No. TZJ 400, Land Rover Defender valued at Kshs 1.2 Million (Italian Lira 40 Million).

10. The Defendants further state that by another oral agreement made in July 1996, it was agreed that in consideration of a Power of Attorney given to the Plaintiff's said representative in regard to the house in Lido di Camaiore Italy and the Land Rover aforesaid, the Plaintiff's representative would return all the bills of exchange drawn on behalf of the 1st Defendant to the 1st Defendant. The Plaintiff's representative subsequently went ahead and sold the house in Lido di Camaiore at a gross under valuation thereby occasioning the Defendants loss and damage.

11. By way of Counterclaim, the Defendants pray that the Plaintiff's claim be dismissed with costs and urge that Judgment be entered in their behalf for:-

a. General damages as per paragraph 40 of their Defence

b. Costs

c. Costs on (a) and (b) above

d. Any other or further relief the Court may deem fit and just to grant.

12. In its long history in the Court corridors, this suit was transferred from Mombasa to Malindi and later on from Malindi, to Mombasa before it was eventually brought back to Malindi for trial on 16th July 2014. The trial indeed commenced before Seron J in Mombasa on 4th March 2009 before the matter was re-transferred to Malindi.

THE PLAINTIFF'S CASE

13. The trial herein commenced before the Honourable Justice Seron at Mombasa on 3rd March 2009. The Plaintiff called three witnesses.

14. PW1- Anthony John Kibiribiri testified that he runs a business called Kibiribiri General Merchants which deals with the sale of timber in Malindi. He told the Court that he knew the Plaintiff Company and its directors Elizabeth Trezzi and Donato Trezzi. He told the Court the two are a brother and sister. PW1 further told the court that he knew the two Defendants herein.

15. PW1 testified that he was sub-contracted in 1994 to do some work by the Plaintiff in their house which stands on Plot No. 4151/3 Malindi. He was to do some interior work to fit doors and windows on the beach house which is about ten metres from the sea. When he completed the work, the 1st Defendant went in with the family and requested PW1 to make some measurements before occupation. The Agreement was that PW1 was to be paid if the client was satisfied with the work done.

16. PW1 testified that as per the agreement, he was paid by the Plaintiff on the recommendation of the 1st Defendant. Later on, the 1st Defendant went to PW1's office accompanied by his lawyer and requested to be issued with a receipt indicating that PW1 was paid. PW1

declined the request. PW1 denied that he received any money from the Defendants.

17. In the year 2005, PW1 met the 1st Defendant after their lawyer Mr. Ole Kina summoned him. Mr. Ole Kina told PW1 that a family known as the Bianchi family had bought the house from the Defendants. The Advocate instructed PW1 to arrange for a meeting with Elizabeth Trezzi and PW1 and Elizabeth visited the house and met the son of the said Bianchi. The son showed them an agreement of sale and PW1 heard Elizabeth tell the son of Bianchi that there was a pending case between the Plaintiff and the Defendants. The son of Bianchi told them that the 1st Defendant had moved to the USA and would not come back.

18. PW1 testified that they later came to learn that Bianchi's son left the house unattended. They reported the matter to the area Chief who advised them to take all the furniture to safe custody. After some three months they got a tenant who brought in his own furniture. PW1 continued keeping the original furniture.

19. PW2-Elizabeth Trezzi testified that she is a shareholder of the Plaintiff together with his brother Donato Trezzi. She told the Court that Plot No. 4151/3 Malindi is owned by the Plaintiff Company. They have two houses on the land. At some point in time they entered into a Sale Agreement with the Defendants. The Defendants were to pay Italian Lira 500,000,000/= for the property by way of Bankers Cheque.

20. PW2 testified that the Agreement had a default clause stipulating that if any one clause was breached, the entire Agreement would collapse and the purchasers would be required to vacate the premises. Later on some of the cheques were dishonoured. The first instalment of 50,000,000/- Liras was paid upon signing the Agreement. Only one promissory note was paid and PW1 still keeps the remaining 21.

