



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.244 OF 2014

1. MAHICAN INVESTMENTS COMPANY LTD

2. BEMBELEZA LIMITED.....PLAINTIFFS

=VERSUS=

TRANSCORE FREIGHTERS LTD.....DEFENDANT

R U L I N G

1. The Application by the Plaintiffs is dated 29th January, 2015. In the Application, the Plaintiffs are seeking for the following reliefs.

(a) That Honourable court be pleased to enter judgment for the Plaintiffs against the Defendant as prayed in the Plaint.

(b) Pending the hearing and final determination of this suit the Honourable Court be pleased to issue an order of injunction restraining the defendants their servants or agents or any one of them from trespassing into or remaining in all that piece of parcel of land situated in Mambrui Town within Kilifi county of the Republic of Kenya known as Land Portion Number 1154 (original number 656/84) Mambrui containing by measurement one Decimal Three Four Nine (1.349) hectares or thereabout.

(c) The costs of, and incidental to this application be provided for.

The Plaintiffs'/Applicants' case:

2. In his Supporting Affidavit, this Plaintiffs' director has deponed that by an agreement dated 2nd August 2013, the 1st Plaintiff sold to the Defendant land portion numbers 654, 657, 1155, 1158, 1159 and 1156 Mambrui together with developments thereon.
3. According to the 1st Plaintiff, the Defendants nominated Mambrui Real Properties Limited and Mambrui Home Developers Limited to hold the suit properties set out in the instrument of transfer dated 4th November 2013 of the RCI, an International Company which operates a pool of share time owned by their members and that at the conclusion of the sale agreement, the Defendant nominated its company, Raha Leo Villas Limited, who directed their RCI clients to deposit their service charges to their Imperial Bank Account No. 0251015023433701 Malindi.
4. It is the Plaintiffs' case that the 1st Plaintiff is the registered proprietor of land portion number

- 1154 Mambrui while the 2nd Plaintiff is registered as lessee of 36 chalets which are a part of the residential estate known as Karibuni Villas developed on land portion number 654 Mambrui.
5. According to the Plaintiffs' director's deposition, the Plaintiffs sold to the Defendant the suit property at the agreed consideration of 80,000 Euros and that it was common knowledge that some of the villas were subject to RCI contracts.
 6. The Defendant was to pay the purchase price in installments of Euro 100,000 on the signing of the agreement, Euro 100,000 on 15th March 2014 and Euros 150,000 on the 15th May 2014, 15th July 2014, 15th September 2014 and 15th November 2014.
 7. It is the Plaintiffs' case that in accordance with clause 5 of the Agreement, it was implied that the Defendant had a list of all the time share clients; that the Defendant agreed to continue with the transaction with the full knowledge that the properties were subject to Timeshare ownership and that any liability to the time shareholders shifted and their interests were intertwined with those of the Defendant.
 8. The Plaintiffs have deponed that they handed over to the Defendant all the keys to each of the villas sold and a CD containing a list of the Timeshare clients and their respective weeks, together with the Timeshare contracts.
 9. It is the Plaintiffs case that the Defendant failed to pay the installments as agreed and default notices were issued whereafter the Defendant purported to prepare a completely different agreement setting out unacceptable terms.
 10. According to the Plaintiffs' director, it is the Defendant who has the premises in its possession and has wrongfully demanded payment of management fees and service charge from the Plaintiffs contrary to the agreement.
 11. The Plaintiffs' director further deponed that the contract signed between the Plaintiffs and the Defendant has been terminated and the deposit forfeited; that the Plaintiffs are entitled to vacant possession and mesne profits and that the Plaintiffs have not transferred the property to the Defendant due to its failure to pay the balance of the purchase price.
 12. The Plaintiffs' director finally deponed that due to the Defendant's actions, they have received a letter from RCI effectively suspending Karibuni villas from the programme; that the potential damage to the Plaintiffs and the business model that the Plaintiffs created is in serious danger of being destroyed and that the Defendant continues entering into and using the suit premises.

