



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC. CASE NO. 12 OF 2012

ABDULGAFFUR ABDULGANI PASTA.....PLAINTIFF

VERSUS

HARRISON MWARUMBA MBUI.....DEFENDANT

JUDGMENT

Introduction:

1. In his Plaintiff dated 1st February, 2012, the Plaintiff averred that in 1994, the Defendant agreed to sell to him plot number 722 Takaungu (*the suit property*); that the parties executed a Sale Agreement and that the agreed consideration for the said land was Kshs. 1,800,000.
2. It is the Plaintiff's case that because the suit land did not have a title document, the Defendant donated to him the power to deal with the suit land vide a Power of Attorney registered on 21st April, 1994; that the Defendant transferred all his interests in the suit land to him and that he took possession of the said land.
3. The Plaintiff has averred that 5th October, 2011, the Defendant purported to refund Kshs. 1,000,000 and that a permanent injunction should issue restraining the Defendant from interfering with the suit land.
4. In his Defence, the Defendant stated that after signing the Sale Agreement with the Plaintiff, the Land Registrar declined to enter the name of the Plaintiff in the register because of the ongoing proceedings in Mombasa Miscellaneous Application Number 60 of 1994; that on that account, the Sale Agreement was frustrated and that he is willing to refund to the Plaintiff the Kshs. 1.2 million paid by him.

The Plaintiff's case:

5. The Plaintiff, PW1, informed the court that he bought the suit land from the Defendant in 1994. However, he later learnt that the Defendant intended to sell the suit land to other parties and that is why he filed the suit. PW1 further stated that after buying the land, he took possession of the same by fencing it; that the said fence was broken down by the Defendant's agents and that it was Dr. Acharya, PW2, who introduced him to the Defendant.
6. PW1 informed the court that he did all the transactions through Dr. Acharya and the land did not have a title document; that the Defendant gave him the Power of Attorney to deal with the suit land and that he was not aware that the land had a dispute as at the time of purchasing it. According to PW1, he informed the Registrar of Lands vide a letter dated 7th April, 1994 that the land should be registered in his (PW1) favour. It was the evidence of PW1 that the Registrar of Lands declined to deal with the transaction until the dispute in Mombasa Miscellaneous Suit No. 60 of 1994 was finalized.
7. When the Defendant forwarded to him two cheques for Kshs. 1,200,000 purporting to refund the purchase price, PW1 stated that he rejected the cheques and send them back to the Defendant's advocate. It was the evidence of PW1 that he came across a Sale Agreement dated 30th March, 2010 which showed that the Defendant had sold the suit land to five people for Kshs. 5,400,000.
8. In cross-examination, PW1 stated that the Defendant was paid Kshs. 1,432,000 by cheque and Kshs. 368,000 was paid by Dr. Acharya in cash; that it was for the Defendant to ensure that his name is entered in the register and that the completion period was to be on 30th April, 1994. It was the evidence of PW1 that HCCC No. 134 of 1991 was finalized.
9. PW2 stated that the Plaintiff is his friend. According to PW2, he informed the Plaintiff about the suit land which the Defendant was selling and that the agreed purchase price was Kshs. 1,800,000. According to PW2, the payment of the purchase price was effected through his office and that Kshs. 1,432,000 was paid to the Defendant by way of cheque while Kshs. 368,000 was paid directly to the Defendant in cash.

The Defence case:

10. The Kilifi Land Adjudication and Settlement Officer, DW1, informed the court that Takaungu was declared an adjudication section in 1990 and that the adjudication exercise was finalized on 20th May, 1993. According to DW1, the titles in respect to the adjudication of Takaungu were not issued because of the case that was filed by the Mazrui family in Mombasa HCCC No. 185 of 1991 and HCCC No. 134 of 1991. The Defendant did not testify in this matter.

Submissions:

11. The Plaintiff's advocate submitted that it is not the duty of the courts to re-write agreements entered into by the parties; that the Plaintiff entered into an agreement with the Defendant and that it was not open for the Defendant to revoke the said agreement seventeen (17) years down the line.

