



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 153 OF 2017

WILLIAM SEVERGNINI.....PLAINTIFF

VERSUS

VALERIA MARINI

GIOVANNI COTTONE.....DEFENDANTS

RULING

1. I have before me for determination two applications. In the first application dated and filed herein on 23rd November 2017, the Plaintiff prays for Orders:-

3. That pending the hearing and determination of this suit, there be issued an interim injunction restraining the Respondents by themselves, their employees, servants and/or agents or otherwise from howsoever interfering with access or entry by the Applicant into (a) house known as Apartment E1 Alhambra Estate Malindi.

4. That the costs of this Application be provided for.

2. The first application is supported by an affidavit sworn by the Plaintiff William Severgnini and is premised on the grounds:-

i) That the Applicant is the bona fide rightful owner of the said house;

ii) That the Applicant entered into an agreement for sale of the said house with the 1st Respondent who was then a fiancée of the 2nd Respondent on 7th April 2010 whereby the 2nd Respondent was to pay the agreed consideration of Kshs 16,000,000/-

iii) That no consideration has been paid to date and therefore the proprietary rights remain with the Applicant.

iv) That the Respondent who are Italian residents have never returned to Kenya since the execution of the agreement but the 1st Respondent has been using intimidation to prevent the Applicant from accessing the said house.

v) That the Respondents' conduct is malicious as they have refused to pay and/or allow the Applicant to enjoy his proprietary rights.

3. In response to the 1st Application, the 1st Defendant/Respondent Valeria Marini filed her own application herein on 11th December 2017 seeking the following orders:-

a) That the Honourable Court be pleased to strike out the Plaintiff's entire suit

b) That the Costs of this application be provided for

4. The 2nd Application is supported by an Affidavit sworn in Italy by the said Valeria Marini and is premised on the grounds that:-

i) This Court has no jurisdiction to determine the suit herein, the claim being contractual in nature;

ii) The suit is founded on an agreement for the sale of an apartment made on 10th July 2010, some seven years ago the action is therefore statute barred by reasons of the provisions of Section 4(i) of the Limitation of Actions Act(Cap 22);

iii) That no leave was sought and obtained from the Court to file the suit out of time; and

iv) The suit therefore amounts to an outright abuse of the process of the Court.

5. Directions were given that the two applications be heard and disposed of together. I have therefore considered the applications and the responses filed thereto. I have equally considered the written submissions placed before me by the Learned Advocates for the parties.

6. Given that the 2nd Application filed by the 1st Defendant deals with the question of jurisdiction of this Court, I shall deal with the same first and thereafter, if need be, address myself to the 1st Application filed herein by the Plaintiff.

7. The main ground for objecting to the jurisdiction of this Court is the contention by the 1st Defendant that the Agreement giving rise to the subject matter of this case was executed more than seven years ago and the action is therefore statute barred and deserving to be struck out upfront.

8. Section 4(1) of the Limitation of Actions Act limits the time of filing actions founded on contract to six years from the date the cause of action. A perusal of the Agreement executed by the parties herein reveals that it was indeed executed on 7th April 2010. The suit herein was filed on 11th July 2017, slightly more than seven years after the agreement was executed by the parties.

9. I note however that the Plaintiff contends that the consideration in the sum of Kshs 16,000,000/- was to be paid in instalments by the 2nd Defendant in Italy over a period of two years. In this context the Plaintiff avers that the 2nd Respondent proceeded to write post-dated cheques which were to be paid in Italy. One such cheque annexed to the application and marked WS-3 is a cheque dated 31st December 2012 for 180,000/- Euros. The 2nd Defendant has not denied that he was to make payments in instalments as stated and/or that he handed over the cheque to the Plaintiff in partial fulfilment of the sale price.

10. Secondly, the Plaintiff points out that when he returned to Italy to cash the said cheque, he found out that the 2nd Defendant had been declared bankrupt and he could therefore not cash the cheque. It is the Plaintiff's case he kept calling the 2nd Defendant who kept on promising to pay to no avail. In this regard the Plaintiff has annexed a declaration made by the 2nd Defendant in Italian on 25th July 2016 in regard to the cheque for Euros 180,000/-. The English Translation annexed thereto as translated by one Roberto Macri on 1st October 2016 reads as follows:-

“DECLARATION

The present cheque was for the payment of the house which I made named to Valeria Marini. I could not pay it for financial reason.

I apologise to have created damages to Mr. William Severgnini but unfortunately I did not have any other choice.”

11. The above being the case it is clear to me that the suit as filed was not out of time. Depending on how one looks at it the six years limitation period could accrue from the date of the cheque of 31st December 2012 or from the date of the last acknowledgment of the debt by the 2nd Defendant which is 25th July 2016. Either way, six years were yet to lapse when this suit was filed on 11th July 2017.

12. The second objection on the grounds of jurisdiction and for which the 1st Defendant urges this Court to strike out the suit, is the fact that this matter was a purely contractual one and has nothing to do with the Environment and Land Court. I did not clearly get the gist of this objection by the 1st Defendant. I say so because in the 1st Defendant's Advocates own submissions, they cite clearly the jurisdiction of this Court as provided under Article 162(2)(b) of the Constitution and Section 13(2) (d) of the Environment and Land Court Act.

13. Section 13(2)(d) of the Environment and Land Court Act aforesaid provides that the Court has a mandate to determine disputes including that:-

“Relating to public, private and community land and contracts in action or instruments granting any enforceable interest in land.”

14. The contract executed by the parties herein was clearly granting enforceable interests in land and that ground does not suffice to have the suit struck out. I therefore refuse to strike the suit out as sought by the 1st Defendant.

15. Turning to the Plaintiff's application, I note that he seeks an order of interim injunction to restrain the Respondents from howsoever interfering with his access or entry into the house. I note however that he had already transferred the property and handed vacant possession to the Respondents. It is not clear to me what sort of access he wants to the house from the affidavit filed herein.

16. I would however be loathe to injunct the Respondents who remain the registered owners of the property. In my considered view, unless and until a declaration is made to the effect that the house still belong to the Plaintiff as sought in his prayers in the Plaint, the orders sought in the application dated 23rd November 2017 would lead to confusion and anarchy. I will therefore decline to grant the same at this stage.

17. The upshot is that the two applications as filed by both the Plaintiff and the 1st Defendant are both dismissed. Parties should proceed to file the main suit for hearing.

18. The costs of both applications shall be in the cause.

Dated, signed and delivered at Malindi this 28th day of September, 2018.

J.O. OLOLA

JUDGE