



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.107 OF 2009

FILIPPO FEDRINI.....PLAINTIFF

VERSUS

IBRAHIM MOHAMED OMAR.....DEFENDANT

J U D G M E N T

Introduction:

1. In his Complaint dated 30th November 2009, the Plaintiff averred that in February 2009, the Defendant informed him that he had identified portions of land number 2156, 2157, 2158, 2159 and 2160 on sale at Casurina, Malindi (the suit properties); that he suggested to him to purchase the said properties on the understanding that they would share with the Defendant the profit that the Plaintiff would make on selling the properties and that the Plaintiff bought the properties on the understanding that should the Plaintiff sell the properties, the Plaintiff would keep the principal and the profit will be shared in equal proportions with the Defendant.
2. Pursuant to the oral agreement, it has been averred, the Plaintiff availed to the Defendant a sum of Kshs.368,000 Euros being the purchase price, the conveyancing fees and the advocate's charges.
3. The Plaintiff averred in his Complaint that prior to the said purchase, he was introduced to a Mr. Martello, the prospective purchaser, who had agreed to re-purchase the suit properties for 480,000 Euros and that he deposited into the Defendant's account 208,000 Euros and paid to the account of Rupert Nochalas 160,000 being the balance of the purchase price.
4. Plaintiff averred that unknown to him, the Defendant acquired the suit properties form Chanoni Estate Limited for Kshs.12,500,000 and that the Defendant refused to transfer the properties to him.
5. In the initial Complaint, Plaintiff was seeking for Judgment against the Defendant for a declaration that the Defendant holds the suit property in trust for him; an order of mandatory injunction requiring the Defendant to deliver to the Plaintiff the title documents; rescission of the contract and in the alternative a declaration that the Plaintiff is entitled to refund the sum of 368,000 Euros upon the resale of the property in addition to 50% of the profit accruing from the sale.
6. The Complaint was amended on 25th March 2010. In the amended Complaint, the Plaintiff deleted the paragraph alluding to the fact that he had agreed with the Defendant to share the profit that will be made on the sale of the property. The prayer for rescission of the contract was also deleted.
7. In his Defence, the Defendant averred that the monies paid by the Plaintiff were fully expended on the purchase and registration of the properties in the Defendant's names as agreed with the Plaintiff; that the properties were bought for purposes of resale and that he has been willing to dispose off the properties as per the agreement with the Plaintiff but for the Plaintiff's refusal.
8. In the counter-claim, the Defendant has stated that the suit properties should be sold whereupon he

would repay the Plaintiff the sum of 368,000 Euros and the profit on resale to be shared in the ratio 50:50 between the Plaintiff and the Defendant.

9. In his Defence to the Counter-claim, the Plaintiff stated that as the Defendant had already made a colossal sum of money through fraudulent means from the Plaintiff, who, on a gentleman's understanding had offered to share out the profit with the Defendant after the Plaintiff had recovered his capital, had no further interest in proceeding with the said arrangement.

The Plaintiff's case:

10. The Plaintiff, informed the court that he had known the Defendant for eight years and had business dealings with him.
11. It was the evidence of PW1 that while in Italy, the Defendant called him and informed him about the suit properties which were on sale. It was his evidence that he sent to the Defendant the first payment of 36,000 Euros to enable him purchase the suit properties for him. According to PW1, he eventually made payments amounting to 368,000 Euros.
12. PW1 produced in evidence documents evidencing the payment of 368,000 Euros together with Indentures in the name of the Defendant for plot numbers 2155, 2156, 2157, 2158, 2159 and 2160 Malindi.
13. The evidence of PW1 was that according to the Indentures, each plot was purchased for Kshs.2,500,000 amounting to a total of Kshs.15,000,000.
14. PW1 informed the court that his efforts to have the Defendant transfer the suit properties in his name have been futile; that he signed a draft agreement but the Defendant declined to sign it and that he does not agree with the suggestion that the suit properties should be sold and then share with the Defendant the profit in the ratio of 50:50.
15. In cross-examination, PW1 stated that when he met the Defendant, he was made to understand that the Defendant was in the business of buying and selling land and that the first transaction he had with the Defendant was when he purchased a house for his son.
16. After purchasing the apartments for his son, PW1 informed the court that he gave the Defendant 4,000 Euros as a gift and that he was not aware if the person who sold the apartments to his son had paid to the Defendant Kshs.1,500,000 as a commission.
17. PW1 denied that he agreed to divide the profits with the Defendant from the proceeds of the suit properties and that although he had earlier on agreed on that position, he has since changed his mind.
18. Although PW1 paid 36,000 Euros when he was in Malindi, he never signed the agreement of sale with the seller. It was his evidence that when he went back to Italy, he instructed his bank to transfer 164,000 Euros to the Defendant's account and that he made this payment without signing any agreement because he trusted the Defendant.
19. PW1 stated that he also transferred 160,000 Euros to Mr. Robert's account after the Defendant informed him to do so together with money for stamp duty.
20. PW1 stated that he spoke to Mr. Mertello, the prospective purchaser of the suit properties, once and that he knew the Defendant was to earn something from the transaction.
21. PW1 informed the court that the earlier agreement of sharing the proceeds of sale of the suit property on a 50:50 basis would have been valid had the Defendant acted in good faith and that indeed a draft agreement was prepared by the firm of Muli & Ole Kina Advocates which he signed. However, PW1 stated that the Defendant declined to sign the agreement which provided how they were to share the proceeds of the sale.