21. PW2 Testified that they were seeking payment of 358, 943, 500 Liras. The Defendants had failed to make payment within the agreed period of two years which ended in 1997. The Defendants had given them a house worth 42,000,000/- Lira to reduce the debt.

22. PW3-Giovani Trezzi told the Court that he was the father of the two Directors of the Plaintiff Company. He testified that the Defendants were introduced to them as persons interested in purchasing the property which was being sold at 500,000,000/- Lira.

23. PW3 told the Court that he was told by PW2 that the purchase price was never settled in full. He recalled that there was a property which he sold in Rome for 42 Million Lira. He was to get 3 Million Lira as Commission. There was also a Motor vehicle registered in Tanzania as part of the payment but they returned it to the Defendant because they had not paid import duty thereon.

THE DEFENCE CASE

24. The Defence called one witness who testified before both Justice Sergon in Mombasa and Justice Angote in Malindi in support of their case.

25. DW1-Bruno Valbonessi is the 1st Defendant herein. He testified that he bought some property in Kenya in 1994 from the Trezzi family who owned the Plaintiff Company. The agreement was done in Italy. DW1 saw the property in 1994 and he spoke to Mr. Trezzi in November 1994 in Milan, Italy about it. By then the house had not been planned as he was first shown the Plans in February 1995 at an Architect's office in Milan.

26. DW1 told the Court that a copy of the Plan in his possession shows that the house was to have four bedrooms, a swimming pool, a garden and footpaths. Based on that Plan, he agreed to purchase the house at 500,000,000/- Lira. The agreement was executed by DW1's son who is the 2nd Defendant. DW1 was in Malindi when his son signed the agreement in Italy on 5th July 1995.

27. DW1 testified that when he later came to Kenya to take over the house having been told it was complete, he found it incomplete. There were no windows, no makuti roof, no swimming pool and no garden or footpaths. The structure was complete but final touches had not been done. They could not therefore occupy the house. DW1 called his son to stop the agreement but it was too late as the son had already issued banker's cheques.

28. DW1 told the Court that he subsequently lodged a complaint in writing with the Plaintiff's. Mr. Trezzi rejected the request to complete the house claiming it was ready for occupation. DW1 then paid for the completion costs to one Wambua and David Kabua. He spent Kshs 2,800,000/- in doing the same.

29. DW1 testified that he paid a deposit of 140,000,000/- Lira in Italy. He also presented 45,000,000/- Lira in promissory notes. The payments were made in January-March 1998. He also paid a further 170,000,000/- Lira, a cheque of 90,000,000/- Lira and bankers cheques of 80,000,000/- Lira through one Carla Bichi, a sister to DW1's wife. The said Bichi who had bought DW1's house in Italy paid the money directly to the Plaintiffs. She paid 30,000,000/- Lira on 30th March 1998 and 60,000,000/- Lira on 26th May 1998.

30. According to DW1 he has spent a total of 450,000,000/- Lira and it was not true that the house in Italy was sold for 42,000,000/- Lira. That house was sold at 170,000,000/- Lira. DW1 further told the Court that Mr. Trezzi took his motor vehicle but returned it when he (DW1) did not give him the supporting documents. He therefore urged the Court to grant him the orders sought in the Counterclaim.

ANALYSIS AND DETERMINATION

31. This suit was initially instituted in Mombasa as Mombasa HCCC No. 485 of 1998. After a few years and on the Plaintiff's Motion, it was transferred to Malindi as Malindi HCCC No. 5 of 2002. After another five years during which it remained largely dormant, it was again transferred back to Mombasa where it landed as Mombasa HCCC No 247 of 2007. It was during that second stint in Mombasa that the trial began before the Honourable Justice JK Sergon in March 2009.

32. It is apparent from the proceedings that the Learned Judge was thereafter transferred to another Station after he had heard the Plaintiff's three witnesses and one Defence witness. Subsequently on 16th July 2014, the Honourable Justice M. Kasango re-transferred the matter to the Malindi ELC Court wherein it was given its current number, ELC No. 167 of 2014.