The Defendant's/Respondent's case:

13. The Defendant's director deponed that there is no dispute concerning the Agreement of 2nd August 2013; that the said agreement is distinct and separate from the agreement of 20th January 2014 and that while the agreement of 2nd August 2013 mentions RCI contracts, it makes no mention of the hundreds of timeshare contracts.
14. According to the Defendant, it was only after the dispute arose in March, 2014 that the Defendant understood that RCI is not a tour operator; that in the Agreement dated 2nd August 2013, the 1st Plaintiff disclosed that Karibuni Chalets is a member of RCI under Contact Code No.42226 and that the Defendant has never seen the contract, nether has the Plaintiffs annexed it on their Affidavit.
15. It is the Defendant's case that the chalets that are the subject matter of the agreement dated 2nd August 2013 are not subject of Timeshare contracts or any RCI contract; that the agreement of 2nd August 2013 does not have a list of the alleged timeshare owners and that the agreement of 2nd August 2013 did not cover the chalets that is subject matter of the agreement dated 20th January 2014.
16. On the issue of the agreement of 2nd August 2013, the Defendant's director deponed that that agreement does not state anywhere that the 36 chalets which are the subject of this suit were under timeshare contracts or were affiliated to RCI. It is not therefore correct, it was deponed, for the Plaintiffs to allege that the Defendant had all necessary information and documents relating to timeshare contracts in respect to the 36 chalets.
17. It is the Defendant's case that the subject matter of the agreement of 20th August 2014 is the 36 chalets; that these properties are distinct and separate from the properties that form th agreement

- of 2nd August 2013 and that the agreement of 20th January 2014 constitutes the entire agreement of the parties and supersedes and cancels all previous negotiations and agreements.
18. According to the Defendant, the physical inspection of the chalets and the land, or even a search at the lands office could not disclose that the chalets were the subject of hundreds of timeshare agreements with third parties.
 19. It is the Defendant's director's case that he was shocked to learn that each of those hundreds of timeshare owners have a right to occupy specific villas for specific weeks for 999 years and that under no circumstances would the Defendant have entered into the agreement dated 20th January 2014 if that information had been disclosed together with the actual contracts.
 20. The Defendant's director deponed that he has since learnt that if a timeshare contract is cancelled, the owner will expect to be paid Euros 20,000 and that with 400 such owners, the Defendant will have to pay approximately of Euros 8,000,000 to get rid of the timeshare owners.
 21. It is the Defendant's case that the Plaintiffs pocketed huge sum of money from timeshare owners, failed to disclose the timeshare contracts and left the Defendant with an obligation to look after their guests for an average of Euros 300 per week.
 22. Because the Plaintiffs had sold thousands of weeks to the hundreds of timeshare owners of the chalets for 999 years, it was deponed, the Defendant could not obtain vacant possession for 999 years.
 23. The Defendant's director finally deponed that the Plaintiffs are not entitled to the orders sought because, they have not given vacant possession; that the Plaintiffs are the ones in breach of the agreement; that the Defendant has not claimed management fees or service charge from the Plaintiffs and that the Defendant cannot pay the balance of the purchase price and yet it will not be able to obtain vacant possession for 999 years.

Submissions:

24. The Plaintiffs' advocate submitted that the right of a seller to recover land where a contract for the sale has been breached for whatever reason is provided for under Section 39 to 41 of the Land Act; that the Defendant is using the suit property without paying for it and that the Defendant cannot have its cake and eat it.
25. The Defendant's counsel on the other hand submitted that as long as the Defendant is unable to obtain vacant, quiet and uninterrupted possession of the 36 chalets, it means the Plaintiffs have not complied with clause 5 of the Agreement and have no lawful excuse to purport to rescind the Agreement, to forfeit the deposit or to demand possession.
26. The Defendant's advocate submitted that the Defendant's right to defend the suit is enshrined in the Constitution. Consequently, it was submitted, the Defendant should be allowed to defend the suit.

