



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 135 OF 2013

VALERIA TANZI.....PLAINTIFF

VERSUS

1. GIULIO GIRO

2. FATMA BARALLON

3. FIDELITY COMMERCIAL BANK LTD.....DEFENDANT

JUDGMENT

1. By a Complaint dated and filed herein on 7th August 2013, the Plaintiff Valeria Tanzi avers that on or about 5th June 2010, she entered into a contract of sale with Giulio Giro, the 1st Defendant herein for the sale of all that land known as Plot No. 178, Kijiwetanga, Malindi for a sum of Kshs 12,000,000/= . The Plaintiff further avers that as provided under the contract of sale, she took possession of the suit premises upon payment of Kshs 2,000,000/= as deposit for the purchase price. The balance of the purchase price was to be paid by monthly instalments of Euros 1,000/= until payment in full.

2. It is the Plaintiff's Case that in fulfilling her obligations in respect of the agreement, she had at the time of filing the suit paid Kshs 7,100,000/= to the 1st and 2nd Defendants and she has in addition undertaken massive construction and development of the property in excess of Kshs 5,000,000/= in worth. It is her contention that after making the payments, she came to realise that the Suitland was registered in the name of the 2nd Defendant Fatma Barallon who is the 1st Defendant's wife.

3. The Plaintiff further contends that sometime in the year 2012, the 2nd Defendant proceeded without her knowledge to procure a loan facility with Fidelity Commercial Bank ,the 3rd Defendant which Bank (at the time to filing the suit) had threatened to sell the suit property after the 2nd Defendant defaulted in making payments. Accordingly the Plaintiff prays for:-

- (a) *A permanent injunction to be issued against the defendants from selling, leasing, interfering, meddling, constructing or in any manner possibly(sic) in respect of Plot No. 178 Kijiwetanga, Malindi;*
- (b) *An order for Specific performance, specifically to transfer the land known as Plot No. 178 Kijiwetanga, Malindi in the Plaintiffs name;*
- (c) *Damages for loss of use and business opportunity and/or refund of money paid, plus costs of*

improvement and construction undertaken on Plot No. 178 Kijiwetanga, Malindi; and

(d) Costs of the suit and any other relief the Court deems fit to grant in the circumstances of this case.

4. In their Statement of Defence and counterclaim, the 1st and 2nd Defendants admit that the suit herein is premised on an agreement of Sale but state that the document dated 5th June 2010 is not an agreement. It is their case that the only agreement in place is the one signed in March 2012 between the Plaintiff and the 2nd Defendant who is the registered owner of Plot No. 178 Kijiwetanga.

5. It is the 1st and 2nd Defendants case that it was a term of the agreement signed in March 2012 that the Plaintiff was to pay 60,000/= Euros upon execution of the agreement and to issue 24 post-dated cheques of 2,500 Euros for the balance of the 60,000 Euros commencing 15th July 2012 for purposes of offsetting a loan which the 2nd Defendant had with the 3rd Defendant. It is their case that the title documents of the suit property had been deposited as security to obtain the loan with the 3rd Defendant with prior information to the Plaintiff who consented to the arrangement.

6. The 1st and 2nd Defendants contend that the Plaintiff has todate only paid half of the purchase price agreed but is in occupation of the suit premises without payment of any rent and in total disregard of the sale agreement.

7. Accordingly, the 1st and 2nd Defendants pray that the Plaintiffs suit be dismissed and that Judgment be entered for them by way of counterclaim for:-

(a) A declaration that the Plaintiff is in breach of the March 2012 agreement of sale entered into by the Plaintiff and the Defendants and for specific performance of the terms of the agreement in full by the Plaintiff;

(b) Interests on (a) above at Court rates; and

(c) Costs and incidentals to the suit.

8. On their part, in their Written Statement of Defence dated and filed herein on 15th August 2014, the 3rd Defendant avers that the Plaint as drawn does not disclose any or any reasonable cause of action against it. The 3rd Defendant denies that in the circumstances pleaded in the Plaint, there is a basis for the grant of an order of specific performance against it. They further contend that they were not party to the alleged contract, its breach or otherwise and there is therefore no privity of contract between the Plaintiff and itself and hence the claim against it is void.

Case Against the 3rd Defendant

9. From the record, it is evident that by an application dated 7th August 2013, the Plaintiff sought to stop the 3rd Defendant from selling and/or disposing off the Suitland pending the hearing and determination of the suit. That application was considered by the Honourable Justice Angote who was then seized of the matter and was dismissed with costs on 24th June 2014. Subsequently on 24th June 2015, on the request of counsel for the Plaintiff, the suit as against the 3rd Defendant was withdrawn with costs.

