



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 125 OF 2009

1. KALUMASS COMPANY LIMITED

2. MASSIMO SPENELLI ALESANDRO.....PLAINTIFFS

=VERSUS=

1. EMMANUEL CHARO TINGA

2. COUNCILLOR ALI DIDI.....DEFENDANTS

J U D G M E N T

Introduction:

1. In their Complaint dated 22nd February, 2007 and filed in this court on 23rd February, 2007, the Plaintiffs averred that at all material times, the 1st Defendant was a director and shareholder of the 1st Plaintiff holding 4,000 shares; that on various dates between the year 1999 and 2005, the 1st Defendant diverted and converted funds and assets meant for and belonging to the 1st Plaintiff for his own use and that he acquired assets in his name using the 1st Plaintiff's monies.

2. The Plaintiffs have averred in the Complaint that due to the 1st Defendant's conduct, the 1st Plaintiff called for a Board meeting on 3rd January, 2007 and replaced the 1st Defendant as a director of the 1st Plaintiff.

3. Other than buying several cars and plot number 808 using the 1st Plaintiff's monies, the Plaintiffs have averred in the Complaint that the Defendants jointly and severally fraudulently subdivided the 1st Plaintiff's parcel of land known as Kilifi/Jimba/419 into three titles, to wit, Kilifi/Jimba/1120, 1121 and 1122 and caused plot number 1122 to be registered in the 2nd defendant's name.

4. The Plaintiffs particularised the alleged fraudulent dealings by the Defendants to include causing Plot No. 419 to be subdivided; alleging that the Title Deed to Plot No. 419 was lost and causing Plot No. 1112 and 808 to be registered in the 1st Defendant's name without the consent of the 1st Plaintiff.

5. The Plaintiffs finally averred that the 1st Defendant owes the 1st Plaintiff Kshs.700,000 and the 2nd Plaintiff Kshs.3,000,000 respectively.

6. The prayers that the Plaintiffs have sought in the Complaint are for a permanent injunction restraining the Defendants from interfering with the 1st Plaintiff's assets and in particular motor vehicles Registration

number KAM 249D, KAP 249E, KAN 122P and KAN 123P and Plot numbers Kilifi/Jimba/808, 1120 and 1121.

7. The Plaintiffs are also praying for an order cancelling the registration of the 1st Defendant or any other party as the owner of the assets listed above and the name of the 1st Plaintiff to be registered instead.

8. The Plaintiffs finally prayed for an order directing the 1st Defendant to deliver accounts to the Plaintiffs and for a refund to the 1st and 2nd Plaintiffs of Kshs.700,000 and Kshs.3,000,000 respectively.

9. In his Defence, the 1st Defendant admitted being a director and shareholder of the 1st Plaintiff but denied that he ceased being a director of the 1st Plaintiff.

10. The 1st Defendant denied diverting and converting funds and assets meant or belonging to the 1st Plaintiff. It is the 1st Defendant's Defence that the motor vehicles enumerated in the Plaint belong to him and further that plot nos 879/1 and 879/2 Watamu were acquired and financed by his own resources.

11. The 1st Defendant further denied that he received Kshs.3,000,000 from the 2nd Plaintiff to acquire parcel of land known as Kilifi/Jimba/1126; that at no time was plot no. 1126 registered in his name and that the suit is bad in law and should be struck out with costs.

12. The 2nd Defendant also filed a Defence in which he denied the allegations raised in the Plaint.

13. On 6th December, 2012, the Plaintiffs withdrew the suit as against the 2nd Defendant.

14. The matter proceeded for hearing on 10th December, 2012, 11th December, 2012, 8th May, 2013 and 17th September, 2015. In between, the matter was adjourned for one reason or the other by the Plaintiffs' counsel.

The Plaintiffs' case:

15. PW1 informed the court that he knows the 2nd Plaintiff and the Defendant. PW1 stated that he has a company known as Kagel Contractors and that he has been in the construction industry for over 30 years.

16. While renovating a hotel known as "Hotel Golden Palm" in Watamu in 1995, it was the evidence of PW1 that he met the 2nd Plaintiff who requested for a quotation in respect to a building he wanted to put up; that he gave the 2nd Plaintiff the quotation although the 2nd Plaintiff never engaged him and that it was not until 1999 that the 2nd Plaintiff instructed him to make furniture for his residence at "Ocean Breeze" which he did.

17. It was the evidence of PW1 that the 2nd Plaintiff used to pay him for his services through the 1st Defendant while outside the country and that the 2nd Plaintiff paid him a total of Kshs.3.6 Million.