The Defence case:

22. The Defendant, DW1, adopted his statement. In the statement, DW1 stated that he is a businessman and an estate agent and that he was introduced to the Plaintiff in the year 2005.
23. The evidence of DW1 was that he assisted the Plaintiff in the purchase of three apartments in Malindi for his son and he paid him his commission.
24. The evidence of DW1 was that while marketing six parcels of land (the suit properties) for Chanoni Estate, he met a Mr. Martello who was willing to purchase them at 480,000 Euros, which was over and above the purchase price by a sum of 100,000 Euros. That is when he informed the

- Plaintiff to purchase the properties and share the profits with him after re-selling them to Mr. Martello.
25. After Mr. Martello and the Plaintiff met, it was the evidence of DW1 that the Plaintiff informed him to move fast and purchase the properties for the purpose of reselling the same at a profit to be divided equally between the two of them.
 26. DW1 informed the court that he informed the Plaintiff that the total purchase price will be 368,000 Euros inclusive of stamp duty and legal charges; that the sum of 164,000 Euros was sent to him while the balance was paid to the vendor and that the Indentures were prepared in his name as per the sale agreement. However, Mr. Martello declined to purchase the suit properties as earlier agreed.
 27. The evidence of DW1 is that a rough draft agreement was prepared by the Plaintiff's wife and Mr. Angima advocate proceeded to an agreement based on it; that the Plaintiff refused to sign the agreement and that when the Plaintiff told him they should sign the agreement prepared by Muli & Ole Kina Advocates, he realised that the Plaintiff was trying to change the earlier agreement.
 28. In cross-examination, the Defendant stated that the Plaintiff paid 368,000 Euros for the plots; that he has the Indentures for the six plots which shows the purchase price of Kshs.2,500,000 and that the actual cost of each plot was 41,000 pounds which is an equivalent of 360,000 Euros.

Submissions:

29. The Plaintiff's advocate submitted that according to the Indentures, the consideration for each plot is Kshs.2,500,000; that the Defendant received a total of Euros 368,000 and he is only accounting for Kshs.15,000,000; that there is no evidence to demonstrate that Chanoni Estate Limited ever authorised any part of the purchase price to be paid to Mr. Spicer or Mr. Zimmerlin and that it is not upon them to state that an extra sum of 160,000 Euros was payable to them or their nominee.
30. According to the Plaintiff's counsel, the Defendant cunningly used the Plaintiff's sum of 160,000 Euros to pay for a matter that was totally unrelated to the acquisition of the suit land and that the Defendant's purported claim on the suit property is tainted with illegalities and that the claim is vitiated by operation of law.
31. The Plaintiff's advocate further submitted that the counter-claim is based on estate agency relationship and the same is not maintainable for want of registration of the Defendant as an agent.
32. Counsel submitted that after single handedly paying the sum of Euros 368,000, the Plaintiff has absolutely nothing in proof of ownership of any interest in the suit property.
33. Counsel submitted that the Defendant holds the suit properties in trust for the absolute benefit of the Plaintiff and consequently should execute documents of transfer of the six plots in favour of the Plaintiff.
34. The Defendant's counsel submitted that the Plaintiff admitted that he paid 160,000 Euros to Robert Nicholas Bullan towards the purchase price; that equity cannot relieve a party from a bad bargain and that it is not for the court to re-write the contracts for parties but to respect the doctrine of freedom of contracts.
35. Counsel submitted that the Plaintiff's claim is for refund of monies held and received; that a constructive trust cannot be implied because the Defendant looked for the suit properties for the purpose of re-selling them and that the properties were never meant to be in the name of the Plaintiff.

