



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.196 OF 2013

1. ROMANO MASSACESI

2. DELFINA FERRARI.....PLAINTIFFS/APPLICANTS

=VERSUS=

GAETANO GRASSO

aka ENNIO GRASSO.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. Before me is the Application by the Plaintiffs in which they are seeking for the following reliefs:

- (a) THAT summary Judgment be entered against the defendant in terms of prayer 2 of the Plaint.**
- (b) That Judgment on admission be entered against the defendant for the sum of Euros86,000.**
- (c) That the Respondent be condemned to pay costs of this Application.**

2. The Application is premised on the grounds that on 23rd October 2012, the Plaintiffs entered into an agreement to loan the Defendant 120,000 Euros to be paid within 6 months; that the Defendant issued post dated cheques which were returned by the bank unpaid and that the Defendant has partly admitted owing the Plaintiffs a sum of 86,000 Euros.
3. It is the Plaintiffs' case that the Defence does not raise any triable issue.
4. In his Grounds of Opposition, the Defendant averred that the triable issues raised in the Defence are whether the Plaintiffs advanced to the Defendant 120,000 Euros; whether the exchange rate at the time the Defendant received the money, if at all, was the one applied by the Plaintiffs; whether the agreement is enforceable in law and whether the Defendant misled the Plaintiffs on the question of ownership of villa no. 14 and 17 situated on plot number 2727.
5. The other issues which should wait for trial, according to the Defendant, are whether the Plaintiffs were entitled to deposit the cheques given to them and at the same time claim the right to access and own villas 14 and 17; whether the fact that the villas were registered in the names of a third party meant that the Defendant cannot in law deal with such property; whether the Defendant defrauded the Plaintiffs and whether the Plaintiffs made inquiries before depositing the cheques.

Submissions:

6. The Plaintiffs' advocate submitted that the Defendant was to repay the money he borrowed from the Plaintiffs within six months failure to which the Plaintiffs were to have a right of lien on plot number 2727; that the Defendant has not denied receiving 120,000 Euros and that six months have since lapsed.
7. Counsel submitted that whether the cheques that the Defendant issued to the Plaintiffs were properly dishonoured or not is not a triable issue and that the filed Defence is a mere denial.
8. On the other hand, the Defendant's advocate submitted that having filed a Defence, the Plaintiffs cannot file an Application for summary judgment pursuant to the provisions of Order 36 Rule 1 of the Civil Procedure Rules.
9. Counsel submitted that an Application for Summary Judgment can only be filed after an appearance has been entered and before a Defence is filed.
10. On the issue as to whether Judgment can be entered for the admitted sum of 86,000 Euros, counsel submitted that the admission was made without prejudice to the very clear and unambiguous denial of the right of the Plaintiffs to recover the money that was advanced pursuant to an agreement drawn by an advocate who did not hold a valid practicing certificate.
11. The Defendant's counsel finally submitted that the prayers for summary judgment as well as those for Judgment on admission are not sought in the alternative; that the result of granting the Application as prayed would be to give judgment for a sum of Euro 206,000 and that the Plaintiffs did not loan that amount to the Defendant.

Analysis and findings:

12. The Application before me has been brought pursuant to the provisions of Order 36 of the Civil Procedure Rules seeking for summary judgment and judgment on admission.
13. According to the Plaint filed on 7th November 2013, the Plaintiffs loaned to the Defendant Euros 120,000. It is the Plaintiffs' averment that the 1st Plaintiff loaned to the Defendant 80,000 Euros while the 2nd Plaintiff loaned him 40,000 Euros.
14. The Plaintiffs have further averred that the parties agreed that in the event the Defendant was unable to repay the said loan, the Plaintiffs were at liberty to enforce the lien over villa number 14 as well as villa number 17 situated on plot number 2727.
15. The Plaintiffs have listed in the Plaint the four cheques that the Defendant gave them in respect of the alleged loaned amount which were returned by the bank as unpaid.
16. In the Plaint, the Plaintiffs are praying for a refund of Kshs.13,200,000 and or a permanent injunction restraining the Defendant from transferring villa number 14 and 17 situated on plot number 2727.
17. The orders in the Plaint and the Application can only be granted in the alternative and not as pleaded.
18. The Plaintiffs cannot claim for summary judgment for a sum of Kshs.13,200,000 and for Judgment on admission for Euro 86,000, when their claim is that they loaned to the Defendant Euros 120,000. On that ground alone, I find that the Application as drafted is defective and should be dismissed.
19. Even if the court is to assume that the prayers in the Application are in the alternative, the prayer for summary judgment cannot be granted considering that the Defendant filed his Defence on 11th December 2013 whereafter the Plaintiff filed a Reply to Defence on 6th January, 2014 and joined issues with the Defendant's Defence.
20. According to the provisions of Order 36 Rule 1(1) of the Civil Procedure Rules, an Application for Summary Judgment can only be filed after the Defendant has appeared but before filing a Defence.
21. Once a Defence is filed, a party can only have the Defence struck out pursuant to the provisions of Order 2 Rule 15 of the Civil Procedure Rules and not otherwise. Consequently, and without an explanation as to why the Application has been filed after one year since the Defence was filed, the prayer for Summary Judgment cannot be granted.
22. In any event, on the affidavit the Plaintiffs did not annex on their affidavit the copy of the agreement that they entered into with the Defendant in respect to the loaned amount or copies of

- the cheques that the Defendant gave them.
23. It is not for this court to go through the bundle Plaintiffs' of documents or statements to ascertain the Plaintiffs' claim at this stage. It is for the Plaintiffs to annex on their Supporting Affidavit the relevant documents that they want to rely on in the prosecution of the Application.
24. It is true that at paragraph 8 (iv) of the Defence, the Defendant admitted owing the Plaintiffs Euro 86,000. However, the averment was on a without prejudice basis. The admission was not therefore unequivocal.
25. Judgment on admission can only be entered at an interlocutory stage when the admission is unequivocal and when allegations of facts made by one party are not traversed by the other. That is not the case in this matter.
26. For those reasons, I dismiss the Application dated 12th January 2015 with costs.

Dated and delivered in Malindi this 5th day of **June**, 2015.

O. A. Angote

Judge