18. Other than the furniture, it was the evidence of PW1 that he also did a small roof at the gate and the finishing of the swimming pool at the 2nd Plaintiff's residence.

19. PW1 stated that he met the 1st Defendant who is from his home area, at "Ocean Breeze". It was the evidence of PW1 that everything that the 2nd Plaintiff was doing was done through the 1st Defendant.

20. It was the evidence of PW1 that after being paid, he lent to the Defendant Kshs.20,000 which he repaid by way of a cheque which he produced in evidence.

21. PW1 informed the court that while working for the 2nd Plaintiff, it is the 1st Defendant who paid him

Kshs.500,000 in two installments and thereafter Kshs.2.1 million; that the said amount was paid to him in cash and that he delivered all the furniture to the 2nd Plaintiff's residence.

22. It was the evidence of PW1 that when the 2nd Plaintiff went back to Italy, he complained to him that he was the only one who was running the affairs of the company (the 1st Plaintiff). PW1 stated that at that time, the 2nd Plaintiff was constructing "Kalumass Petrol Station" in Watamu and on that basis, he declined to lend PW1 Kshs.1.2 Million that he had requested.

23. PW1 informed the court that it is the 2nd Plaintiff who built the Petrol station; that the 1st Defendant always worked under the 2nd Plaintiff and that the 2nd Plaintiff's residence is at "Ocean Beach".

24. In cross-examination, PW1 stated that Kalumas Company Ltd, the 1st Plaintiff, was incorporated by the 2nd Plaintiff and the Defendant; that he did not know the 1st Defendant when he did the first quotation for the 2nd Plaintiff; that he did not have the documents in respect of the 1st Plaintiff; that he did not have any invoices for the works he did and that by the time he made the furniture for the 2nd Plaintiff, "Ocean Breeze Hotel" had already been constructed.

25. PW1 informed the court that he did not know the person who built "Ocean Breeze"; that he did not know the plot number that the said hotel stands on and that he did know in whose name the plot is registered.

26. PW1 further stated that he did not have evidence to show that the money that the 1st Defendant paid him for the furniture was wired on the 1st Defendant's account by the Plaintiff.

27. It was the evidence of PW1 that he did not know the plot number that "Kalumas Petrol Station" was standing on although he knows that the Petrol Station was built by the 2nd Plaintiff.

28. The second witness, PW2, informed the court that he is a small time businessman running a bar and restaurant; that the 2nd Plaintiff while in the company of the 1st Defendant went to his plot number 419 in 1996 and that he agreed to sell an acre of his plot to the 2nd Plaintiff.

29. It was the evidence of PW2 that he sold to the 2nd Plaintiff an acre of plot 419 for Kshs.1,500,000 and that thereafter the 1st Defendant started developing a hotel on the land that was later on known as "Ocean Breeze".

30. It was the evidence of PW2 that after selling the said plot, he was never involved in the construction of the hotel on the plot and that he had no idea as to the person who paid for the construction.

31. According to PW2, he was paid Kshs.1,500,000 in cash and that the land he sold was registered in the name of Kalumass Company Limited; that indeed, the whole land measuring 5.5 acres was registered in the name of Kalumass Company Ltd although he only sold one acre and that he did not have a title Deed as at the time of the sale of the property.

32. PW2 informed the court that he does not know the directorship of the 1st Plaintiff and that he reported the issue of the registration of the whole of his land in the name of the company to the CID.

33. In cross-examination, PW2 stated that he did not have a copy of the sale agreement in respect of the one acre that he sold to the 2nd Plaintiff; that he did not have any documents to show that he owned plot No. 419 and that he knew the 1st Defendant as a contractor.

34. PW3 informed the court that he is an accountant working with "Ocean Breeze" as a manager.

35. It was the evidence of PW3 that "Ocean Breeze" is owned by the 2nd Plaintiff who lives in Italy; that

prior to being employed at Ocean Breeze, he used to work for Kalumass Company Limited and that the said company was registered on 13th March, 2000.

36. PW3 informed the court that the 1st Plaintiff was involved in the business of touring and petrol station services and that the directors of the Company were the 2nd Plaintiff, the 1st Defendant and Ann Spinelli.

37. According to PW3, his work at the company involved keeping books and doing banking reconciliations. It was the evidence of PW3 that the company had a petrol station and offices which it let to third parties who included Aziz Driving School, G4S, Malindi Water Company and Fly Bank Tours.