Analysis and findings:

27. In what I find to be long and rather repetitive pleadings, averments and depositions, the parties herein are blaming each other for the breach of the Sale Agreement dated 20th January, 2014.
28. In the current Application, the Plaintiffs are seeking for an order of injunction as against the Defendant to restrain it from continuing to occupy the suit properties. The Plaintiffs are also seeking for the entry of Judgment.
29. It is now settled that for the Plaintiffs to be granted an order of injunction, they have to prove that they have a prima facie case with chances of success and that unless the injunctive order is granted, they will suffer irreparable damage that cannot be compensated by way of damages. If the court is in doubt about the two, then it has to decide the case on a balance of convenience.
30. In its Complaint, the Plaintiffs have averred that they sold to the Defendant land portion numbers 654, 657, 1155, 1156, 1158 and 1159 Mambrui vide an agreement dated 2nd August 2013.
31. After the Agreement of 2nd August 2013, the 2nd Plaintiff entered into another agreement of 20th January 2014 with the Defendant.
32. According to the Complaint and the Plaintiffs' director's Affidavit, the 1st Plaintiff is the registered proprietor of land portion number 1154 while the 2nd Plaintiff is registered as lessee of 36 chalets

- which are a part of the residential estate known as Karibuni developed on land portion number 654 Mambrui.
33. In the Complaint, the Plaintiffs are seeking for several orders, the main ones being a declaration that the contract dated 20th February (sic) 2014 has been lawfully rescinded with the result that the Plaintiffs forfeited the 100,000 Euro deposit paid; vacant possession, mesne profits; a permanent injunction amongst other prayers.
 34. In the alternative, the Plaintiffs have prayed in the Complaint for the payment of the purchase price of Euros 700,000 in lieu of rescission of the contract.
 35. The Agreement dated 2nd August 2013 between the 1st Plaintiff and the Defendant has been annexed on the Supporting Affidavit.
 36. That Agreement is in respect to land Reference Numbers 654, 657, 1155, 1156, 1158 and 1159.
 37. It is imperative to note at this stage that the Agreement of 2nd August 2013 acknowledges the fact that the chalets, otherwise known as Karibuni villas are constructed on land portion numbers 654 and 657 Mambrui.
 38. In the Agreement of 2nd August 2013 it is stated that “Karibuni villas is a member of the RCI under contract code number 42266.”
 39. Clause D of the agreement states that the vendor has agreed to sell the land together with the developments contained thereon known as “Karibuni Villas Complex subject to such leases entered into between the vendor and the various lessees of the individual chalets.
 40. According to Agreement of 2nd August 2013, the completion date was supposed to be 90 days from the date of execution of the agreement. The total consideration for the sale was 500,000 Euros. The 1st Plaintiff was required to grant vacant possession of the properties to the purchaser.
 41. On 20th January 2014, the two Plaintiffs entered into an agreement with the Defendant. In this Agreement, it was stated that the 2nd Plaintiff is registered as proprietor as lessee of the 36 chalets mentioned in the earlier agreement and developed on land portion number 654 Mambrui.
 42. According to clause 1.4 of the Agreement of 20th January 2014, the agreement constituted the entire agreement of the parties with regard to the subject matter and superseded and cancelled all previous negotiations and agreements.
 43. It is therefore clear that from the said clause, the agreement of 20th January 2014 nullified the agreement of 2nd August 2013 in so far as the 36 chalets are concerned.
 44. The import of that clause is that the Defendant was no longer purchasing the land on which the 36 chalets were standing but rather the chalets themselves.
 45. The agreed purchase price was Euros 800,000 which was to be paid in installments after the payment of a deposit of Euros 100,000 on the signing of the agreement. The first installment of Euros 100,000 was to be paid on 15th March 2014 while the other four payments of Euros 150,000 were to be made on 15th May 2014, 15th July, 2014, 15th September 2014 and 15th November 2014. Those installments have not been paid by the Defendant.
 46. The completion documents were supposed to be forwarded to the Defendant's advocate upon payment of the balance of the purchase price, which was supposed to be on 15th November 2014.
 47. On the issue of possession, clause 5 of the Agreement stated as follows:

“vacant possession shall pass to the purchaser on 15th January 2014 together will all rights and obligations attached thereto including service charges, rates and any other payments due and payable on the said premises from the said date PROVIDED THAT the purchaser undertakes to collect all rents, timeshare profits and any other payment accrued and payable to the vendors as at 15th January 2014....”

48. In the Agreement, the Plaintiffs gave to the Defendant several warranties. Some of the warranties were that the Plaintiffs were not engaged in or threatened by any litigation, arbitration or administrative pleadings relating to the property; that there is no adverse claim or dispute against the property regarding ownership and that the Plaintiffs had disclosed to the purchaser all material information relating to the property.
49. The agreement of 20th January 2014 further provided that in the event the Defendant fails to pay

- the installment due, the agreement shall be deemed to be cancelled and all monies paid to the date of default by the purchaser shall be deemed to be forfeited.
50. According to the Plaintiffs' director's deposition, it was common knowledge that some of the villas sold were subject to RCI contracts and the Defendant agreed to purchase the said villas with the full knowledge that they would have to perform the obligations hitherto performed by the Plaintiffs.
 51. Although the Agreement of 2nd August 2013 stated that Karibuni Villas is a member of RCI under contract code number 42266, the agreement of 20th January 2014 was silent on that issue.
 52. Resort Condominiums International (RCI) is an international organization which operates a pool of shared time owned by their members. All that the timeshare contractor needs to do is to deposit his timeshare with RCI which evaluates the time or property based on season. After depositing the timeshare with RCI, one will select the time share week he would want to use in place of the one he has deposited.
 53. Of course, one can only deposit his timeshare with RCI if he has a "timeshare property".
 54. A timeshare is a property with a particular form of ownership or use rights. These proprietary rights are typically resort consortium units, in which multiple parties hold rights to use the same property, and each time shareholder is allocated a period of time, mostly one week, and almost always the same time every year, in which time one may use the property.
 55. Timeshares are generally treated as real property and can be resold to another party depending with the wording of the contract.
 56. Once the owner of the property enters into a timesharing contract, it follows that he loses possessory rights over the house or unit during the time that the timeshare holder is supposed to be in occupation.
 57. The mere fact that Karibuni villas is a member of RCI does not in itself say much is so far as the number of weeks that have been bought by third parties, otherwise known as timeshares.
 58. The only time that the sale agreement of 20th January 2014 alluded to the fact that there could be in existence timeshare ownership in the suit properties is at clause 5 of the agreement where the Defendant undertook to collect "timeshare profits accrued and payable to the Plaintiffs by 15th January 2014".
 59. The details of the agreements that were in existence between the Plaintiffs and the timeshare owners were neither referred to in the agreement nor annexed on the agreement. Indeed, the Plaintiffs have not annexed those agreements on the Supporting Affidavit.
 60. According to the Plaintiffs, when possession was handed over to the Defendant after the signing of the agreement of 20th January 2014, they also handed to the Defendant all the keys to each of the villas and "a CD" containing the list of the Timeshare owners and their respective weeks.
 61. There is no evidence before this court to show that the "CD" which had the Timeshare contracts was ever disclosed to the Defendant or that the Defendant was shown or given the said Timeshare contracts.
 62. This court has not been told why the "CD" which has now been annexed on the Supporting Affidavit was not made part of the agreement or why the timeshare contracts were not specifically referred to in the agreement that was entered into between the Plaintiffs and the Defendant.
 63. Can it be that the Plaintiffs intention was to withhold the information in respect to the Timeshare ownership that was existing on some of the villas? If that is so, can the Plaintiffs argue that they have handed to the Defendant vacant possession of the villas pursuant to clause 5 of the Agreement? These questions can only be answered in finality after trial. However, this court is supposed to make a finding at this stage, if prima facie, the Plaintiffs handed over vacant possession.
 64. Timeshare contracts, even when not registered, are a form of ownership of chalets by third parties recognised by the owner of the chalets and subject to the terms therein. This court cannot determine the extent of ownership the time-sharers had in respect of the villas in dispute because the Plaintiffs, have not annexed on the Affidavit the timeshare contracts. In fact, neither this court, nor the Defendant, is aware of the actual number of villas that have been encumbered by the said timeshare contracts.
 65. The Black's Law Dictionary, 9th Edition, has defined the word "vacant" to mean "the state of fact of a lack of occupancy in an office or piece of property while "possession" has been defined to

