



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 196 OF 2013

ROMANO MASSACESI.....1ST PLAINTIFF

DELFINA FERRARI.....2ND PLAINTIFF

VERSUS

GAETANO GRASSO (also known as) ENNIO GRASSO.....DEFENDANT

JUDGMENT

Background

1. By a Plaint dated 6th November, 2013 Romano Massaccesi and Delfina Ferrari (the Plaintiffs) pray for Judgement against the Defendant jointly and severally for: -

a) A permanent injunction restraining the Defendant, their servants, employees and/or any other party from transferring, conveying and/or selling villa numbers 14 and 17 situated on all that property known as Plot No. 2727 Malindi to any third party and/or interfering with the peaceful enjoyment of the said villas and or;

b) Kshs.13,200,000/-;

c) costs of the suit and interest.

2. The basis of those prayers is the Plaintiffs' contention that they loaned the Defendant Euro 120,000/- on or about 23rd October, 2012 with an agreement that the said amount was to be repaid within 6 months. It was a further term of their agreement that in the event the Defendant was unable to repay, the Plaintiffs would be obliged to enforce the lien on the said villa numbers 14 and 27 situated on Plot No. 2727 belonging to the Defendant.

3. The Plaintiffs further aver that the Defendant issued them with post-dated cheques to cover the said amount equivalent to Kshs.13,200,000/- but when they deposited the cheques, the same were returned unpaid. When the Plaintiffs tried to lodge a caveat on the said villas at the Mombasa Lands Registry, they discovered that the same were not registered in the Defendant's name.

4. But in a Written Statement of Defence dated 11th December, 2013, Gaetano Grasso aka Ennio Grasso (the Defendant) denies that the Plaintiffs advanced him the said Euro 120,000/- or at all. He further denies misleading the Plaintiffs on the question of the ownership of the said villas Nos 14 and 17 situated in Plot N. 2727 aforesaid.

5. Without prejudice to the denials, the Defendant states that he did obtain an advance of Euro 86,000/- from the Plaintiffs but the Plaintiffs failed to pay the balance of Euro 34,000/- as agreed on. It is his case that the Plaintiffs then proceeded to bank the post-dated cheques without first enquiring from him whether they could do so. By so acting, the Plaintiffs became the authors of their own misfortune.

6. The Defendant accuses the Plaintiffs of maliciously causing his prosecution in a criminal case in Malindi with a view to force him to pay them Euro 120,000/-. He asserts that the Plaintiffs have failed to discharge their obligations under the contract and that they are hence not entitled to the orders sought herein.

THE PLAINTIFFS' CASE

7. The Plaintiffs called one witness in support of their case.

8. PW1 – Romano Massacesi is the 1st Plaintiff herein. He told the court that on or about 31st October, 2013, the Defendant approached the 2nd Plaintiff and himself and requested for a friendly loan to assist him sort out his issues at the Port as the Defendant claimed his containers had been detained.

9. PW1 testified that they agreed to assist the Defendant and they then gave him a total of Euros 72,000/- which was equivalent to Kshs.7,920,000/-. PW1 personally contributed Euros 32,000/-. As security the Defendant issued post-dated cheques and assured the Plaintiffs that the cheques would go through.

10. PW1 further told the court that the Defendant subsequently paid them with cheques totaling Euros 5,040/- which was equivalent to Kshs.554,400/- and they agreed that amount shall act as interest on the loan. The cheques were to be deposited in a month's time. However on 2nd November, 2013 when they deposited the cheques, they were informed that they had bounced. The Defendant has since failed and/or neglected to refund the amount despite the requests made to him.

THE DEFENCE CASE

11. The Defence equally called one witness in support of their case.

12. DW1 – Gaetano Grasso is the Defendant herein. He told the court that he went to the Plaintiffs and asked for a loan in Euros to sort out something at the Port of Mombasa. The amount involved was Euros 82,000/- and they went to Kupalila Advocates before whom they signed a guarantee for the money.

13. DW1 told the court that the Agreement with the Plaintiffs was for 120,000/- Euros. DW1 owned Plot No. 2727 Malindi where there are 18 villas he had constructed thereon plus a restaurant. DW1 took the Plaintiffs to the property to see. The Plaintiffs then chose villa Nos 14 and 17 to be the guarantee for the money advanced.

14. DW1 further testified that he gave the Plaintiffs some post-dated cheques but none was honored as he had no money in his account. DW1 told the court that he called the Plaintiffs and told them to return the cheques in the event they were dishonoured. DW1 however denied that he owes the Plaintiff the sum of Kshs.13,200,000/-.

15. DW1 testified that their agreement was that if the cheques did not go through, the Plaintiffs would take the villas. The Plaintiffs have however never asked DW1 to transfer the villas to them. The villas are however still there and very clean. DW1 told the court that he is ready and willing to transfer the villas if the Plaintiffs pay him a balance of Euros 24,000/-.

