



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 58 OF 2012

FABIO LUCHETTI

ALLESANDRO LUCHETTI.....PLAINTIFFS

VERSUS

MARIA ZACCAGNINO.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Complaint dated and filed herein on 7th December 2012, Fabio Luchetti and Allesandro Luchetti pray for:-

1) A declaration that the Plaintiffs are, by virtue of the Agreement of Sale dated 24th of August 2009, each entitled to possession, development, use and enjoyment of a One-Third share respectively in the four Acres purchased out of property known and described as Kilifi/Jimba/1250 situate in Watamu in Malindi District of Kilifi County;

2) A declaration that the Plaintiffs are, by virtue of the Agreement of Sale dated 24th August 2009, entitled to information regarding the current and/or past processes leading up to the transfer and registration in favour of the Purchasers to that Agreement of the four Acres purchased and comprised out of property known and described as Kilifi/Jimba/1250;

3) An order prohibiting the Defendant from transferring the subject four Acres comprised and purchased out of Kilifi/Jimba/1250 to any other party aside from jointly between the Defendant and the Plaintiffs herein;

4) Costs of, and incidental to this suit; and

5) Interest.

2. Those prayers arise from the Plaintiffs' contention that by virtue of an Agreement of Sale dated 24th August 2009, the Plaintiffs and the Defendants jointly purchased four Acres of land out of the property known and described as Kilifi/Jimba/1250 for a sum of Kshs 1,196,000/- from one Kadzo Ndamonahi Banda.

3. The Plaintiffs assert that according to the terms of the Agreement, the property was divisible equally between themselves with each purchaser acquiring equal proprietary interest therein. In breach of the said terms, the Defendant has denied the Plaintiffs ingress into the said Property hence denying them the use and enjoyment thereof.

4. In her Written Submissions of Defence and Counterclaim dated and filed herein on 8th March 2013, Maria Zaccagnino (the Defendant) admits that the Parties entered into the said Agreement with the Vendor. She however denies that the Plaintiffs made any monetary or other contribution towards the purchase of the said portion of land.

5. The Defendant further denies that there was any agreement as to the divisibility of the portion of land as alleged by the Plaintiffs or at all. She avers that she is the biological mother of the Plaintiffs and that at the time of the purchase of the land, she did include the Plaintiffs names in consideration of her love and affection towards them.

6. The Defendant avers that following a breakdown of her marriage to the Plaintiffs' father, the Plaintiffs took offence with the fact that their mother had decided to re-start her life with a Kenyan man. She avers that she is a *femme sole* who is *sui juris* and capable of determining

her own destiny without the interference of her children who have since taken to insulting her and insisting that she terminates her relationship with the Kenyan boyfriend.

7. Further and in addition to the foregoing, the Defendant avers that as part of the terms of settlement between herself and the Plaintiffs' father, she became the owner of all their matrimonial property which hitherto belonged to herself and the Plaintiffs' father that were situated in Kenya. The suit property was and is part of the matrimonial property which was settled in her favour.

8. In the alternative, the Defendant avers that the consideration for which she had the Sale Agreement drawn in her name and that of the Plaintiffs was love and affection. Due to the intransigence, lack of respect and hostility directed by the Plaintiffs to herself, the Defendant avers that the said consideration has since dissipated and the Plaintiffs are not entitled to benefit from the said Agreement.

9. The Defendant accuses the Plaintiffs of contemptuously locking her out of the suit premises in contravention of injunction orders granted herein at the interlocutory stage and by way of her Counterclaim prays for the following:-

a) A declaration that the Plaintiffs did not make any momentary contribution to the purchase and the development of the suit premises;

b) A declaration that the house and all the associated and appurtenant facilities erected within the suit premises belongs to the Defendant;

c) A mandatory order of injunction requiring the Plaintiffs, their servants and/or agents to hand over vacant possession of the house erected on the portion of land known as Kilifi/Jimba/1250;

d) As a consequential order, an injunction to restrain the Plaintiffs, their servants and or agents or any one of them from trespassing into the Defendant's house erected on Portion Number Kilifi/Jimba/1250;

e) In the alternative and without prejudice a declaration that the Plaintiffs are duty bound to contribute each their share of the costs of development of all the common property including the fence;

f) Damages for trespass;

g) Costs of the suit; and

h) Interest on all pecuniary awards.