Analysis and findings:

36. In the amended Plaintiff, the Plaintiff averred that he agreed orally with the Defendant to purchase the suit property at a price of Euros 368,000 which the Defendant informed him was the total purchase price of the suit properties.
37. Pursuant to the said oral agreement, the Plaintiff availed 368,000 Euros being the purchase price. The Plaintiff admitted in the Amended Plaintiff and in his evidence that out of the said sum of 368,000 Euros, he paid Rupert Nicholas Bullar Spicer the sum of 160,000 Euros while 208,000 Euros was deposited in the Defendant's account.
38. According to the Plaintiff, he later on realised that the Defendant had fraudulently acquired the suit properties and had them registered in his own name.

39. The Plaintiff's main prayer is for a declaration that the Defendant is holding the suit properties in trust for him and in the alternative a refund of 368,000 Euros together with interest from the date of filing the suit.
40. On the other hand, the Defendant's case is that he agreed with the Plaintiff to purchase the suit properties with the ultimate intention of re-selling it to a Mr. Mertello at a profit whereafter they were to share the profit in the ratio of 50:50.
41. According to the evidence by the Defendant, he is willing to refund to the Plaintiff 368,000 Euros after the re-sale of the suit properties and share the profit in the ratio of 50:50.
42. The issues that I am supposed to deal with are as follows:

- (a) Whether the Defendant is holding the suit properties in trust for the Plaintiff**
- (b) If the answer is in the affirmative, whether the suit properties should be transferred to the Plaintiff.**
- (c) If the answer is not in the affirmative, whether the Defendant should refund to the Plaintiff Euro 368,000 with interest.**
- (d) Whether the suit properties should be sold and the Plaintiff be refunded 368,000 Euros and the excess amount to be shared equally.**
- (e) Who should pay the costs of the suit.**

43. It is not in dispute that it is the Defendant who identified land known as plot numbers 2155, 2156, 2157, 2158, 2159 and 2160 Malindi which were being sold by Chanoni Estates Limited.
44. The evidence by the Plaintiff was that he instructed the Defendant to purchase the suit properties for him and he sent to him a total of 208,000 Euros for that purpose.
45. On the Defendant's instructions, it was the evidence of PW1 that he sent 160,000 Euros by way of a bank transfer to Rupert Nicholas Bullan Spicer, being the balance of the purchase price. The said sum was sent on 9th April 2008.
46. In cross examination, PW1 informed the court that the initial oral agreement he had with the Defendant was that after re-selling the suit properties, he will get his money back and the profit would then be shared between the two of them in the ratio of 50:50. However, when he realised that the Defendant was acting in bad faith, he changed his mind on this initial oral agreement.
47. The initial arrangement between the Plaintiff and the Defendant is also captured in the Plaintiff's statement filed in this court on 18th June, 2013 in which the Plaintiff states as follows:-

“ I agreed to purchase the property on condition that should I sell the property as we agreed, I would keep the principal, the profit being shared equally between us. The aforesaid agreement to purchase the property for resale was made orally in the course of the months of February 2008.”

48. In the Defence to the Counter-claim filed on 26th February 2014, the Plaintiff averred as follows:

“As the Defendant had already made a colossal sum of money through fraudulent means from the Plaintiff who on a gentleman understanding had offered to share out the profit with the Defendant after the Plaintiff had recovered his capital expenditure had no further interest in proceeding with the said arrangement. In other words, the Defendant had no moral basis of demanding any further money from the Plaintiff.”

49. The evidence before this court shows that after the Plaintiff paid to the Defendant 208,000 Euros and 160,000 Euros to a Mr. Rupert, the suit properties were transferred in favour of the Defendant by way of Indentures dated 9th April 2008. The said indentures were registered on 15th August 2008.
50. Although the 10% deposit was paid by the Plaintiff when he was in Kenya, he never signed the

- Agreements for sale. Indeed, the evidence before this court shows that the Defendant travelled to Italy to attend to the Plaintiff's daughter's wedding and the Plaintiff never insisted on signing the agreements for sale or the transfer documents in respect to the suit properties.
51. The payment of what he was told to be the purchase price without signing the sale agreement or meeting the vendor clearly shows that the Plaintiff's intention was to have the suit properties registered in the name of the Defendant so as to facilitate the oral agreement that they had.
 52. Indeed, the Plaintiff's actions and the oral agreement he entered into with the Plaintiff shows that the suit properties were being purchased with the sole intention of re-selling them with a view of making a profit, which profit was to be shared between the two of them equally.
 53. There is no evidence before me to show that the Plaintiff instructed the Defendant to buy for him the suit properties for his own use. Indeed, the pleadings by the Plaintiff shows the contrary. Consequently, the issue of a resulting trust does not arise.
 54. A resulting trust can only arise when a person receives property but the person who transfers the property did not have the intention of transferring his beneficial interest in the property unless there is some objective manifestation of consent to do so.
 55. In the case of **Gissing Vs Gissing (1971) AG 886, the House of Lords** held that a resulting trust is created when a property is purchased by one party and the purchase price is paid in whole or in part, by another person on the understanding that the person paying the money will receive an interest in the property.
 56. In the case of **Oxley Vs Hiscock (2005) 3 WLR 715, the House of Lords** held as follows:

“When money is provided by two or more parties on the basis that they should have a shared interest in the property, and if there is an agreement on how much each party should have in the property, that is conclusive”

57. In this case, the money for the purchase of the suit property was contributed by the Plaintiff alone while the Defendant identified the suit properties. However, the parties herein were in a business arrangement, notwithstanding the fact that it is the Plaintiff who was providing the full purchase price. The arrangement was that they would share in profits that they would make after re-selling the suit properties. There was therefore an understanding that they will share in the profits and not that the Plaintiff will receive an interest in the properties. The Defendant was not purchasing the property for the Plaintiff.
58. It is trite law that oral agreements, just like written arrangements, are enforceable. An oral contract is often provable by actions taken by one or both parties.
59. Having admitted in his pleadings and evidence that there was initially an oral agreement between him and the Defendant, the Plaintiff cannot now turn around and claim that the Defendant is holding the suit properties in trust for him. **In Halsburys Laws of England, 4th Edition, volume 16, paragraph 1444 at page 7, it is stated that the court will not interfere with freedom of contract and will not generally, merely because a man has made an improvident contract to relieve him from its consequences.**
60. If, as claimed by the Plaintiff, he discovered that the Defendant did not purchase the suit properties at a consideration of 360,000 Euros, and that the Defendant has actually defrauded him 160,000 Euros from the transaction, his recourse is to rescind the oral agreement and claim for damages from the Defendant and Mr. Rupert.
61. If the intention of the Defendant was to declare Kshs.15,000,000 as the purchase price for the sole intention of evading the payment of stamp duty, then the Defendant's action are in criminal nature.
62. What is confounding however is why the Plaintiff agreed to pay twice the amount that is indicated on the Indenture as the purchase price. Is it that he was a party to the issue of evading the payment of stamp duty or was he ignorant of the market rates prevailing then? And why would he pay 160,000 Euros to an individual and yet he knew or ought to have known that the vendor was a limited liability company and 208,000 Euros to the Defendant?
63. I might not have answers to those questions, suffice to say that the Defendant is not in breach of the oral agreement that he entered into with the Plaintiff.
64. Having paid 160,000 Euros to a Mr. Rupert without inquiring whether indeed he was a director of the vendor, the Plaintiff has himself to blame if the said Mr. Rupert is indeed not a director of the vendor. Indeed, the Plaintiff should have joined Mr. Rupert in these proceedings for him to

- explain the circumstances under which he received 160,000 Euros.
65. Having failed to sue Mr. Rupert, this court can only agree with the Defendant that the said 160,000 Euros was part of the purchase price although the said amount is not captured in the Indentures.
66. I say so because the Plaintiff was not purchasing the land in Kenya for the first time. As admitted in evidence the Plaintiff had purchased apartments for his son which were registered in his son's name.
67. The Plaintiff must have inquired into the actual purchase price of the suit property and only paid the 368,000 Euros having been satisfied that the purchase price was 360,000 Euros. He went ahead to pay 160,000 Euros to a person he was convinced was a director of the vendor. The Defendant cannot be accused of this payment which the Plaintiff made voluntarily.
68. Considering that I have found that the Defendant is not holding in trust the suit properties for the Plaintiff in view of the oral agreement, and in view of my findings that the Defendant utilised the money sent to him to purchase the suit properties, the issue of the Defendant having fraudulently obtained 160,000 Euros from the Plaintiff does not arise.
69. Having failed to sue Mr. Rupert Nicholas Bullen Spicer whom he paid 160,000 Euros, he cannot claim 368,000 Euros from the Defendant because he only paid to his account 208,000 Euros which he used to purchase the suit property as agreed.
70. This court can only enforce the oral agreement which the Plaintiff entered into with the Defendant and cannot relieve the Plaintiff from a bad bargain, which, from the evidence before me, is not a bad bargain after all.
71. For those reasons, I dismiss the Plaintiff's amended Plaint dated 24th March 2010 with costs and allow the Defendant's counter-claim dated 9th April 2010 in the following terms:

(a) The Defendant to sell plot numbers 2155, 2156, 2157, 2159 and 2160 Malindi and upon the said sale to pay the Plaintiff the sum of 368,000 Euros and the excess amount after the sale to be shared between the Plaintiff and the Defendant in the ratio of 50:50.

(b) The Plaintiff to pay the costs of the Counter-claim.

Dated and delivered in Malindi this 23rd day of **October 2015**.

O. A. Angote

Judge