ANALYSIS AND DETERMINATION

16. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses as well as the evidence produced at the trial herein. I have equally considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

17. In their Complaint as filed herein on 7th November, 2013, the Plaintiffs who are a husband and wife pray for an injunction to restrain the Defendant from transferring or selling villa Nos. 14 and 17 situated at Plot No. 2727 Malindi. In the alternative, they pray for payment of the sum of Kshs.13,200,000/-.

18. The basis of the Plaintiffs' claim is an agreement dated 23rd October, 2012 executed before one M.M. Kupalia Advocate by the parties herein. The said agreement (Dexh 1) titled "Loan Agreement" provides in the relevant portion as follows: -

“WHEREAS the Borrower is possessed of or otherwise entitled to ALL THAT piece or parcel of land described as Plot No. 2727 (Origin 514/17) on which he has caused to be developed several villas as per the approved development Plan annexed herewith AND WHEREAS the Lenders have agreed to advance by way of Loan One Hundred and Twenty Thousand euros (E. 120,000) interest free to be secured by Villa Number 14 on the said Plot 2727 Malindi for a period of six (6) months from the date hereof NOW THIS AGREEMENT WITNESSES as follows: -

- 1. That the amount lent to the Borrower is One Hundred and Twenty Thousand (e. 120,000) Euros**
- 2. That the amount shall be refundable on or before the expiry of six (6) months from the date hereof**
- 3. That should the Borrower be unable to refund the said sum within the stipulated period the Lender shall have a right of lieu (sic) over the villa herein described**
- 4. The Lender shall have the right to carry out the renovations to the villa if deemed necessary**
- 5. The Lender shall have the first option to reclaim the villa at the price of the amount herein lent.**

19. According to the 1st Plaintiff, they entered into this Agreement after the Defendant approached him and his wife and told them that a container carrying his goods was stuck at the Port of Mombasa. The Plaintiffs therefore agreed to lend to the Defendant a personal loan on the security of the villas erected on the Defendant's Plot No. 2727 Malindi.

20. It was the Plaintiff's case that they proceeded to loan the Defendant a sum of euro 192,000/- and that contrary to their Agreement, the

Defendant failed and/or neglected to repay the amount within 6 months as agreed. When the Plaintiffs attempted to deposit the post-dated cheques given to them by the Defendant they were dishonored and the Plaintiffs subsequently came to learn that the villas offered as security were not in the Defendant's names.

21. In his testimony before the court, the Defendant, an 85 year old man denied receiving 192,000/- euros from the Plaintiffs. He however admitted receiving a total of 96,000/- Euros and told the court that if the Plaintiffs were to pay him a balance of 24,000/- Euros to make up for the 120,000/- Euros provided in the Agreement, he was ready and willing to transfer the villas to the Plaintiffs.

22. According to the Defendant he was beneficially entitled to the two villas as he is the one who had purchased the land and developed it before registering the same in the name of his son.

23. I have considered the material placed before me. While the Plaintiffs claim to have advanced a total of Euros 192,000/- the Defendant only conceded to have received a friendly loan of 96,000/- Euros. As it were the parties herein executed an Agreement on 23rd October, 2012. That contract as signed by all parties indicates that the amount lent was Euros 120,000/-

24. As it were there is no other Agreement in support of euros 192,000/- as claimed by the Plaintiffs. Nor is there any other document mentioning Euros 96,000/- as purported by the Defendant. As we have seen above, the contract provided that the Defendant would repay the sum lent of Euros 120,000/- within 6 months.

25. Clause 3 of the Loan Agreement clearly provided that where the Defendant was unable to refund the sum lent within the 6 months, the Plaintiffs had a right of lien over the villas described therein.

26. As it turned out, the 1st Plaintiff told the court that they are no longer interested in the villas. In my view the Plaintiffs are justified in their rejection of the villas. This is so because while the Defendant insisted that he is the one who purchased and developed the villas in Plot No. 2727 Malindi, he had no documents of title thereto.

27. At the trial herein, the Defendant produced a Power of Attorney donated by his son to himself indicating that he is now in a position to deal with the property, there was however no historical background or any other documentation indicating how he had transferred the villas to his son. As it were, as at the time the parties entered into the Loan Agreement on 23rd October, 2012, there was no proof that the villas belonged to the Defendant.

28. While the Plaintiffs ought to have been more vigilant when they entered into the Loan Agreement with the Defendant in regard to the status of the villas, it is my view that it would be unjust and inequitable to let the Defendant retain the sums paid together with his villas.

29. Accordingly I am satisfied that the Plaintiffs case should succeed in the alternative. Given that it was not made clear to this court the exchange rate when the parties entered into the contract, Judgement is hereby entered for the Plaintiff in the sum of the equivalent of euros 120,000/- at current exchange rates together with interest at court rates.

30. The Plaintiffs shall also have the costs of this suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF NOVEMBER, 2019.

J.O. OLOLA

JUDGE