



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.7 OF 2008

NAOMI MICHELLE LEVY.....PLAINTIFF

=VERSUS=

GIUSEPPE BOLZONI.....DEFENDANT

J U D G M E N T

1. The Plaintiff in this matter commenced this suit by way of a Plaint dated 26th February 2008 through the firm of Daly and Figgis Advocates.
2. In a quick succession, the Plaintiff appointed the firms of Khaminwa & Khaminwa Advocates, Nyakoe Macharia & Co. Advocates, Khatib & Co. Advocates, Harit Sheith Advocates, S. N. Gikara Advocates and Kadima & Co. Advocates to act for her.
3. All those advocates, for one reason or the other, filed Applications thus the delay in concluding the suit.
4. Indeed, after this court heard the Defendant's witness on her counter-claim, the firm of Harit Sheith successfully set aside the proceedings of this court on 6th March 2014.
5. When the matter came up for hearing on 8th July 2015, the Plaintiff was not in court and the court for the second time, dismissed the Plaintiff's claim for non-attendance. The Defendant proceeded to prosecute her Counter-claim.
6. The Plaintiff's attempt through the firm of Kadima & Co. Advocates to set aside the proceedings of this court for the second time was rejected by the court.

Pleadings:

7. The Plaintiff averred in her Plaint that vide two agreements dated 14th November 2006, the Defendant agreed to sell to her Apartment 6B and Apartment 6 together with Garage E standing on subdivision number 651 for a consideration of 320,000 Euros in respect to the first property and 160,000 Euros in respect to the second property.
8. The Plaintiff averred that the agreements contained a covenant that the Defendant had disclosed all matters and that the properties would be sold in the same condition and state as they were on the date of the sale agreements.
9. The Plaintiff averred in the Plaint that she paid 120,000 Euros to the Defendant as the first installment.
10. According to the Plaint, Mr. Char Silva, the owner of a small studio house adjoining the back of one of the suit properties sold to Mr. Armando Tanzini the studio house, which was pitched at a lower level by one floor; that Armando Tanzini told the Plaintiff that he was building an additional floor to the house to make it two storeys and that when the Plaintiff returned to Kenya, she found

- Mr. Armando Tanzini had failed to make the planned extension to the studio house and instead had proceeded to construct an entirely new structure.
11. It has been averred by the Plaintiff in her Complaint that as a result of the building works, the new construction had caused significant damage both internally and externally to the suit properties.
 12. It is the Plaintiff's averment that it came to her realization that the Defendant had entered into an agreement with Mr. Tanzini allowing him to proceed with the new construction; that the said agreement was never brought to her notice before the sale of the suit properties and that the new construction has deprived the properties of all the natural light, ventilation and air flow and completely destroyed the view she thought she would enjoy from the properties.
 13. As a result of the damage, it is the Plaintiff's position that the official value of the first property is now 180,000 Euros while the second property had devalued to 94,000 Euros.
 14. The Plaintiff averred that the damage caused to the two properties will cost her a total of 110,000 Euros.
 15. The Plaintiff prayed for a declaration that the purchase price of the suit property should be re-amended; for an order to demolish the offending building and for the Defendant to pay for the full repair of the suit properties.
 16. The Defendant filed a Defence and Counterclaim
 17. In the Defence, the Defendant averred that any work that was done on the suit property was done after the execution of the sale agreements and with the consent and acquiescence of the Plaintiff; that the Defendant gave to the Plaintiff vacant possession of the suit premises upon execution of the sale agreement and that she had no knowledge whatsoever that Mr. Tanzini was planning any work on the studio house.
 18. The Defendant averred in her Defence that it is the Plaintiff who is directly responsible for the damage and devaluation of the suit premises because she did not consult him before she agreed with Mr. Tanzini as to the work that Mr. Tanzini carried out and that it is the Plaintiff who should compensate him for the devaluation, loss and damage.
 19. The Defendant is seeking for several orders in the counter-claim, including an injunction; a declaration that the agreements have been duly rescinded; a declaration that the deposit paid by the Plaintiff has been forfeited; special damages; vacant possession and mesne profits.

The Plaintiff's case:

20. As I have already stated, when this matter came up for hearing on 8th July 2015, the Plaintiff was not in court. The Plaintiff's suit was dismissed for want of attendance pursuant to the provisions of Order 12 Rule 3 (1) of the Civil Procedure Rules. The Defendant proceeded to prosecute the Counter-claim pursuant to the provisions of Order 12 Rule 3(3) of the Civil Procedure Rules.