38. PW3 informed the court that the 1st Defendant was the Managing Director of the company and that he later on ceased to be a director and remained as a simple shareholder.

39. In cross-examination, PW3 stated that "Ocean Beach" stands on plot no. 819 although he did not know the registered proprietor of the said plot.

40. It was the evidence of PW3 that when he was employed, the 1st Plaintiff had already been incorporated and that he did not have a copy of the Memorandum and Articles of Association of the company.

41. According to PW3, the tenancy agreements that he saw referred to plot number 879/1 and not plot 879/2; that he did not know the circumstances under which the 1st Defendant ceased to be a director in the 1st Plaintiff's company and that he did not know the plot number that the Petrol station was standing on or the person who built it.

42. PW4, a valuer, informed the court that in the year 2000, the 1st Defendant instructed him to value plot number Kilifi/Jimba 808, 419 and 1100 and other movable assets.

43. According to PW4, plot no. 808 was in the name of the 1st Defendant, while plot 419 and 1100 were in the names of Kalumas Tours Safari Limited.

44. It was the evidence of PW4 that he valued plot no. 808 at Kshs.4.5 Million, Plot NO. 419 at Kshs.14 Million, Plot No. 1100 at 4.5 Million, loose assets at Kshs.400,000 and the motor vehicles at Kshs.4.1 Million.

45. PW4 informed the court that during the valuation, plot no. 808 had a building which was 60% done while plot number 419 had a house with a swimming pool, a small bakery, a garage and servant quarters. Plot number 1100 was vacant.

46. According to PW4, he was informed that a petrol station was to be put on plot number 808.

47. PW4 stated that he was paid by his instructing client, the 1st Defendant and that plot number 808 was in the name of the 1st Defendant while plot number 419 was in the name of Kalumass Tours Safaris Limited, so was plot number 1100.

The Defence case:

48. The 1st Defendant closed his case without tendering any evidence.

The Plaintiff's submissions:

49. The Plaintiffs' counsel submitted that the 2nd Plaintiff, together with his sister and the 1st Defendant were the first directors of the 1st Plaintiff; that the other directors entrusted the 1st Defendant to run the

affairs of the company and that the 2nd Plaintiff and his sister purchased land known as Kilifi/Jimba 419 from PW2.

50. Counsel submitted that in the Plaintiffs' bundle of documents, the Plaintiffs have exhibited bank statements showing how the 2nd Plaintiff sent to the 1st Defendant money to invest in the affairs of the 1st Plaintiff; that the 1st Defendant embarked on a fraudulent and self-enrichment acts which were not known to his co-directors by causing to be registered a company known as Kalumas Tours and safaris Limited and by sub-dividing plot 419 into three plots and that the 1st Defendant also re-wired the funds that were meant to purchase the cars for the 1st Plaintiff to his account.

51. The Plaintiffs' counsel summarised the evidence f PW1, PW2, PW3 and PW4 which I have already summarised above.

52. Counsel urged this court to also consider the witness statements of Masimo Spinelli, Anna Spineli, Ken Munene and Mr. Shilunga who never testified in this matter.

53. Counsel also urged this court to consider the Plaintiffs' bundles of documents that were filed in this court but were never produced in evidence.

54. The Plaintiffs' advocate submitted that no evidence was adduced by the 1st Defendant to rebut the Plaintiffs' statements or evidence on record; that no evidence was adduced by the 1st Defendant on the source of his income to enable him acquire prime properties and that the 1st Defendant admitted in his statement of having received funds from Italy.

55. The Plaintiffs' advocate submitted that the consequence of failure by the 1st Defendant to adduce any evidence in support of his claim or even to rebut the Plaintiffs' claim and evidence is and can only be one: that the Plaintiffs' evidence stands as uncontroverted.

56. Counsel submitted that the Plaintiffs have proved that the Defendant unjustly enriched himself; that this court should not reward the Defendant's acts of fraud and that this court is a court of law and equity.

57. The Plaintiffs' counsel finally submitted that the Plaintiffs have proved that Kalumass Company Limited was registered earlier in time than Kalumass Tours and Safaris Limited; that the 1st Defendant fraudulently had all the assets meant for the 1st Plaintiff registered in his company's name; that the 1st Defendant opted to keep quiet regarding the source of his capital and that the record is replete with proper documents and evidence but neither the 2nd Plaintiff nor his sister Ann Spinelli got a chance to testify.

The Defendant's submissions:

58. The 1st Defendant's advocate quoted the provisions of Sections 107, 108 and 109 of the Evidence Act and submitted that the Plaintiffs failed to discharge the burden of proof of the allegations in the Plaintiff.

