



IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 35 OF 2014

MUKIKA CHAI DZOMBO.....PLAINTIFF/APPLICANT

=VERSUS=

COAST DEVELOPMENT AUTHORITY.....DEFENDANT/RESPONDENT

RULING

Introduction:

1. The Application before me is the one dated 4th March, 2014 seeking for the following orders:
 - a. **THAT injunction restraining the Defendant either by itself, its servants, agents or howsoever otherwise from undertaking and/or continuing to carry on ballast crushing, quarrying or related works on the parcel of land known as Plot No. 432 at Mwapula/Magongoni Land Adjudication Area being Mwapula/Magongoni/432 or otherwise occasioning waster or damage pending the hearing and determination of the suit.**
 - b. **THAT a temporary injunction restraining the Defendant from alienating, selling or otherwise disposing of the parcel of land known as Plot No. 432 at Mwapula/Magongoni Land Adjudication Area being Mwapula/Magongoni/432 pending the hearing and determination of the suit.**
 - c. **Interim preservatory Order of possession by the Plaintiff over the parcel of land known as Plot No. 432 at Mwapula/Magongoni Land Adjudication Area being Mwapula/Magongoni/432 pending inter partes hearing of this suit.**
 - d. **The original title to the parcel of land known as Plot No. 432 at Mwapula/Magongoni Land Adjudication Area being Mwapula/Magongoni/432 to be returned to the Plaintiff forthwith.**
 - e. **Cost of this application to be borne by the Defendant.**
2. The Application is supported by the Plaintiff's Affidavit.

The Plaintiff's/Applicant's case

3. The Plaintiff has deponed that on 27th February, 2012, he entered into an agreement for the sale of parcel of land known as Mwapula/Magongoni/432 (the suit property) with the Defendant. The Plaintiff has deponed that he then handed over vacant possession of the suit property to the Defendant on 27th February 2012 together with the original title for the smooth transfer of rights and interest upon completion.
4. According to the agreement, the completion date would have been 17th May, 2013 at which time

the Defendant should have paid the entire purchase price whereupon the transfer of the property was to be effected. However, it was deponed, the Defendant reneged on his contractual obligation thus this suit.

The Defendant's/Respondent's case:

5. The Defendant's Legal Service Manager deponed that upon taking possession of the suit, the Defendant encountered a myriad of problems which included a dispute about the suit property between the Plaintiff and his clan members and that there was no access road to the suit property.

6. It is the Defendant's case that it resolved to vacate the suit property to allow the disputing parties solve the problem of ownership and for the Plaintiff to provide an access road after which it would resume its works on the land; that to date it has not received any communication from the Plaintiff and that currently, it is carrying out its works on a different site being Mwapula/Magongoni 1211 and not the suit property.

7. Other than not being on the suit property, the Defendant has also denied that it is possession of the original title deed and that it was agreed that the Defendant will only pay the subsequent installments after the above issues had been dealt with and resolved.

Further/Supplementary Affidavits

8. In his Further Affidavit, the Plaintiff reiterated that the Defendant is quarrying on his land and it is in the interest of justice that the Sale Agreement between the Defendant and Plaintiff be rescinded.

Submissions

9. The Plaintiff's advocate submitted that it is not in dispute that there is in existence a contract between the Plaintiff and the Defendant and that the Defendant has refused to complete the said contract. Consequently, it was submitted, the Plaintiff has established a *prima facie* case with chances of success.

10. The Plaintiff's advocate further submitted that the Defendant is carrying out ballast crushing, quarrying and related works on the suit property and that the agreement states as much. Counsel relied on the case of **Kuta Lunganzi & Another -Vs- Another -Vs- Panda Mkauma Panda & Another (2013) eKLR** in which this court held as follows:

“It is common knowledge that quarrying wastes land and there will be no commodity known as lend after the quarrying..... The Plaintiffs will therefore not be able to recover any land in the event they succeed in their claim.”

11. The Defendant's advocate submitted that upon the signing of the sale agreement, the Plaintiff was paid kshs. 2,000,000 as a deposit and that although the Defendant was to pay the balance of the purchase price in quarterly installments of Kshs.500,000, the agreement did not have a completion date.

12. Counsel relied on the case of **Rose Wambui Wahito -Vs- John Ian Maingey (2013) eKLR** in which Nyamweya J held that although the Sale agreement was made subject on the Law Society Conditions of Sale, the Plaintiff did not provide any evidence of the said Law Society agreement format or the conditions therein as to rescission or termination.

13. The Defendant's counsel submitted that it is the Plaintiff who has not completed his part of the agreement to be entitled to payment of the purchase price and that the Plaintiff has not made any effort to obtain the consent of the Land Control Board to sub-divide or transfer the suit property.