The Defendant's case:

21. Silvia Bolzoni, DW1, testified on behalf of her late father, the Defendant. The detailed evidence of DW1 is captured in the statement that was filed in court on 13th February 2013 and reproduced in her Affidavit of 29th April 2014 and filed in court on 29th June 2015.
22. Accompanying the said statement are a bundle of documents which DW1 produced in evidence on 8th July 2015. The said documents were filed on 13th February 2013.
23. The evidence of DW1 was lengthy and rather verbose. I shall however summarise the said evidence as follows:
24. DW1 informed the court that she was appointed the administrator of the Estate of the Defendant on 21st May 2010. DW1 produced the letters of administration in evidence.
25. It was the evidence of DW1 that her late father entered into two written agreements with the Plaintiff on 14th November, 2006 in which he agreed to sell to the Plaintiff apartment No.6 and 6B situated on the 1st and 2nd floors and Garage E situated on the ground floor. The said building stood on L.R. No.651.
26. DW1 produced in evidence the agreement in respect to apartment 6 and the garage which shows the purchase price as 320,000 Euros.
27. The purchase price for apartment number 6B was 160,000 Euros. Like the earlier apartment, the

- purchase price was to be paid in installments.
28. DW1 informed the court that the Plaintiff later on claimed for a refund of her deposit on the ground that the Defendant had not made full disclosures and if not, she was going to sue the Defendant and keep the matter in abeyance in court for over 10 years. DW1 produced in evidence the email by the Plaintiff dated 13th July, 2007.
 29. It was the evidence of DW1 that as at 30th November 2006, the Plaintiff had demonstrated her intention not to comply with the terms of the agreement.
 30. The evidence of DW1 was that the agreement of 6th April 2007 between the Plaintiff and Mr. Tanzini permitting Mr. Tanzini to construct a structure next to the suit properties was made after the Plaintiff had executed the two agreements.
 31. According to DW1, the Plaintiff was already living in the suit apartments as at 6th April 2007 when he entered into the agreement with Mr. Tanzini.
 32. It was the evidence of DW1 that the renovations that were made by Mr. Tanzini, a neighbour, were authorized by the Plaintiff. DW1 Produced the agreement that was entered into between Mr. Tanzini and the Plaintiff.
 33. DW1 informed the court that the Defendant never entered into an agreement with Mr. Tanzini for the construction of an extension as alleged in the Plaintiff.
 34. DW1 produced in evidence the letters that were exchanged between her advocate and the Plaintiff's advocate prior to the filing of this suit. It was the evidence of DW1 that when the Plaintiff failed to pay the 1st installment of 80,000 Euros for apartment 6 and the garage and 40,000 Euros for apartment 6B, the Defendant issued to her a completion notice dated 10th December 2007 which she produced in court.
 35. After the expiry of 21 days, it was the evidence of DW1 that her advocate issued to the Plaintiff a rescission and forfeiture notice.
 36. DW1 produced the valuation report of Wyco Valuers indicating that as at 11th August 2007, the value of the apartment 6B was 102,550 Euros and that the Plaintiff remained in possession of the apartments between 14th November 2006 until 6th October 2009 when the court handed over possession of the apartments to the manager of the condominium company.
 37. It is the evidence of DW1 that the Plaintiff is liable for the drop in the value of the suit property because Tanzini's construction happened after execution of the two agreements of sale.
 38. According to DW1, the Defendant has lost the income he would have received from the two apartments if they had been rented out.
 39. Having dismissed the Plaintiff's suit, the issues for determination viz-aviz the Defendant's Counterclaim are as follows

(a) Whether the Plaintiff was in breach of the agreements of 14th November 2006.

(b) If the answer to (a) above is in the affirmative, the payable damages.

Analysis and findings:

40. The evidence before this court shows that Silvia Lucia Bolzoni, DW1, was granted limited letters of administration by this court on 15th December 2010. Indeed, the record shows that the Plaintiff's advocate agreed with the Defendant's advocate to have DW1 represent the Estate of the late Guiseppe Bolzoni in this suit.
41. It is not in dispute that on 14th November 2006, the Defendant entered into two agreements with the Plaintiff.
42. According to the first agreement, the Defendant was said to be the beneficial owner of Apartment number 6 situated on the first and second floors and garage number E situated on the ground floor of the building on LR.NO.651 as well as 838 ordinary shares in Ndovu Ndogo Limited.
43. The first agreement further provided that the Plaintiff was to pay 80,000 Euros to vendors advocate upon execution of the agreement and the balance of 240,000 Euros was to be paid by the Plaintiff to the Defendant within 3 years in three annual installments. The first installment of

- 80,000 Euros was to be paid on the first anniversary of the agreement in 2007.
44. The agreement further provided that the completion date was to be on 30th September 2009, time being of the essence. It was only upon completion that the Defendant's advocate was required to deliver to the Plaintiff's advocate with all the completion documents.
45. Clause 4.5 of the agreement provided that possession of the property was to be granted to the Plaintiff upon execution of the agreement and payment of the deposit.
46. If the purchaser failed to comply with any of the conditions of the agreement, the vendor was required to give him at least 21 days notice requiring him to remedy the same failure to which the vendor was entitled to forfeit to himself the deposit paid and to declare the sale rescinded or to sue for all sums due and unpaid. That clause applied to the vendor *mutatis mutandis*.
47. The Defendant also produced in evidence the second agreement which was in respect to apartment number 6B. Save for the purchase price of 160,000 Euros and payment of installments of 40,000 Euros within 3 years, all the other terms are similar to the terms that were in the first agreement.
48. After paying the deposit in respect to the two agreements, the Plaintiff refused to pay the first installment that was due in December 2007.
49. The reason for refusal to complete the agreements is captured in the Plaintiff's email of 13th July, 2007 in which she stated as follows:-