The Plaintiff's Case

10. The trial thereafter commenced with both sides calling Oral evidence in support of their respective cases.

11. The Plaintiff Valeria Tanzi testified as PW1 and also called her father Constantino Tanzi who testified

as PW2. On her part, PW1 testified that she had lived in Kenya for about 10 years. It was her case that she bought the suit property from the 1st Defendant having met him at the property in Kijewetanga in 2010. They signed an Agreement in June 2010. At the point of signing the Agreement, she paid the Defendant 5,000 Euros and after a few days transferred 20,000 Euros from her account in Italy to the Defendant. She produced in Court both the Agreement which is in Italian and a translated version as Plaintiff Exhibit 1 (a) and (b). It was her case that the initial 5,000 Euros was in cash and is captured in the Agreement that they signed. She stated that she thereafter started paying 1,000 Euros per month as per their agreement to the 1st Defendant. The 1st Defendant used to pick the money from their house and would sign on a piece of paper. The Acknowledgement Slips were produced and marked as Plaintiff Exhibits 3.

12. The Plaintiff testified that after she paid a total of 70,000/= Euros, she asked the 1st Defendant who was a friend of her father Dino Tanzi (PW1) for the title. This was after about one year after she moved into the suit premises. It was then that she learnt that the title deed for the property was in the name of the 2nd Defendant who was the 1st Defendant's wife. She then thought it wise that they should do an agreement with the 1st Defendant wife. At that time PW1 did not know the 2nd Defendant. Later in 2012 the 2nd Defendant took PW1 to an Advocate and they signed another agreement which she produced and was marked Plaintiff's Exhibit 5.

13. It was PW1's case that she continued paying by cheque even after the 2nd Agreement. She paid 11,000 Euros in this manner with the last instalment being made either in December 2012 or January 2013. In 2013, PW1 still did not have the title deed and the 2nd Defendant who had travelled to Italy then called and asked her not to pay any money to the 1st Defendant. Apparently, the 1st and 2nd Defendant who were husband and wife had separated at this time. Thereafter, PW1 received a letter from Fidelity Commercial Bank in July 2013. PW1 tried to reach the 2nd Defendant who was in Italy in vain. It was PW1's testimony that upto this time, she had been unaware that the 2nd Defendant had charged the property to the Bank. She then stopped making any other payments.

14. As at that time, PW1 states that she had put a wall around the property, she had repaired the swimming pool, changed the Makuti roof and painted the house. In her estimation, she had spent between 13,000-14,000 Euros in repairing and maintaining the house which she knew to be her property. She produced photos (Plaintiffs Exhibits 7) to show the improvements made.

15. Thereafter, she received a second letter from the Bank advising the 2nd Defendant to leave the house within 45 days. PW1 then moved out of the house. It is her case that the total amount she had then paid to the 1st and 2nd Defendant was 70,000/= Euros. She had also spent 14,000/= Euros to renovate the house. She wants her money back. She also prays for damages for breach of contract. It is her case that she did not pay the balance purchase price of Kshs 4.5 million because the Defendants failed to give her title to the property.

16. Upon cross-examination PW1 insisted that she signed the 1st Agreement with the 1st Defendant. As at that time she did not know the 2nd Defendant. She did not also know about the requirement of a title deed in Kenya as this was the first property she had ever bought in her life.

17. On his part, PW2-Constantino Tanzi (also known as Dino Tanzi) told the Court that the Plaintiff is his daughter. He had known the 1st Defendant since 2009. He had however only seen the 2nd Defendant once although they had spoken on phone. PW2 stated that he wanted to surprise his daughter by buying her a house. It is then he contacted the 1st Defendant who was selling the house. That was about May or June 2010. The 1st Defendant then drew an Agreement in Italian language. PW1 then started making payments in instalments. In total, he and his daughter PW1 paid 70,000 Euros. PW2 stated that he stopped making the payments when the 2nd Defendant called. PW1 had occupied the house from 2010 until the time the Bank sold the house. The 2nd Defendant had advised that they stop payment until she comes to Kenya but she never came. Later PW2 learnt that PW1 had entered into another Sale

Agreement with the 2nd Defendant. PW2 was not present when this 2nd Agreement was signed.