14. The Defendant's counsel further submitted that the Plaintiff was guilty of Material non-disclosure; that it is the Plaintiff who has been in possession of the title deed in respect

to the suit property, a fact he did not disclose and that the Plaintiff should have disclosed to the court about the pending suits.

15. Counsel finally submitted that where a party seeks to rescind an agreement, he has to refund the deposit paid and that there is no evidence that a notice of rescission was given to the Defendant. Counsel relied on the case of **Jane Kabira & Another -Vs- Standard Chartered & 5 others (2012) eKLR282** to buttress her arguments.

Analysis & findings:

16. The Agreement of Sale of the suit property that was entered into by the Plaintiff and the Defendant on 27th February, 2012 provides that the purchase price of the land was kshs. 4,400,000.
17. The first installment of Kshs. 2,000,000 was to be paid upon execution of the sale agreement. The amount was duly paid by the Defendant. The balance of Kshs. 2,400,000 was to be made in quarterly installments of Kshs. 500,000 and the Defendant was at liberty to assume vacant possession of the suit property and start its operations upon payment of the deposit of kshs. 2,000,000.
18. The Defendant has admitted that it took possession of the suit property before a dispute arose between the Plaintiff and the members of his clan.
19. When the Defendant did not pay the requisite installments, Plaintiff's advocate wrote to the Defendant on 6th January, 2014 demanding for vacant possession of the land. In the Plaintiff, the Plaintiff is claiming for the rescission of the agreement and for damage for breach of contract.
20. The Defendant has stated in its Replying Affidavit that the reason it has not paid the agreed installments is because a dispute arose between the Plaintiff and the members of his clan and that the suit property does not have an access road. In the counter-claim, the Defendant is claiming for specific performance of the contract and for delivery of possession and access to the suit premises.
21. Although the Agreement does not expressly provide the completion date, the completion date can be implied from the agreement. The deposit of the purchase price was paid on the date the agreement was signed. That was on 27th February 2012. The balance of the purchase price was to be paid in quarterly installments of kshs. 500,000. The first quarter must have been paid on 27th May, 2012, which was the third month after the deposit of kshs. 2,000,000 was paid.
22. The Defendant has admitted that it has not paid the agreed installments because the agreement was frustrated by the Plaintiff's clan members. However, the defendant has not attached any evidence to show the existence of a dispute over the suit property. The Defendant has also not filed a suit to have the agreement rescinded on the basis that the agreement has been frustrated.
23. Instead, the Defendant is asking for the specific performance of the contract. It is trite law that an order of specific performance can only succeed where a party shows that he has complied with all the terms of the contract, which the Defendant has not done.
24. Specific performance is an equitable remedy that compels a party to complete a contract according to the precise terms agreed upon so that under the circumstances, justice will be done between the parties. Specific performance grants a party what he actually bargained for in the contract rather than damages.
25. The Defendant cannot continue using the suit property for quarrying purpose or for any other purpose or pray for an order of specific performance of the contract when it has not met its obligations under the contract.
26. The agreement of sale did not state that the Law Society Conditions of Sale shall apply. Consequently, the stringent conditions provided for in the Law Society Conditions of Sale on the procedure that a party must comply with before an agreement of sale can be rescinded does not apply. All a party is required to do in such a scenario is to give to the defaulting party reasonable notice of his intention to have the agreement rescinded, which action the Plaintiff undertook *vide* his advocate's letter dated 6th January 2014.
27. Even if the Law Society Conditions of Sale are applicable, the Plaintiff does not have to provide to the court the evidence of those Conditions or to prove that those Conditions can only apply as argued by the Defendant.
28. Once those conditions are said to apply to an agreement of sale, It is upon the court to independently look at those conditions and make a determination as to whether a party purporting

to rescind an agreement of sale has complied with them to the letter. It is only then that the court can decide whether the Plaintiff has established a *prima facie* case with chances of success or not. However, as I have already stated, those conditions are not applicable in this case and the notice by the Plaintiff's advocate dated 6th January, 2014 suffices. Whether the notice was or was not received by the Defendant is an issue that can only be proved at trial.

29. In view of the evidence before me, I am satisfied that the Plaintiff has disclosed all the material facts in respect of the ownership of the suit property. The Plaintiff has established that he is the registered proprietor of the suit property and that he entered into a valid agreement of sale. I am satisfied, *prima facie*, that the Plaintiff is entitled to the installments mentioned in the Agreement of sale of the suit property.

30. In the circumstances and for the reasons I have given above, I allow the plaintiff's Application dated 4th March, 2014.

DATED AND DELIVERED IN MALINDI THIS **11th** DAY OF **July**, 2014

O. A. Angote

Judge