59. Counsel submitted that the evidence of PW1, PW2, PW3 and PW4 was insufficient to prove the allegations pleaded in the Plaintiff and that there was no prove to show that the properties subject of the suit alleged to belong to the Plaintiffs were actually theirs and not the 1st Defendant's.

Analysis and findings:

60. The Plaintiffs initially sued two Defendants. However, the Plaintiffs withdrew their suit as against the 2nd Defendant leaving the 1st Defendant as the only Defendant.

61. The allegations in the Plaintiffs' Plaintiff are that the 1st Defendant was a Director of the 1st Plaintiff; that on various dates between the year 1999 and 2005, the 1st Defendant diverted and converted funds and

assets meant for and belonging to the 1st Plaintiff for his own use and that the 1st Defendant acquired assets in his name by using the 1st Plaintiff's monies.

62. Other than buying several cars whose registration numbers have been enumerated in the Plaint and land known as Kilifi/Jimba 808 using the 1st Plaintiff's funds, the Plaintiffs averred in their Plaint that the 1st Defendant fraudulently sub-divided parcel of land known as Kilifi Jimba/419, which had been purchased by the Plaintiffs, into three portions, to wit, Kilifi Jimba/1120, 1121 and 1122 and caused the said plots to be registered in his name.

63. The Plaintiffs' further claim in the Plaint is that the Defendants owe the 1st Plaintiff and the 2nd Plaintiff Kshs.700,000 and Kshs.3,000,000 respectively.

64. The Plaintiffs are seeking for an order cancelling the registration of the 1st Defendant or any other party as the owner of motor vehicle registration numbers KAM 249D, KAP 249E, KAN 122P and KAN 123P and plot numbers Kilifi/Jimba/808, 1120 and 1121. The Plaintiffs have also prayed for an order directing the Defendants to refund them Kshs.3,700,000.

65. As was expected, the 1st Defendant denied in his Defence that he diverted the 1st Plaintiff's funds to purchase the said motor vehicles and the enumerated plots.

66. The Defendants further denied that they owe the 1st and 2nd Plaintiffs Kshs.700,000 and Kshs.3,000,000 respectively.

67. From the pleadings, the issues for determination are as follows:-

(a) Whether the Plaintiffs financed the purchase of motor vehicles registration number KAM 249D, KAP 249E, KAN 122P and KAN 123P.

(b) Whether the Plaintiffs financed the purchase of parcels of land number 419 which was allegedly sub-divided by the 1st Defendant to create parcel of land numbers Kilifi/Jimba 1120, 1121 and 1122;

(c) Whether the Plaintiffs financed the purchase of parcel of land number Kilifi/Jimba 808 and 1126;

(d) Whether the 1st Defendant had the said motor vehicles and the parcels of land fraudulently registered in his name;

(e) Whether the said registration of motor vehicles and parcels of land should be cancelled and instead be registered in favour of the Plaintiffs;

(f) Whether the Defendants owe the 1st and 2nd Plaintiffs Kshs.700,000 and Kshs.3,000,000 respectively and;

(g) Who should pay the costs of the suit.

68. The Plaintiffs called a total of four witnesses.

69. The first Witness, PW1, informed the court that initially, the 2nd Plaintiff had wanted him to put up a building for him. However, after giving the 2nd Plaintiff his quotation, the 2nd Plaintiff never engaged him.

70. However, it was the evidence of PW1 that later on, the 2nd Plaintiff instructed him to make for him furniture for his hotel and a petrol station.