- mean “the right under which one may exercise control over something to the exclusion of all others”.
- 66.It is therefore not frivolous when the Defendant argue that the Plaintiffs did not disclose that they have sold the chalets for thousands of weeks for 999 years and received millions of Euros in return.
- 67.The Plaintiffs have averred that they are in danger of being sued both locally and abroad for breach of contract; that there is also a potential loss of revenue for the year 2015 and that there is the added danger that their reputation and business will suffer loss.
- 68.This argument is contradictory in the sense that the agreement between the Plaintiffs and the Defendant did not mention the contracts that the Plaintiffs are likely to be sued over both locally and internationally if they are not complied with.
- 69.The likelihood of being filed locally and internationally suits by third parties is also contrary to the provisions of clauses 6.1.3 and 6.14 of the agreement of 20th January, 2014. At clause 6.1.3, the Plaintiffs confirmed that they are not engaged in or threatened by any litigation relating to the property. At clause 6.1.4, the Plaintiffs covenanted that there is no adverse claim or dispute against the property regarding ownership.
- 70.Although clause 6.1.5 of the agreement states that the Plaintiffs disclosed to the Defendant all material information relating to the property, the failure by the Plaintiffs to annex all the timesharing contracts on the sale agreement of 20th January 2014 leads me to the conclusion that the Plaintiffs have not established, a prima facie case, that they were capable of handing to the Defendant vacant possession. In that respect, I find and hold that the Plaintiffs have not established a prima facie case with chances of success.
- 71.Indeed, the right by the vendor to regain possession pursuant to section 39 of the Land Act can only occur after ascertaining that it is the purchaser who is in breach of the contract.
- 72.The extent of the damages that the Plaintiffs are likely to suffer if the injunctive order is not granted has also not been shown to this court.
- 73.If it is found at trial that it is the Defendant who is in breach of the contract, then the Plaintiffs will have the right to regain possession, in addition to being awarded proved damages and mesne profits. The Plaintiffs will therefore not suffer any damages that they cannot be compensated by damages.
- 74.In the circumstances, and considering that the Defendant is in possession of the suit properties, this court shall not at this stage order for its eviction. Consequently, the prayer for an injunctive order is declined.
- 75.The Plaintiffs have also prayed for the entry of Judgment. It is trite law that when the Defendant has raised a triable issue, he should be allowed to defend the suit.
- 76.In my view, the question of whether the Plaintiffs gave to the Defendant vacant possession or not is a triable issue considering that the Plaintiffs have admitted that there exists timesharing contracts between themselves and third parties in respect of the chalets purchased by the Defendant.
- 77.The trial court will have to determine, based on the evidence before it, whether it is the Plaintiffs or the Defendant who breached the Agreement of 20th January 2014 viz-a-viz the timesharing contracts. Consequently, the Defendant should be allowed to unconditionally defend the suit.
- 78.For the foregoing reasons, I dismiss with costs the Plaintiffs' Application dated 29th January 2015.

Dated and delivered in Malindi this 17th day of July 2015.

O. A. Angote

Judge