THE PLAINTIFFS' CASE

10. On the same date that the Plaintiffs filed this suit, they filed an application under Certificate of Urgency seeking to restrain the Defendants from accessing and/or interfering in any way with the suit property pending the hearing and determination of this suit. That application was dismissed on 6th June 2013 and the Plaintiffs did not take any further action herein.

11. Subsequently and by an application dated 13th February 2018, the Defendant sought to have the Plaintiffs suit dismissed for want of prosecution and for leave to be granted to the Defendant to prosecute her Counterclaim. That application was allowed on 3rd May 2018 and the Plaintiffs' suit was accordingly dismissed for want of prosecution with leave being granted to the Defendant to prosecute her Counterclaim.

THE DEFENCE CASE

12. In support of her case the Defendant testified herein as her sole witness. As her evidence-in-chief, she adopted the testimony as relayed in her Affidavit sworn and filed herein on 8th March 2013.

13. The Defendant avers in the said Affidavit that she is the biological mother of the Plaintiffs and that she recently entered into a Judicial separation with her husband who is the Plaintiffs' father in Italy. Prior to the separation, the Defendant and her husband had invested heavily in the suit property among other properties.

14. The Defendant asserts that when the property was purchased, the Plaintiffs made no contribution thereto but in consideration of love and affection, she included the Plaintiffs in the Sale Agreement with the intention that once it is sub-divided, it shall be registered in her names as well as those of her children. Accordingly the Defendant proceeded to invest a great deal of money and resources on the property after it was purchased and was in exclusive possession thereof.

15. Following the breakdown of her marriage however, the Plaintiffs took offence with the fact that the Defendant had decided to re-start her life with a Kenyan man and have been insulting the Defendant and threatening to cause her harm. The Defendant asserts that due to the intransigence, lack of respect and hostility directed at herself by the Plaintiffs, the consideration of love and affection she had for them had dissipated and she was no longer desirous of letting the Plaintiffs benefit from the Sale Agreement.

ANALYSIS AND DETERMINATION

16. I have perused and considered the pleadings herein, the Defendant's oral testimony in Court and the submissions of the Learned Advocates, Dr. Khaminwa for the Plaintiffs and Mr. Ole Kina for the Defendant.

17. The two Plaintiffs herein are the sons of the Defendant. By a Sale Agreement dated 24th August 2009, the Defendant mother and her two sons jointly bought four acres of all that parcel of land known as Kilifi/Jimba/1250 situated in Watamu from one Kudza Ndamonahi Banda at a consideration of Kshs 1,196,000/-.

18. The short Agreement of Sale executed by all the parties herein reads in the relevant portion as follows:-

“Now this Agreement Witnesseth as following (sic):

That on or before the execution hereof, the Purchasers have paid to the Vendor a deposit of the sum of Kenya Shillings Eight Hundred and Seventy Three Thousands (Kshs 873,000/=) the receipt of which sum the Vendor does hereby acknowledges) and the balance of the sum of Kenya Shillings Three Hundred and Twenty Three Thousands (Kshs 323,000/=) shall be paid when the title documents are ready.

That the Purchasers are at liberty to take possession, enter and initiate developments on the Plot they have purchased.

That the Agreement made on 3rd October, 2007 is hereby cancelled.”

19. Some three years after they executed the Agreement, the Plaintiffs instituted this suit accusing their mother of denying them the possession, use and enjoyment of the property they had jointly bought. They also accused their mother of taking away and concealing all documentation relating to the property with the aim of maliciously registering the same in her name as the sole owner thereof.

20. In her Statement of Defence and Counterclaim, the Defendant admits that she did enter into the said Sale Agreement jointly with the Plaintiffs. She however denied that the Plaintiffs were entitled to any of the orders they sought herein on account that the Plaintiffs did not make any monetary or other contribution towards the purchase price.