12. Counsel submitted that the claim by the Mazrui's over the suit land is not before the court; that the sale was complete by virtue of the irrevocable Power of Attorney and that the Defendant surrendered and transferred all his rights in the suit land to the Plaintiff.

Analysis and findings:

13. The evidence before me shows that on 15th April, 1994, the Plaintiff entered into an agreement of sale of land known as Plot number 722 Takaungu for Kshs. 1,800,000. The agreement shows that the Defendant acknowledged receipt of Kshs. 760,000 from the Plaintiff.

14. Although the agreement states that Kshs. 540,000 was to be paid upon the Plaintiff's name being entered in the register by the Lands and Settlement Department, PW1 and PW2 stated that the entire purchase price was paid to the Defendant.

15. On the same day the Sale Agreement was signed, the Defendant also signed an irrevocable Power of Attorney in which he appointed the Plaintiff to be his lawful Attorney in respect of the suit land and to "*sign, seal and deliver all necessary documents for survey, transfer, subdivision, register, or conveyance*" and to occupy the suit land.

16. Indeed, vide his letter dated 7th April, 1994, the Defendant informed the Chief Land Registrar to substitute his name in the register for plot number 722 Takaungu with that of the Plaintiff. However, in the letter dated 12th August, 1994, the Chief Land Registrar responded to the Defendant's advocate letter and informed him that he could not register the suit land in the name of the Plaintiff because there was a pending suit being Mombasa HCC Miscellaneous Application Number 134 of 1991.

17. The evidence by PW1 and PW2 was that the Defendant was paid the purchase price by way of cash and cheques. It was the evidence of the two that Kshs. 1,432,000 was paid by cheques while Kshs. 368,000 was paid to him in cash. The acknowledgment slips for Kshs. 368,000 by the Defendant were produced in evidence.

18. Indeed, the fact that the Defendant signed the Power of Attorney of 15th April, 1994 was acknowledged by the Defendant's advocate's letter dated 7th May, 2010 in which he stated that the Defendant has since revoked the Power of Attorney due to frustration. The frustration alluded to in the letter was the pending case, being Mombasa HCC Miscellaneous Application Number 134 of 1991.

19. The Plaintiff's advocates responded, to the Defendant's advocate letter and informed him that HCCC No. 134 of 1991 has nothing to do with the suit land. The Plaintiff's advocate rejected the Defendant's attempt to refund the purchase price paid.

20. The cumulative evidence before me shows that the Plaintiff complied with the Sale Agreement of 15th April, 1994. Indeed, the only reason why the Defendant sought to revoke the Sale Agreement and the Power of Attorney was due to the pending HCCC No. 134 of 1991 and not for any other reason.

21. Having entered into the agreement of 15th April, 1994 and the Power of Attorney of the same day, it was not open for the Defendant to revoke the contract seventeen (17) years down the line on account of a suit that he was not a party to. It does not matter that the Mazrui's are also claiming the land.

22. Having given to the Plaintiff an irrevocable Power of Attorney, the Defendant is bound by the terms of the same. This is the position in law as was stipulated in Halsbury's Laws of England 4th Edition, Volume 42 at page 210 where the author stated as follows:

"Further, where a Power of Attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee of the power or the performance of an obligation owed to him, then, so long as the donee has that interest or the obligation remains undischarged, the power may not be revoked by the donor without the donee's consent, or by the death, incapacity or bankruptcy of the donor."

23. The purported revocation of the Power of Attorney by the Defendant is therefore ineffective. Indeed, Section 116(5) of the Registered Land Act provides that an irremovable Power of Attorney given for valuable consideration cannot be revoked.

24. In the circumstances, and considering that the Plaintiff performed his obligations under the Sale Agreement, I find that the Plaintiff has proved his case on a balance of probabilities. I therefore allow the Plaintiff's claim dated 1st February, 2012 as prayed.

DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF APRIL, 2018.

J.O. OLOLA

JUDGE