



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 127 OF 2013

MARIO NUZZO.....PLAINTIFF

=VERSUS=

ZAGO GIUSEPPE.....DEFENDANT

RULING

Introduction

1. The Plaintiff has filed an Application dated 3rd September 2013 seeking for the following orders:
 - a. **That this Honourable Court be pleased to enter Summary Judgment against the Defendant herein ZAGO GIUSEPPE for payment of Euro 150,000 and in the alternative the transfer of Two (2) apartments at the property on PLOT No. 20120 situated at Mambrui in Malindi as prayed for in the Plaintiff.**
 - b. **That costs of this application be provided for:**
2. The Application is premised on the grounds that the Statement of Defence does not raise any triable issue and that the same is a sham and a mere denial.

The Plaintiff's/Applicant's case:

3. It is the Plaintiff's deposition that he entered into an agreement with the Defendant for the Defendant to buy shares from him for a consideration of Euro 100,000 and for the transfer of two apartments comprised in plot Number 20120 but the Defendant breached the said agreement; that the Defendant has admitted that fact in his Defence and that summary judgment ought to be entered.

The Defendant's/Applicant case:

4. In his response, the Defendant has deponed that the suit herein raises triable issues because it does not specifically deal with a liquidated sum only but also the transfer of apartments to the Plaintiff.
5. It is the Defendant's position that he has pleaded in his defence that the amount of Euro 150,000 was reduced by the dishonoured agreement between himself and the Plaintiff and that that issue ought to be brought out by way of oral evidence; that there is another suit being Malindi HCCC No. 179 of 2012 involving the same apartments and that the Defence raises several triable issues.
6. The Parties filed written submissions which reiterated what has been deponed in the affidavits.

Analysis and findings:

7. According to paragraph 4 of the Plaint, the Plaintiff entered into an agreement with the Defendant on 6th March, 2008 in which the Defendant agreed to buy the Plaintiff's shares for a consideration of Euro 100,000 and transfer to the Plaintiff two apartments situated on plot number 20121 Mambrui in Malindi or pay to the Plaintiff Euro 150,000 in lieu of the said apartments.
8. At paragraphs 5, the Plaintiff has averred that the Defendant paid the Plaintiff the sum of Euro 100,000 as per clause 2.1 of the agreement but he failed to transfer to the Plaintiff the two apartments valued at Euro 150,000. The transfer of the apartments was supposed to be done on or before 30th October 2008.
9. The Plaintiff is seeking for an order of specific performance of clause 2.2 of the agreement and in the alternative payment of Euro 150,000= being the value of the apartments.
10. The Defendant has admitted the existence of the agreement dated 6th March, 2008 as pleaded in the Plaint but stated that the Plaintiff dishonoured another agreement between him and the Plaintiff in regard to a property in Italy reducing the amount of Euro 150,000 and therefore the two apartments.
11. The Defendant further averred in the Defence that he is not in breach of the agreement because the Plaintiff occupied and modified the two apartments which were incapable of transfer as no title was in existence when the Plaintiff and the Defendants entered into the agreement; that both the Defendant and the Plaintiff were to facilitate the transfer of the apartments by obtaining all the necessary instruments of transfer and that the value of the apartments as pleaded in the Plaint is denied.
12. The Agreement dated 6th March, 2008 is part of the Plaintiff's list of documents that were filed together with the Plaint.
13. Clause 2.2 of the agreement, which the Plaintiff is seeking to enforce, provides as follows:

“The purchaser will transfer to the vendor the said two apartments valued at Euro 150,000 on or before 30th October 2008 provided that the purchaser reserves the right to pay the vendor the sum of Euro 150,000 in lieu of the two apartments.”

14. The Defendant now states in his Defence that he cannot transfer the two apartments to the Plaintiff as agreed because, firstly, the Plaintiff dishonoured another agreement in regard to a property in Italy and secondly that the Plaintiff modified the two apartments and rendering them incapable of being transferred.
15. The agreement that the Defendant is referring to in his Defence is in respect to a purported property in Italy. That second agreement or property is not part and parcel of the agreement of 6th March 2008 whose existence the Defendant has acknowledged in his Defence. I do not see the relevance of the second agreement pleaded in the Defence which has not even been annexed on the Defendant's pleadings. That is therefore not a triable issue.
16. If the two apartments are incapable of being transferred as pleaded in the Defence, then the Defendant should pay to the Plaintiff Euros 150,000 as envisaged in the agreement. It cannot lie in the mouth of the Defendant to say that the Plaintiff modified the apartments and that they are incapable of being transferred when the said apartments were actually supposed to be transferred to the Plaintiff on or before 30th October 2008 and in lieu of the said transfer a sum of Euro 150,000 was to be paid to the Plaintiff.
17. Summary judgment can be entered in a liquidated claim or for the recovery of land by a land lord from a tenant or against a trespasser. The Plaintiff is claiming for the two apartments from the Defendant as a trespasser and in the alternative for a liquidated claim of Euro 150,000. The Application for summary judgment is therefore properly before this court.
18. The law relating to summary judgment has now been settled. In the case of ***Dhanjal Investments Limited -Vs Shabaha Investments Limited Civil Appeal*** held as follows:

“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandnial Restaurnat -Vs- Devshi & Co. (1952) E.A.C.A. 77 and followed in the case of Sonza Figuerido & Co. Ltd. -Vs- Mooring Hotel Limited (1952) EA 425 that, if the defendant shows a bona fide triable issue he must be allowed to defend without conditions.”

19. From the Defence filed in this court, no good reason has been given by the Defendant why it cannot transfer the two apartments to the Plaintiff or in lieu pay to the Plaintiff Euro 150,000 in view of the fact that the Defendant was to perform either of the two unconditionally.
20. Having found and held that the Defence does not raise even a single triable issue, I shall, which I hereby do, allow the Plaintiff's Application dated 3rd September 2013 in the following terms:
- a. That Summary Judgment against the Defendant for payment of Euro 150,000 be and is hereby entered.
 - b. Those in the alternative the Defendant to transfer to the Plaintiff two apartments on plot Number 20120 Mambrui, Malindi forthwith.
 - c. The Defendant to pay interest on (a) above at court rates from the date when this suit was filed until payment in full.
 - d. The costs of this Application and the suit to be paid by the Defendant.

Dated and Delivered in Malindi this **9th** day of **May**, 2014.

O. A. Angote

Judge