18. Subsequently, the Bank sent notice insisting that they must move out of the house because the Defendants owed them money. The house had four bedrooms and four toilets. When the daughter moved in PW2 stated that it was just the house and a chicken pen. There was a swimming pool which was not functioning and they did repairs and improved the property. PW2 denied that the bank sold the property because of his default to repay a loan. He stated that he was unaware that the property belonged to the 2nd Defendant and he was not aware of the loan.

The Defence Case

19. The two defendants equally gave oral testimony with the 2nd Defendant testifying as DW1 while the 1st Defendant testified as DW2. In her testimony, DW1-Fatma Barallon informed the Court that the 1st Defendant was her husband. It was her case that they had rented a house to the Plaintiff for Kshs 35,000/= per month. After about one year, the Plaintiffs decided they wanted to purchase the property for Kshs 12,000,000/= .They did not however have all the cash and it was agreed they would pay in instalments of 1,000 Euros per month until completion.

20. Accordingly, on 4/8/2011 the parties had an agreement done through an Advocate and the Plaintiff deposited a sum of Kshs 2,000,000/= into the Defendants' account. Thereafter, the Plaintiffs stated that they needed a loan and the parties went to Fidelity Bank where they agreed to give DW1's husband 24 cheque leaves. The house was to be mortgaged for Kshs 5 Million. It was DW1's case that the Plaintiff only honored the cheques for a while. After an initial amount of Kshs 300,000/= was received, the rest of the cheques were dishonoured. That was after the 4th month after both PW1 and DW1 signed an agreement. The Agreement was not however dated or stamped after the Plaintiff's father refused to pay the Kshs 200,000/= demanded by the Advocate.

21. It was further DW1's testimony that the Plaintiff never paid Kshs 7,100,000/= as claimed. It had been agreed that instead of paying Kshs 35,000/= as rent, she would pay Kshs 100,000/=. It was also agreed that the rent paid earlier would be converted to be part of the purchase price. The Plaintiff however only paid some little money although DW1 was unable to recall the exact amount. On 18/4/2013, the Bank demanded the Kshs 5 Million that had been lent to the Defendants. The Defendants then asked the Plaintiffs to pay but they did not. The Bank thereafter instructed Auctioneers who gave them 45 days to pay or lose the house. The Plaintiff thereafter sued the Defendants. It was therefore DW1's request that the Court orders the Plaintiff to pay as per the Counterclaim so that the title can be released. According to DW1, the Bank has never sold the property.

22. On his part, DW2- Giulio Giro also told the Court that he first met the Plaintiff in 2009. The Plaintiff's father (PW2) approached DW2 in 2010 seeking to rent a house. The house was costing about Kshs 35,000/=. They rented the house for about two years.

23. However, after sometime, they told DW2 that they wanted to buy it. DW2 had bought the house but registered it in his wife's (DW1's) name. A Sale Agreement was subsequently prepared by an Advocate. However, when the Advocate asked for Kshs 200,000/= as fees, the Plaintiff's father refused. At that time, it was only DW2 and PW2 who were present. The Plaintiffs then paid Kshs 2 Million down payment. They also claimed that all that had been paid as rent would form part of the deposit.

24. It was then agreed that the Plaintiffs would pay Kshs 100,000/= monthly but they only did this for about 14 months after which they stopped. The total amount according to DW2 came to about Kshs 6 Million. The parties were dealing in Euros and sometimes the exchange rates could vary.

25. According to DW2, they have been sued because the Plaintiff failed to pay anything to the Bank. DW2 states that he had a loan of Kshs 5 Million with Fidelity Bank. The 2nd Defendant guaranteed the loan using the property as security. The Plaintiff should therefore pay the balance to the Bank after which the Defendants can release the title to them.

26. I have considered the Pleadings filed herein and the Oral testimonies adduced by the Parties in Court. I have similarly considered the Written Submissions and authorities placed before me by the Learned Advocates representing the Parties herein.

27. At the root of this dispute is a document stated to have been signed in Malindi on 5th June 2010 between the Plaintiff's father Constatino Tanzi (also known as Dino Tanzi-PW2) and the 1st Defendant. That document, the English translation whereof was produced herein as Exhibits 1(b) is titled "Preliminary Contract of Sale". The obviously poorly translated and/or drafted document reads in the relevant parts as follows:-

Preliminary Contract of Sale

.....