“I have contacted my lawyer and the lawyer has told me to tell you, that you are in breach of your contract, that you did not disclose that you made a document with Tanzini to build a building next door, this is a breach of point 5.1.5.2 of the sale and purchase contract that we made under Kenya Law.....if you want to go to court with me in Kenya then it will take 10 years the outcome will be the same.....you withheld information with regard to the sale of the apartment, you can agree with me or stay 10 years in a court case.....”

50. There is no evidence before me to show that the Defendant entered into an agreement with Mr. Tanzini before or after the agreements of 14th November 2006.
51. To the contrary, a handwritten agreement dated 6th April 2007 was produced by the Defendant showing that the Plaintiff allowed Mr. Armando Tanzini to extend his house, which was next to the suit properties. Indeed, according to their agreement, Mr. Tanzini was supposed to have completed the extension of his house by 30th April 2007.
52. The fact of allowing Mr. Tanzini to carry on with the said construction is captured in the Plaintiff's affidavit sworn on 22nd February, 2008 and filed in this court as follows:

“Believing that the said Armando Tanzini had procured all the requisite consents from the company and the regulatory authorities, I signed a written note with the said Armando Tanzini acquiescing to the renovation provided that it was completed by the end of April 2007. Annexed hereto and marked “MNL3” is a true copy of the agreement reached between myself and Armando Tanzini.”

53. It will appear that Mr. Tanzini did more than what he had promised to do to his house. According to the Affidavit I have alluded to above, the Plaintiff discovered that there was a prior handwritten agreement between the Defendant and Mr. Tanzini in respect to the renovations.
54. No evidence was placed before me to show that the Defendant ever entered into an agreement with Mr. Tanzini prior to the signing of the agreements of 14th November 2006.
55. Even if such an agreement existed, the same cannot be a ground to be used by the Plaintiff to refuse to complete the agreement because having purchased the suit properties, he had a right to refuse to give Mr. Tanzini permission to build the impugned renovations.
56. In any event, if it is argued that the Defendant was in breach of the two agreements due to the purported agreement between the Defendant and Mr. Tanzini, then the Plaintiff should have issued to the Defendant a 21 day's notice pursuant to clause 7.2. The Plaintiff never did this but rushed to court seeking for orders that do not conform with the two sale Agreements.
57. When the Defendant received the email of 13th July 2007, he caused his advocate to serve on the

- Plaintiff a notice requiring him to pay the next installment.
58. The Defendant's advocate again wrote to the Plaintiff on 10th December 2007 giving her 21 days to comply with the terms of the agreement failure to which the sale would be rescinded and the deposit would be forfeited.
59. The Defendant was served with a similar letter on 8th January 2008. On 12th February 2008, the Defendant's advocate informed the Plaintiff that the Defendant had rescinded the agreements and forfeited the deposit paid.
60. The evidence before me clearly shows that it is the Plaintiff who breached the two agreements of sale and the Defendant was entitled to issue the 21 days notice which he did.
61. The evidence before this court also shows that the Plaintiff refused to comply with the notices that she was given, and consequently the Defendant was entitled to rescind the two agreements and forfeit the deposit paid pursuant to the terms of the agreement.
62. Considering that there is no evidence that the Plaintiff remained in the suit premises after the Defendant rescinded the two agreements on 12th February 2009 and considering that the Defendant admitted that the Plaintiff was removed from the house by the court on 6th October 2009, I shall therefore not make any order for mesne profits.
63. There is also no evidence that the devaluation of the suit property was caused by the Plaintiff in view of the fact that Mr. Tanzini obtained approvals from the then Municipal Council of Malindi. The head lessor also allowed Mr. Tanzini to carry on with the extension of the house he had purchased.
64. For the reasons stated above, I allow the Defendant's Counter-claim dated 16th May 2008 in the following terms:

(a) An order of permanent injunction be and is hereby issued restraining the Plaintiff, her servants and or agents or any one of them from remaining on or continuing in occupation of Apartment number 6 situated on the first and second floor and garage number E situated on the ground floor and apartment number 6B situated on the third and fourth floor of the building on L.R. No. 651 Malindi.

(b) A declaration be and is hereby issued that the Agreements of 14th November 2006 have been duly rescinded.

(c) A declaration be and is hereby issued that the deposit that was paid by the Plaintiff to the Defendant has been forfeited.

(d) A declaration be and is hereby issued that the Defendant is the legal owner of Apartment number 6, 6B and garage E situated on L.R. No.65, Malindi.

(e) The Plaintiff to pay to the Defendant the costs of the counter-claim.

Dated and delivered in Malindi this 30th day of **October** 2015.

O. A. Angote

Judge