33. On its return to Malindi, the Honourable Justice Angote re-heard the testimony of the 1st Defence Witness on 2nd July 2015 after which the matter was adjourned to enable the Defence call other witnesses. As it turned out, no other witness testified until the 25th day of October 2018 when this Court declined any further adjournments herein and closed the Defence Case.

34. This Court did not therefore have the benefit of listening to the testimony of the four witnesses who testified herein and/or to observe their demeanor. I have however carefully gone through the pleadings filed herein, the testimony of the witnesses as per the typed proceedings herein, the evidence adduced at the trial and the submissions of the Learned Advocates for the parties.

35. It was not contested that the Plaintiff Company is the registered owner of all that parcel of land known as Portion No. 4151/3 Malindi. It was also not contested that within the said parcel of land, the Plaintiff has built two houses (Villas) comprising of a residential unit commonly known like the Plaintiff, as 'Geranium'.

36. By a Written Agreement dated 5th July 2015, the Plaintiff agreed to sell and the Defendants, who are a father and his son, agreed to buy one of the residential villas at a consideration of 500,000,000/- Italian Lira. It was a term of the Agreement executed in Milan, Italy that the said amount of money would be paid as follows:-

a. Upon Execution of the Agreement

i. Lira Fifty Million (50,000,000/-) by Bank Draft and Lira Fifty Million (50,000,000/-) by means of two Certificate of Deposit to the bearer issued by Banca Di Roma of Lira Twenty Five Million (25,000,000/-) each, expiring on 20th September 1995.

The balance was payable as follows:-

i. Lira Twenty Million (20,000,000/-) payable by means of a cheque dated 30th November 1995 and another Lira Twenty Million (20,000,000/-) payable on 20th December 1995 by means of cheques.

ii. Lira Three Hundred Sixty Million(360,000,0000/-) by means of Bank Drafts of Lira 15,000,000/- each expiring every end of the month from 31st January 1996 to 31st December 1997.

37. It was the Plaintiff's case that while the Defendants paid the deposit of Lira 50,000,000/- as agreed, of the 21 Promissory Notes of 15,000,000/- Lira issued pursuant to Clause 3(b) of the Agreement, only one was honoured. It was further the Plaintiff's case that after a number of the Promissory Notes were dishonoured, they stopped any attempt to use them owing to the penalties that accrued from their rejection.

38. The Plaintiff's Director Elizabeth Trezzi (PW2) testified that the Defendants tried to make good their default by transferring to the Plaintiff a house in Italy worth 42,000,000/- Lira. The Defendants also offered the Plaintiffs a Motor vehicle with a Tanzanian registration number but the Plaintiffs rejected the same as it had no log book.

39. On their part the Defendants contend that the Plaintiff assured them that the villa they were purchasing was complete and fit for occupation. However, on or about 1st August 1995 when they moved into the villa, they realized to their consternation that the premises were incomplete, unfit for habitation and in a totally dilapidated state.

40. It is their case that as at when they entered into the Agreement, the Plaintiffs knew they required the premises for the purpose of personal accommodation and it was therefore essential that the Plaintiffs would complete the house properly in accordance with the contract. The Defendants assert that due to the Plaintiff's omissions, they were compelled to spend a sum of KShs 2, 800, 0000/- in terms of work, labour and materials to complete the premises and put them in a tenable state.

41. The Defendants further assert that in accordance with the Agreement dated 5th July 1995, completion of the suit premises was a condition precedent for the payment of the balance of the purchase price. It is their case that the villa as handed over to them was not worth the value agreed and that they have since paid to the Plaintiffs Lira 395 Million for the premises, an amount which they now seek to recover in their Counterclaim.

42. I have carefully studied the English translation of the Agreement executed by the parties herein on 5th July 1995. It is apparent that as at the time the same was executed, the Plaintiffs were in the process of completing construction of the Villas on the said parcel of land.

43. Clause 3a of the Agreement provided that Italian Lira 50,000,000/- was payable to the Plaintiffs upon execution of the Agreement whilst Clause 3b provided that the balance was to be liquidated in instalments starting from 30th November 1995 and ending on 31st December 1997. That Clause 3b further provided that non-payment of any one instalment shall nullify the Agreement and that the Purchaser would have no right to claim any sum paid upto the time of breach and would have to vacate the premises within ten days of receiving notice of such default.