Given that Mr. Giulio Giro promises to sell to Mr. Tanzi Valeria, who promises to buy for person or , society or entity to indicate the notarial deed, the entire properties of the land area of approximately 3,500 square meters, located in Malindi Kenya, distinguished with Plot No. 178 Malindi, with overlying villa of approximately 200 sqm and farm buildings, stables, warehouses, shelters etc, all as further described and shown surrounded in ...in the plant which has subscribed by the parties, are attached to this document under the letter "A" forming an integral and substantial,

"A" Covenant and agree as follows:-

- 1. The premise is an integral and essential part of this writing;*
- 2. The seller guarantees that the aforementioned property are free and available, free weights, charges, registration and registration of title, 'servitude, liens, encumbrances including tax in the state of fact and law as you have. Given that most of the buildings that exist on land insist on the ground here promised for sale have been built and made without authorization by the competent authority of construction, Mr. Giulio Giro is committed to regularize such buildings, getting all the necessary and required authorisations and providing the pilings, before the act notary selling, making, so, the promised really for sale respondent all effective state actually present.*
- 3. The parties consensually agree that the price of this promise of sale is set at Euros 120,000(one hundred and twenty thousand) i.e Kshs 12,000,000/= will be adjusted as follows:*

Mr. Tanzi Valeria undertakes to pay to Mr. Giulio Giro Euro 20,000(twenty thousand Euro) cash and 1,000(one thousand) Euros per month until repayment of the debt. If Mr. Tanzi Valeria provide to pay the full price within three years from the date of subscription of this promise of sale, Mr. Giulio Giro to remit to Mr. Tanzi Valeria the amount agreed in view of the fact that the price, as stipulated above takes into account the payment in instalments for the long term, otherwise the price will remain as agreed.

- 4. Delivery of the overlying land and buildings and then entry into possession is made from the date of subscription of this promise of sale and from that date fees and charges will be respectively in profit and at the expense of the buyer.*

28. From the foregoing it is discernable from the document that the 1st Defendant promised to sell to PW2 the entire property comprised in Plot No 178, Malindi at the price of Euros 120,000/=(or Kshs 12 Million at their agreed exchange rate). PW2 paid in cash Euros 20,000/= as deposit and there was an agreement that hence forth, PW2 would take possession of the premises and would be paying Euros 1,000 monthly to the 1st Defendant in addition to taking care of the fees and charges that may arise to the relevant authorities. It is further evident that as at the time, the parties were working on the basis of an exchange rate of 1 Euro to 100 Kenya shillings given the conversions of the currencies as shown in the document.

29. In his testimony in Court, PW2 testified that she wanted to surprise his daughter Valeria Tanzi (PW1) by buying her a house. It is indeed evident that after the execution of the said Preliminary Contract of Sale document PW1 moved into the premises and took possession thereof. According to PW1 and PW2, they remained faithful to the contract and after making payments to the tune of Kshs 7,000,000/= they asked for the property's title deed from the 1st Defendant and it was only then that the 1st Defendant disclosed to them that the property was in the name of his former wife, the 2nd Defendant.

30. Having learnt of this new development, the Plaintiff proceeded to sign a new contract with the 2nd Defendant sometime in July/August 2012. In this contact (marked as Plaintiff's Exhibit No. 5) the 2nd Defendant conceded having received Euros 60,000/= (or Kshs 6,000,000/= at the conversion rate aforementioned). The contract went on to state that the balance of the Euro 60,000/= purchase price would be paid in 24 equal monthly instalments of Euros 2,500/= (or Kshs 250,000/=) with effect from 15th July 2012 and thereafter on 15th of each succeeding month. The 2nd Defendant acknowledged receipt of the 24 Post-dated cheques.

31. According to PW1, she had by then put in a sum of Kshs 4,000,000/= to refurbish the house and she demanded that the defendants furnish her with a title deed for the property. According to PW1 and PW2, it then came as a complete surprise to them when it emerged that the defendants had in January 2012 taken a loan from Fidelity Commercial Bank using the property as a collateral. The Bank would later in 2013 force PW1 out of the house as they demanded to exercise their Statutory Power of sale when the Kshs 5 Million loan remained unserviced.

32. On their part, DW1 and DW2 testified that the Plaintiff first moved into the premises as a tenant paying rent of Kshs 35,000/=. They did not however produce any tenancy agreement to that effect. Indeed a perusal of the document titled Preliminary contact of Sale signed on 5th June 2010 would appear to rule out this contention as the Plaintiff only took possession subject thereto.