71. According to PW1, he made the said furniture and was paid Kshs.3.1 Million by the 2nd Plaintiff, through the 1st Defendant.
72. Other than being paid Kshs.3.1 million by the 2nd Plaintiff for the furniture, PW1 informed the court that he was not aware about the plot number on which “Ocean Breeze” or Kalumass Petrol Station stands on.
73. In a nutshell, PW1 informed the court that he was not aware about the people who were registered as the proprietors of the suit properties.
74. It was the evidence of PW1 that that the 2nd Plaintiff used to send to the 1st Defendant monies while he was abroad. However, PW1 did not produce any evidence by way of bank statements or otherwise to support that allegation.
75. The purported owner of parcel of land number Kilifi/Jimba 419, PW2, informed the court that the said plot measured 5.5 acres; that he sold to the 2nd Plaintiff one (1) acre and that he was paid Kshs.1,500,000 by the 2nd Plaintiff.
76. However, instead of hiving off only one acre, it was the evidence of PW2 that the 1st Defendant had the whole land subdivided and registered in his favour.
77. PW2 informed the court that “Ocean Breeze” has been build on a portion of the land that he sold to the 2nd Plaintiff. However, it was the evidence of PW2 that as at the time he sold plot number 419, he did not have a Title Deed and that he never reduced the agreement he entered into with the Plaintiffs in writing.
78. PW2 did not produce any evidence to show that indeed parcel of land number Kilifi/Jimba 419 belonged to him and that he sold a portion of the said plot to the 2nd Plaintiff for Kshs.1,500,000 or at all.
79. PW2 did not also produce any evidence to show that indeed it is the Plaintiffs who built “Ocean Beach” on plot number 419. Indeed, PW2 admitted that he was not aware of the person who constructed or who financed the construction of “Ocean Beach”. PW2 was not also aware of the directorship of the 1st Plaintiff.
80. The Manager of “Ocean Breeze”, PW3, informed the court that the 1st Defendant was initially the 2nd Plaintiff's Managing Director; that before he moved to “Ocean Beach” he used to keep the 1st Plaintiff's books of accounts and that “Ocean Beach” is on plot No.419.
81. It was the evidence of PW3 that he did not have the Memorandum and Articles of Association of the 2nd Plaintiff and that he did not know the registered proprietor of plot no.419.
82. PW4, a valuer, informed the court that he was engaged by the 1st Defendant to value plot number 808, 419 and 1100; that during the said valuation; he was made aware that plot number 808 was registered in the name of the 1st Defendant while plot numbers 419 and 1100 were in the names of Kalumas Tours Safaris.
83. Neither the Plaintiffs nor the Defendants testified in this matter.
84. None of the Plaintiffs' witnesses produced evidence to show the relationship between the 1st Plaintiff, the 2nd Plaintiff and the 1st Defendant.
85. Indeed, no evidence was placed before this court by the Plaintiffs' witnesses to show that the Plaintiffs made any payments, either to them or to the 1st Defendant for the purpose of purchasing the motor

vehicles and the parcels of land enumerated in the Plaintiff.

86. In fact none of the Plaintiffs' witnesses produced the books of accounts or the bank statements of the Plaintiffs which would have supported the Plaintiffs' assertion that the assets enumerated in the Plaintiff were purchased by the 1st Defendant using the Plaintiffs' funds.

87. Although the Plaintiffs' counsel has urged this court to consider the statements of the 2nd Plaintiff and his co-director which are on record, it is trite that this court cannot consider the said statements and documents unless the same are produced in court on oath.

88. The failure by the 1st Plaintiff's director(s) to adduce evidence to prove the allegations that the suit properties were purchased using the Plaintiffs' funds renders the suit a non-starter.

89. Indeed, considering the serious allegations of fraud leveled against the 1st Defendant, and in view of the provisions of sections 107, 108 and 109 of the Evidence Act, it was incumbent upon the Plaintiffs to adduce evidence to show that the 1st Defendant fraudulently acquired the named assets before the 1st Defendant could be called upon to rebut the said evidence.

90. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

91. It was therefore for the Plaintiffs to prove that a company by the name "Kalumas Company Limited" was incorporated; that the 2nd Plaintiff channelled funds through the said company and that the 1st Defendant used those funds to purchase the suit properties and had them registered in his name. It was not for the 1st Defendant to disprove those facts before the Plaintiffs could discharge their burden of proof.

92. At the risk of sounding repetitive, the Plaintiff always has the burden of proof to produce evidence to prove his case. If that burden is met, then the burden of proof shifts to the other party, putting the Defendant in the position of having the burden to prove his defence.

93. Having failed to discharge their burden of proof by not producing any evidence to support the allegations in the Plaintiff, the 1st Defendant was not under any legal obligation to testify in this matter.

94. It may be true that all assets enumerated in the Plaintiff are registered in the name of the 1st Defendant. However, without any form of evidence that tend to show that the 1st Defendant acquired those assets fraudulently, or that even those assets are registered in favour of the 1st Defendant using the Plaintiff's funds, the 1st Defendant was not under any obligation to prove that he acquired those items lawfully because he who alleges must proof.

95. The Plaintiffs having failed to attend court to prove their case even after being given numerous opportunities to do so, the most appropriate order that should ensure is for the dismissal of the Plaintiff.

96. For those reasons, I dismiss the Plaintiff's Plaintiff dated 22nd February, 2007 with costs.

Dated, signed and delivered in Malindi this 25th day of November, 2016.

O. A. Angote

Judge