



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.76 OF 2015

ABDULKARIM ABDALLA OMAR.....PLAINTIFF

=VERSUS=

JIMMY SHAKALA GALOGALO.....DEFENDANT

R U L I N G

1. The Notice of Motion before me is dated 19th May, 2015. In the Application, the Plaintiff is seeking for the following orders:
 - (a) **That an order of temporary injunction be granted restraining the defendant by himself, his agents and or employees or any one claiming through him or otherwise from selling purporting to sell or offer for sale, disposing off, charging, mortgaging or sub-dividing of parcel of land known as Kilifi/Takaye Musoloni/765 pending the hearing and further pending the hearing and determination of this suit or further orders of this honourable court.**
 - (b) **That the court do issue an order of inhibition against the defendant inhibiting the registration of any dealing with the suit premises pending the interpartes hearing and further pending hearing and determination of this suit or further orders of the court. The said orders be served upon the land registrar Kilifi.**
 - (c) **Costs of this application.**
2. The Application is premised on the grounds that the Plaintiff has paid the Defendant Kshs.804,500 for Kilifi/Takaye Musoloni/765 (the suit property) leaving a balance of Kshs.90,500; that the Plaintiff has spent Kshs.1.2 million in developing the suit property and that the Defendant has refused and or neglected to complete the transaction.
3. It is the Plaintiff's deposition that the Defendant might be planing to dispose off the suit property without his knowledge thus the current Application.
4. The Application is also supported by the Affidavit of Francis Katana Charo who has deponed that indeed the Defendant sold to the Plaintiff two acres of the suit property.
5. In his response, the Defendant admitted having entered into an agreement with the Plaintiff for the sell of ½ an acre of the suit property and a further 1 ½ acres for Kshs.1,500,000 per acre and not 795,000 as alleged.
6. The Defendant has deponed that before completion, the Plaintiff flattened the entire land using a grader and in the process demolished the foundation of his house.
7. According to the Defendant, there was no agreement between him and the Plaintiff for subdivision

- and transfer of the 2 acres of the suit property; that it is the Plaintiff who is in breach of the agreements and that in any event, the consent of the Board has never been applied for.
8. The Plaintiff's advocate submitted that the Plaintiff paid the Respondent Kshs.804,500 and spent a further 1.2 million hiring a grader to flatten the premises and remove coral stones; that the Defendant cannot now start hiding under the provisions of the Land Control Act and that the Plaintiff has since learnt that the Respondent is unwilling to submit himself to the Board.
 9. The Defendant's advocate on the other hand submitted that the Plaintiff has not availed any evidence of the subsequent agreement or the payment of the sum of Kshs.794,500.
 10. According to counsel, it is inconceivable that the parties would enter into a written agreement for the sale of ½ an acre at the price of Kshs.100,000 but fail to enter into a written agreement for sale of 1 ½ acres at a price of Kshs.795,000.
 11. Counsel submitted that the suit is contrary to the provisions of Section 38(1) of the Land Act and the Land Control Act.

Analysis and findings:

12. The Defendant has admitted that he entered into an agreement with the Plaintiff for the sale of ½ an acre of the suit property vide an agreement dated 8th April 2012. The said agreement has been annexed on the Plaintiff's Affidavit.
13. The agreement shows that the purchase price was Kshs.100,000 of which the Plaintiff paid to the Defendant Kshs.60,000 which was acknowledged in the agreement. There is no evidence that indeed the Defendant received the balance of Kshs.40,000.
14. There is also no evidence before me to show that the Plaintiff entered into another agreement for the sale of an additional 1 ½ acres, or evidence to show that the Defendant received a total of Kshs.895,000.
15. In the absence of a written agreement in respect to the additional land measuring 1 ½ acres, I find and hold that the Plaintiff has not established a prima facie case with chances of success in view of the provisions of Section 38 of the Land Act which provides as follows:

“38(1) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto: and the signatures of each party signing has been attested to by a witness who was present when the contract was signed by such Party.”

16. In respect of the sale for the ½ an acre of the suit property, the Plaintiff has not shown that an Application for sale and subdivision of the land was made to the Land Control Board pursuant to the provisions of Section 6 of the Land Control Act.
17. Consequently, I do not think the Plaintiff has established that he has a prima facie case with chances of success for lack of the consent of the Board.
18. The law is clear that where the consent of the Board is not obtained within 6 months from the date of signing the agreement, such an agreement is null and void. The only recourse the Plaintiff will have in those circumstances is for a refund of the money paid.
19. In any event, there is no evidence of payment of the purchase price by the Plaintiff save for Kshs.60,000.
20. In the circumstances, I find that on the material placed before me, the Plaintiff has not established a prima facie case with chances of success.
21. The Plaintiff has not also shown the substantial loss that he is likely to suffer if the injunctive orders are not granted. I say so because under Section 7 of the Land Control Act, the Plaintiff recourse is to recover damages and not the land where the consent of the Board is not obtained.
22. For those reasons, I dismiss the Plaintiff's Application dated 19th May, 2015 with costs.

Dated and delivered in Malindi this 19th day of February, 2016.

O. A. Angote

Judge