



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 143 OF 2012

THURSDAY INVESTMENT LIMITED.....PLAINTIFF

-VERSUS-

ANIELO STORELLI.....DEFENDANT

JUDGEMENT

1. The plaintiff, Thursday Investments Limited commenced this suit against the defendant vide its plaint dated 10th July 2012. In it, the prayers sought are:

- a) Vacant possession of all that parcel known as KWALE/GALU KINONDO/1107.
- b) Eviction of the Defendant from the suit premises.
- c) Costs of this suit and interest at Court rates.
- d) Any other or further orders this Honourable Court may deem fit to issue.

2. The gist of the plaintiff's case is that it is the registered owner of the land parcel No Kwale/Galu Kinondo/1107 (herein after referred to as the suit property). The said property was sold to the defendant by a private deed dated 12.12.2004 at a price of 77.479 Euros. A deposit of 7.479 Euros was paid at execution of the agreement and the balance was to be paid to 40 equal monthly instalments of 1.750. The plaintiff pleaded that the defendant defaulted and in spite of demand continues with the default thus necessitating this suit.

3. The plaintiff's claim is contested vide a statement of defence filed on 17th August 2012. The defendant denied the entire claim and in paragraph 8 pleaded that the suit is statute barred and put the plaintiff on notice. The defendant denied any notice of intention to sue was issued. He urged the Court to dismiss the suit with costs to him.

4. Both parties filed documents in support of their cases. At the close of pleadings, each of them called a single witness. The plaintiff's witness gave evidence through interpretation on 27th November 2015. Mr Polli Piero told the Court that he is a shareholder and general manager of the plaintiff who was incorporated in Kenya on 5th March 1996. He produced the certificate of incorporation as **Pex 2**. He stated that the plaintiff acquired title of the suit property on 29th May 1997 and produced a copy as **Pex 1**. **PW 1** continued that the defendant was introduced to him by a friend. Subsequently they entered into a sale agreement on 12.12.2004. The agreement was drawn in Italian language. He produced a copy of the Italian version as **Pex 4 (a)** and the English translation as **4 (b)**.

5. **PW 1** further stated that the agreement provided for payment of the purchase price in 40 equal monthly instalments. The defendant was put in possession on payment of the deposit of 7.479 euros. He also said the agreement provided for a default clause i.e. if the defendant defaulted in paying the full purchase price, the property would revert to him. It is the plaintiff's case that the defendant defaulted. He is therefore entitled to vacant possession of the suit property. He also produced as **Pex 8** a resolution made by the plaintiff authorizing him to sell the land. He denied an allegation contained in defendant's document that the defendant made a payment of 45.000 euros on 28.1.2009 as on this date he only received 5.000 euros. He asked the Court to grant the prayers sought in the plaint.

6. During cross – examination, he confirmed the plaintiff is the registered owner of the suit property but it did not sell the land as the company works through its directors. That he signed the private deed/agreement on behalf of the company. That **Victoria Maria** who is a co-director died on 25.9.2004. He was unaware if the resolution was registered with the Registrar of Companies. He admitted receiving 5.000 euros deposited in his account and on 29.1.2010 he received 1480 euros. On 7.2.2005 he received 5.250 euros. That on 28.1.2009 he received 5.000 euros but the defendant falsified the document by adding 4. On 2.1.2007 he received 5.000 euros. In total he received 29.409 euros from the defendant. That the 1% share held by his deceased wife can be taken by any family member. In re – examination, the witness said

the defendant was aware the property was registered in the name of the company as he had shown him documents. This was the close of the plaintiff's case.

7. The defendant gave his evidence on 17th January 2017. He began by saying he knew **PW 1** but he did not know his wife. That on 12.12.04 they entered into a contract with him. He was to pay 70.000 euros which according to him he paid in full. That he even paid **PW 1** more money when he requested for interest. The defendant stated the property was not transferred to him as **PW 1** kept postponing saying there is no problem as they are both Italians. That he has been on the suit property since 12.12.2004 which is a period of over 12 years. The defendant stated further that it is not possible that he be evicted because when he made payments he was not given any receipts. He does not know the plaintiff company. That the plaintiff did not deposit any resolution to file this case. He urged the Court to give him the title deed.