21. As it turned out, following an application dated 13th February 2018, made by the Defendant, the Plaintiffs case was dismissed for want of prosecution and the Defendant was allowed to prosecute her Counterclaim.

22. It is the Defendant's case that her two sons did not contribute anything towards the purchase and/or subsequent developments of the suit property and that she had only included their names in the Agreement as a result of her love and affection for her children. It is further her case that the Plaintiffs have since become intransigent, disrespectful and abusive to her and that the consideration of love and affection has since dissipated as a result whereof the Plaintiffs have since lost any entitlement they may have had to the suit property.

23. From the material placed before me, it was apparent that as at the time the parties entered into the Agreement of Sale, the Defendant was happily married to one Franco Luchetti with whom they brought forth the two Plaintiffs. According to the Defendant they did with her said husband invest their jointly acquired income from sources in Italy in the purchase of various portions of land in Watamu, one of them being the suit property herein.

24. According to the Defendant, when they first acquired the property, she was to partner with one Mohammed Habib Shani. However, after they paid the initial deposit of Kshs 800,000/= the said Shani pulled out on the partnership. The Defendant told the Court that she then decided to refund Shani his money and to include his sons in the Agreement due to her love and affection for them.

25. As things turned out, the Defendant's marriage to Franco Luchetti aforementioned broke down after the Defendant fell into a romantic relationship with a Kenyan man. Like their father, the Plaintiffs did not take this well. At paragraph 5 of an Affidavit he swore in support of their application for injunction dated 7th December 2012, Fabio Luchetti, the 1st Plaintiff herein swore as follows:-

“5. That the Defendant, who also happens to be my mother, fell out with my father and in turn in the process, we, the 1st and 2nd Plaintiffs also fell out with her as a result of her extra-marital affairs with a young Kenyan Gentleman while still married to my father. That it was during such time that saw the beginning of the Defendant, in apparent retaliation, decline to allow us access to the property and going as far as threatening us with dire criminal action should we attempt to step foot on the subject property.”

26. The Defendant confirms this position at paragraphs 8 and 9 of her Affidavit filed herein on 8th March 2012 in which she states as follows:-

“8. That following the breakdown of my marriage, the Plaintiffs took offence with the fact that I decided to re-start my life with a Kenyan man. They have taken to insulting me calling me all sorts of names and threatening to inter alia cause me personal harm if I do not relinquish my claim to my property and give it to them.

9. The Plaintiffs are unreasonably interfering with my personal life by insisting that I should terminate my relationship with my Kenyan boyfriend. I am an adult of sound mind capable of taking care of myself and minding my own business.”

27. As it were, it was apparent to me that prior to the breakdown of the said marriage for whatever reason, both the Plaintiffs and their mother had enjoyed possession of the suit property in terms of the Agreement of Sale dated 24th August 2009. According to that Agreement,

the possession, use and enjoyment of the property was immediately allowed for the Purchasers upon the execution of the Agreement.

28. While the Defendant contended that they had purchased the suit property with her former husband and that she had refunded her initial partner one Mohamed Habib Shani the deposit paid of Kshs 800,000/-, nothing was placed before me to demonstrate that it is not the Purchasers shown in the Agreement who indeed paid for and purchased the property.

29. While it is also true that the Judicial Separation endorsed in Italy between the Defendant and her husband on 4th January 2013 decreed all the matrimonial property in Kenya to the Defendant, I was not persuaded that the suit property was matrimonial property owned solely as it were between the Defendant and her now estranged husband capable of being disposed as purported in the said Judicial Separation between the Defendant and the Plaintiff's father.

30. From the material placed before me, it was evident that both the Plaintiffs and the Defendants had jointly purchased and therefore jointly own the suit property. All the three are at liberty to agree on how they want to share the property in the event they no longer desire to remain together.

31. The long and short of it is that while the Plaintiffs suit was dismissed way back for want of prosecution, I did not also find merit in the Counterclaim.

32. Accordingly the Counterclaim is dismissed.

33. Given the nature of the relationship between the parties, I shall make no order as to costs.

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

J.O. OLOLA

JUDGE