REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 126 OF 2016

RICCARDO NELSON PASOTTO.....PLAINTIF

VERSUS

CARLO BARBIN LISSONE.....DEFENDANT

RULING

1. By a Plaint dated and filed herein on 23rd May 2016, the Plaintiff Riccardo Nelson Pasotto commenced these proceedings seeking a refund of 10,000 Euros (Kshs 1,000,000/=) and interest at 12% from 2007 until the date of payment. The sum was allegedly paid as down payment for the purchase of two apartments at Ascot Residence in Watamu. The total purchase price was to be 80,000 euros (kshs 8,000,000/=) which was to be paid in full upon the expected completion of construction of apartments in 2012.

2. In his Written Statement of Defence dated and filed herein on 11th July 2016, the Defendant Carolo Barbin Lissone avers that there was no Sale Agreement executed between the two parties. In the alternative, the Defendant avers that if at all there was any agreement made between him and the Plaintiff resulting in payment of money, the agreement and the payments were made in Italy for a consideration to have been given in Italy and therefore the Courts in Kenya do not have the jurisdiction to consider the same.

3. Subsequently to the filing of the Written Statement of Defence, the Defendant filed the motion presently before me dated 1st September 2016 seeking that the suit herein be struck out with costs. The Application which is supported by the Defendant's Supporting Affidavit sworn on the same day is premised on the grounds set out on the face thereof to the effect that:-

(a) The suit is scandalous, frivolous and vexatious;

(c) The suit may prejudice, embarrass or delay fair trial

(c) The suit is rather an abuse of the Court process; and

(d) That the cause of action accrued in the year 2007 and the suit is therefore time barred.

4. In response, the Plaintiff has filed a Replying Affidavit sworn on 21st October 2016 in which he states that there was an Oral Agreement between the Defendant and himself for the sale of the two apartments indicated in the Plaint and that he paid the Defendant as per a Bank Slip attached to his Affidavit. It is his

case that this Court has jurisdiction as the said oral agreement was entered into in Kenya and the apartments that were to be sold were in Watamu, Kenya.

5. I have considered the application and the response thereto. I have equally considered the Written Submissions placed before me by the Learned Counsels appearing for the two parties.

6. It is the Defendant's case that the alleged contract which the Plaintiff relies upon is not in writing and therefore offends the Provisions of Section 3(3) of the Law of Contract Act. The said section provides as follows:

> *"3(3) No suit shall be brought for the disposition of an interest in land unless*
>
> *(a) The contract upon which the suit is founded*
>
> *(i) Is in writing*
>
> *(ii) Signed by all parties thereto and*
>
> *(iii) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.*

7. It is not disputed that the alleged contract between the parties was not in writing. That is probably one reason the Plaintiff is not seeking to enforce the said contract to occupy and/or take possession of the two apartments he says he was buying from the Defendant. I however take note that the Defendant does not deny receipt of the sum of 10,000 Euros (or Kshs 1,000,000/= as converted in the Plaint). All that the Defendant states is that if the money was paid pursuant to an agreement, then the same was done in Italy and this Court therefore lacks jurisdiction to consider the same.

8. In ***Macharia Mwangi Maina & 87 Others –vs- Danson Mwangi Kagiri(2014) eKLR***, the Court of Appeal sitting in Nyeri while dealing with a situation such as this one agreed with the decision in the English case of ***Yaxley –vs- Golts & Another(2000) Ch 162*** where it was held that:-

> ***"An oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel."***

9. As Lord Bridge observed in ***Lloyds Bank PLC –vs- Rosset, (1991) 1AC 107, 132,***

> *"a constructive trust is based on a "common intention "which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the Claimant."*

10. In the instant case, the Plaintiff avers that he paid the sum of 10,000/= Euros (or Kshs 1,000,000/=) to the Defendant when he began construction of Apartments at what is referred to as the Ascot Residence in Watamu in 2007. According to the Plaintiff, the said apartments Nos 3D and 4D were to be on the ground floor of the building which was due for completion in 2012. That was the basis upon which he made the down payment. As already noted, the Defendant does not deny receipt of this money. As was stated by the Court of Appeal in the ***Macharia Mwangi Maina case*** (above), constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. Quoting the decision of ***Lord Reid in Steadman-vs- Steadman (1976) Ac 536, 540,*** the Court observed that:-

> *" If one party to an agreement stands by and lets the other party incur expenses or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable*.

11. I am accordingly persuaded that the transaction between the parties created some sort of constructive

trust in favour of the Plaintiff and in light of the overriding objectives of this Court and the need to dispense substantive and not technical justice, the request to strike out the Plaint on the basis that the agreement on which it was based was unenforceable is not warranted.

12. On the question of the suit being time-barred, I think it is correct as the Defendant/Applicant states that the suits based on a contract should be brought to Court before the end of six years as prescribed under Section 4(1) (a) of the Limitation of Actions Act Cap 22 of the Laws of Kenya. According to the Plaintiff, while they entered into a Sale Agreement in 2007, the Defendant represented to him that the apartments would be completed in 2012 and that is when the Plaintiff was expected to pay the balance of the purchase price. However when in 2012 he went to check on the construction, he found out that the Defendant had not only completed the apartments but had sold them to a third party. The Defendant has not controverted these assertions by the Plaintiff.

13. In my mind, even though the agreement between the parties was entered into in 2007, the events leading to the suit arose in 2012 when the plaintiff expected to pay the balance of the purchase price and to be put in possession. As it were the Defendant would neither put him in possession nor refund his money. That being the case, when the Plaintiff moved to this Court and filed this case on 23rd May 2016, he was still within the time as prescribed under Section 4(1) (a) of the Limitation of Actions Act.

14. Having found that the suit is not time-bared and that it raises at least one possible triable issue against the Defendant, I do not deem it necessary to consider whether it is frivolous or vexatious to warrant striking out.

15. The upshot is that I find no merit in the Defendant's application dated 1st September 2016. The same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 6th day of December, 2017.

J.O. OLOLA

JUDGE