44. PW1-Antony John Kibiribiri was the man sub-contracted by the Plaintiff's to do finishing works on the Villas constructed by the

Plaintiff. The arrangement was that PW1 would be paid when the Client was satisfied with the works. He told the Court that he finished the required work in 1995 and that when the 1st Defendant and his family arrived at the premises, he was satisfied and as a result, he was paid by the Plaintiff.

45. Under Clause 4a of the Agreement, the premises were to be handed over to the Defendants in July 1995. It is apparent that this was largely complied with as the 1st Defendant told the Court that he entered the premises on 8th August 1995. That would have been the time that he met PW1 and was handed over the same.

46. According to the 1st Defendant however, those premises were not fit for the purpose they were intended and he was therefore compelled to spend a sum of Kshs 2.8 Million to put them in the right frame. As it were, Clause 8 of the Agreement provided that the Plaintiff would rectify any construction defects in agreement with the Defendants.

47. From the material placed before me however, it was not clear if what the Defendant claims to have spent money on were the agreed construction defects. According to the Defendants, the works were done badly and inefficiently, without skills and in an improper and un-workmanlike manner. In addition the materials were bad and unsuitable and the premises were incomplete and dilapidated. Why the Defendants did not take it upon themselves to view the premises prior to the execution of the Agreement will remain a mystery. This is more so given that according to the 1st Defendant, at the time the Agreement was executed, he was here in Malindi when his son the 2nd Defendant executed the Agreement on his behalf in Milan, Italy.

48. At any rate, other than the assertion that they did spend Kshs 2.8 Million to complete the premises, no single document was produced before the Court to evidence the nature of the repairs that were necessary and/or that any payments in that amount were incurred in completing the premises.

49. From the material placed before me, it was clear that other than the initial deposit made of 50,000,000/- Lira and the first installment of the promissory notes made on 30th November 1995, the only other payment made and acknowledged by the Plaintiff's was the proceeds from the sale of the house in Italy at Lira 42,000,000/-. Given that the Plaintiffs were denying payments having been made, nothing would have been easier than for the Defendants to produce evidence of the alleged payments made.

50. Indeed while in their Defence and Counterclaim the Defendant lists as part of the payments made the sum of 40,000,000/- Italian Lira as the value of the Motor vehicle registration Number TZJ 400, the 1st Defendant conceded in his testimony before the Court that the Plaintiffs rejected the Motor vehicle as they did not have its log book and other documents.

51. And while he alleged that his sister-in-law one Carla Bichi directly paid some 90,000,000/- Lira into the Plaintiff's account, no documentary proof was given for the alleged payments. Nor was there any support for the claim that the house sold in Italy was worth 170,000,000/- Lira and not the 42,000,000/- Lira that the Plaintiffs sold it for.

52. In the result, I was persuaded that the Defendants were in breach of the Agreement executed on 5th July 1995. That breach under Clause 3b of the Agreement entitled them to vacant possession of the premises. Unfortunately for the 20 years journey that this matter has spent in our Courts, the Defendants have continued their possession and occupation of the suit premises. The result I must say, is that the Plaintiff has suffered loss and damage for which they deserve to be awarded damages.

53. As the Court of Appeal stated in *Attorney General –vs- Halal Meat Products Ltd (2016) eKLR:-*

“It follows that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. (See Mc Gregor on Damages, 18th Ed. Paragraph 34-42).

54. In the matter before me the Plaintiff claims mesne profits in the sum of Lira 30,000/- per month for the duration they were kept off the premises. I do hereby award them Lira 10,000/- per month from the time this suit was filed until vacant possession is granted.

55. Accordingly the Defendants' Counterclaim is hereby dismissed. Save for the assessment of the mesne profits Judgment is instead entered herein for the Plaintiff as against the Defendants jointly and severally as prayed in the Plaintiff.

56. The Plaintiff will have the costs of this suit as well as of those of the Counterclaim.

Dated, signed and delivered at Malindi this 24th day of October, 2019.

J.O. OLOLA

JUDGE