33. On her part, DW1 stated that the Plaintiff has never paid the Kshs 7,000,000/= being claimed herein. It was her case that the Plaintiff only paid rent of 35,000/= which was to be converted to be part of the purchase price. She however conceded that when it was agreed that the Plaintiff would purchase the property, she paid Kshs 100,000/= for a few months although DW1 was unable to recollect how much as the money was being paid to DW2. On his part, DW2 supports the position that after the initial Kshs 2 Million down payment was made, it was agreed in the contract prepared before an Advocate that the Plaintiff would pay a sum of Kshs 100,000/= monthly. It is however his case that the Plaintiff only paid for about 14 months after which they stopped. It is his case that the total amount paid by the Plaintiff came to about Kshs 6 Million.

34. Recalling that the new contact executed in July/August 2012 between the Plaintiff and the 2nd Defendant acknowledged receipt of Kshs 6 Million from the Plaintiff, it is difficult to see how the payments made by the Plaintiff would remain at Kshs 6 Million even after, according to DW2, she made payments of Kshs 100,000/= per month for about 14 months. The Plaintiff's Exhibit 3 is a hand-written document in Italian which shows various dates and amounts. According to PW1, this was the document that DW1 would sign whenever she received payments of Euros 1,000/= per month in cash from the Plaintiff. The Defendants did not contest this document. It clearly shows that the 2nd Defendant was paid and signed for 1,000 Euros on the following days.

| <u>Date</u> | <u>Amount (In Euros)</u> |
|-------------|--------------------------|
| 30/6/2010 | 1,000 |
| 30/7/2010 | 1,000 |
| 7/9/2010 | 1,000 |
| 19/10/2010 | 1,000 |

| | |
|-----------|-------|
| 3/11/2010 | 1,000 |
| 2/12/2010 | 1,000 |
| 4/1/2011 | 1,000 |
| 3/2/2011 | 1,000 |
| 3/3/2011 | 1,000 |
| 2/4/2011 | 1,000 |
| 5/5/2011 | 1,000 |
| 31/5/2011 | 1,000 |
| 5/7/2011 | 1,000 |

35. I am accordingly inclined to accept the Plaintiff's claim at Paragraph 6 of the Plaintiff's claim that as at the date of filing the suit they had paid in excess of Kshs 7,100,000/= to the Defendants, again taking into account the conversation rates earlier mentioned.

36. Perhaps out of naivety or sheer lack of knowledge, the documents prepared by the parties herein were done in the most casual manner one can imagine. It is difficult to fathom that the parties herein intended to seriously dispose of a property worth Kshs 12 Million in the manner in which they went about it. Be that as it may, am not convinced that the Defendants can run away from the fact that they misled the Plaintiff to pay them various sums of money either through misrepresentation of facts or sheer fraudulent intent. In the first instance, the 1st Defendant purported to sell the suit property to the Plaintiff's father and received various amounts of money therefore without disclosing that the property was registered in the name of his wife, the 2nd Defendant. Again having known that her husband was in the process of selling the property, the 2nd Defendant accepted to guarantee a loan taken by the 1st Defendant using the property without the knowledge and/or consent of the Plaintiff who had by then taken possession of the suit premises.

37. The failure by the Defendants jointly, and/or severally to service the loan leading to the Bank's exercise of its Statutory Power of Sale and thereby dispossessing the Plaintiff of the suit premises was callous and mischievous in the extreme. Whatever the case, the Defendants must not be allowed to benefit from their own misconduct and mistakes. In my considered view, there was a valid contract between the parties which contract was rendered in operable by the fraudulent acts of the defendants jointly and/or severally.

38. It was the Plaintiff's case that having moved into the premises, she made certain improvements by repairing the swimming pool, constructing a wall and painting the suit premises. While she claimed she had used Kshs 4 Million in improving the premises, she only provided pictures and did not provide the actual receipts for expenditures incurred. I however take note that the Plaintiff has lost a house which she had occupied and invested in both materially and emotionally.

39. Accordingly, I dismiss the counterclaim and I hereby enter Judgment for the Plaintiff as against the Defendants jointly and/or severally as follows:-

| | Kshs |
|---|-------------|
| (a) Damages for loss of use of the suit premises and breach of contract | 2,000,000/= |
| (b) Refund for money paid to the Defendants jointly and/or severally | 7,100,000/= |

(c) Interest on (b) at prevailing Commercial Bank rates from the date of payment.

(d) Costs on this suit.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J. O. OLOLA

JUDGE