8. In cross – examination, he said he signed the agreement dated 12.12.2004. That the purchase price was 70.000 while the total value was 77.479. That he paid the balance in instalments with the last payment of 400 made on 16th January 2009. That their agreement was based on trust according to their tradition. He conceded that they never visited the lands office as Polli was to do everything. That he should be given title because he paid everything. In re – examination, the defendant said the agreement did not mention the plaintiff. That if he paid everything, it would be 35,000 euros for receipts he was given. He did not know what motive Polli had for wanting to give receipts for only 35,000 euros. They signed the agreement and Sharia witnessed. This also marked the close of the defendant's case.

9. Thereafter both parties filed written submissions. Both counsels made reference to the case of **Purple Co. Trading Ltd vs Bhanos Shashi Kunt Jai (2014) eKLR** which held that Courts cannot enforce illegal contracts. This means both parties agree the contract entered between the parties was illegal for their different reasons. The defendant also submitted that the suit was filed 13 years from date of default thus statute barred. The defendant however did not indicate the date of default but submits the suit was filed out of the statutory period for recovery of land. The statutory period for recovery of land is given at 12 years as per the provisions of section 7 of the Limitation of Actions Act Cap 22. This suit was filed on 24.7.2012. The agreement that put the defendant in possession of the land is dated 12.12.2004. The period between the two dates is eight (8) years. The defendant's averment of statute of limitation is therefore unfounded. He cannot also claim the land by virtue of adverse possession as time stopped running as soon as the suit was filed which was before the lapse of 12 years.

10. Is the plaintiff entitled to vacant possession? The defendant in his evidence both in chief and re – examination stated he does not know Thursday Investments Ltd. It is not in dispute that the suit property is registered in the name of the plaintiff. A copy of a title produced was not questioned. The private deed was executed between Polli Piero and the defendant in their individual capacities. There is no contract between the plaintiff and the defendant. The defendant went further to challenge the ordinary resolution authorizing Polli to sell the land saying the said resolution was not presented to the Registrar of Companies. It follows that the interest in the suit property was not passed to the defendant in accordance with the provisions of **section 3 (3) of the Law of Contract Act**.

11. Assuming there was a valid contract between the parties (although the parties have submitted the contract was illegal), the plaintiff stated the defendant breached the contract when he failed to pay the purchase price within the agreed timelines. The timelines provided in the deed was 40 months effective 30th January 2005. This would end about 30th April 2008. From the defendant's documents filed, the same shows payment made on 28th January and 29th January 2010. The defendant also stated that only 35,000 was acknowledged as payment received by Polli Piero. From his own documents filed, the amount paid does not add up to 77.479 which was the purchase price. It is my opinion that once he was sued for default, the burden of proof shifted upon him to demonstrate that he indeed paid the full purchase price. He has failed to discharge this burden. Consequently the plaintiff's claim for breach of their contract is thus proved. Their contract was specific that in case of breach the suit property reverts back to the plaintiff. Since no transfer of ownership had taken place, the plaintiff is justified to claim physical possession from the defendant.

12. There is no requirement in law and none was cited to this Court that the plaintiff had to file a resolution with the Registrar of Companies to bring the present suit. I find no reason to deny the plaintiff its entitlements merely on this ground. In conclusion I find no reasons to refuse to grant the prayers sought in the plaint as there is no plausible defence to the claim. Accordingly I enter judgment as prayed in the plaint. The defendant is hereby directed to surrender vacant possession of the suit premises to the plaintiff within 45 days from today. In default the plaintiff is at liberty to evict him using lawful means.

Dated, signed & delivered at Mombasa this 25th May 2018

A. OMOLLO

JUDGE