



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 146 OF 2013

MOHAMED ALI SHOSI.....PLAINTIFF

=VERSUS=

MOHAMED SWALEH.....DEFENDANT

JUDGMENT

Introduction:

1. The Plaintiff moved this court by way of a Plaint dated 20th August, 2013 and filed on the same day.
2. In the Plaint, the Plaintiff has averred that at all material times, he was the registered owner of plot number 124 Watamu measuring approximately 24m x 15m whereupon he erected a three bedroomed Mansion (the suit property).
3. According to the averment in the Plaint, the Plaintiff entered into a sale agreement with the Defendant for the purchase of the suit property; that the Defendant was paid the full purchase price of Kshs. 1,300,000 and that the Defendant was supposed to execute the transfer documents in favour of the Plaintiff. However, it was averred, the Defendant has refused to vacate the suit property or to execute the transfer documents.
4. The Plaintiff's claim is for an order of specific performance of the agreement of sale and eviction of the Defendant from the suit land.
5. In his Defence, the Defendant averred that under the contract, the purchaser was to pay him kshs. 650,000 which amount the Plaintiff never paid and that the Plaintiff has never transferred to the Defendant the Motor vehicle which was released to the Defendant as part of the purchase price.
6. The Defendant has pleaded in the alternative that he is willing to complete the transaction if the Plaintiff pays him the balance of the purchase price of Kshs. 650,000 and sign and avail all the required documents of transfer of the motor vehicle that the Plaintiff gave him as part of the purchase price.

The Plaintiff's case:

7. The Plaintiff, Pw1, informed the court that on 12th March, 2013, he agreed with the Defendant to purchase his house (the suit property) for Kshs. 1.3 million. Pw1 informed the court that he agreed with the Defendant to transfer to him his car valued at Kshs. 600,000 and to pay him Kshs. 700,000 in cash being the balance of the purchase price.

8. It was the evidence of Pw1 that subsequently, he gave the Defendant Kshs. 50,000 to enable him settle his children's school fees and the balance of the purchase price of Kshs. 650,000 was to be paid later.
9. On 12th March, 2013, Pw1 called the Defendant and they met in the Plaintiff's house. He then gave the Defendant kshs. 650,000 in cash, the car and the logbook.
10. It was the evidence of Pw1 that the Defendant then called his advocate, Pw 2, and informed him what had transpired. The advocate prepared an agreement which both parties read on the same day. According to Pw1, the advocate asked the Defendant if he had been paid all the money and given the the car and the logbook which he answered in the affirmative. The agreement dated 12th March, 2013 was produced as PEXB1.
11. It was the evidence of Pw 1 that although the Defendant had agreed to hand to the Plaintiff the house upon signing the agreement, he requested to be given time to relocate. He however refused to vacate the house.
12. In cross-examination, Pw1 stated that he paid the Defendant kshs. 50,000 before the Assistant Chief and Mr. Abdi Hassan. After two weeks they went to the advocate's office in the company of his business partner.
13. It was the evidence of Pw1 that by the time they went to the advocate's office, he had already paid the Defendant Kshs.650,000 and that it is the Defendant who was to give him the transfer documents for the car for signing.
14. Mr. Joseph Muisyo, Pw2, is the advocate who drew the agreement between the Plaintiff and the Defendant. According to Pw 2, the Plaintiff and the Defendant went to his office and told him to prepare an agreement for the sale of the suit property at a consideration of Kshs. 1,300,000.
15. Pw 2 informed the court that he asked the Defendant if he had been paid the full purchase price which he agreed. That is when he allowed the parties to sign the agreement.
16. In cross-examination, Pw 2 stated that he was satisfied that the Defendant had been paid the full purchase price although the agreement shows that he acknowledged having received only Kshs. 50,000 and the car.
17. Pw 2 informed the court that it is true that the agreement states that Kshs. 650,000 was to be paid upon execution of the agreement but during the signing of the agreement, the parties told him that Kshs. 650,000 had already been paid.

The Defendant's case:

18. According to the Defendant, Dw1, the Plaintiff has refused to pay him the balance of the purchase price. The Defendant acknowledged that the Plaintiff paid him Kshs. 50,000 as deposit before the Assistant Chief.
19. It was the evidence of Dw1 that although the Plaintiff gave him the car, he told him that he could only pay him the balance of Kshs. 650,000 before his advocate. That is when they went to the advocate's office. According to Dw1, he told the advocate, Pw2, that he had been paid Kshs. 50,000 for the house and he was to wait for a few days to be paid the balance of the purchase price which was Kshs. 650,000. Dw1 stated that the reason he was given by the Plaintiff as to why he could not pay him the Kshs. 650,000 on that day was because he had foreign currency and he was waiting for the exchange rate to improve.
20. Dw1 stated that after signing the agreement, he expected to be paid Kshs. 650,000 which never happened.
21. In cross-examination, Dw1 stated that he was literate and he knew how to read. The Defendant was then told to read the first part of the agreement in court which he did. Dw1 stated that he read the agreement before he signed it.
22. According to Dw1, he was to be paid Kshs. 650,000 upon "closing" the agreement. It was his evidence that they were to go back to the advocate and prepare another agreement for the balance of the purchase price. Dw1 denied that the advocate, Pw2 told him that the signing of the agreement meant that the entire purchase price had been cleared by the Plaintiff.

Submissions:

23. The parties' advocates filed written submissions. The Plaintiff's advocate submitted that the

- agreement clearly stated that the Defendant had been paid the balance of the purchase price being Kshs. 650,000 and that oral evidence cannot be adduced to contradict a written document. Counsel relied on Section 97 (1) of the Evidence Act.
24. The Plaintiff's counsel also relied on the case of **Openda -Vs- AHN (1984) KLR 208** where it was held that a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller at the time of completing the sale.
25. Counsel submitted that the Defendant was paid the full purchase price before he executed the agreement.
26. The Defendant's advocate did not file his submissions.

Analysis & findings:

27. It is not in dispute that the Defendant agreed to sell his house to the Plaintiff for Kshs. 1,300,000. It is also not in dispute that before the agreement for the said sale was reduced in writing, the Plaintiff paid to the Defendant Kshs. 50,000 and gave the Defendant his vehicle and the log book valued at Kshs. 600,000, leaving a balance of Kshs. 650,000.
28. What is in dispute is whether the said Kshs. 650,000 was ever paid by the Plaintiff.
29. It was the evidence of the advocate who drew the agreement for the two parties, Pw 2, that he asked the Defendant if he had been paid the full purchase price which he answered in the affirmative. That is when he allowed him to sign the agreement.
30. On the other hand, the Defendant stated that he was to be paid the balance of Kshs. 650,000 at a later date. It is on that understanding that he signed the agreement of sale. The Defendant stated that he knew how to read and that indeed he read the agreement before signing it.
31. The conditions in the agreement that was prepared by Pw 2 and signed by both the Plaintiff and the Defendant states as follow:
- (ii) The vendor has taken possession of the said house at the time of signing this agreement.
 - (iii) The buyer has taken over possession of the said motor vehicle at the time of signing this agreement.
 - (iv) The vendor to hand over any document pertaining the said completed house at the time of signing this agreement.
 - (v) The vendor to hand over possession of the said property immediately and
 - (vi) The purchaser to pay the advocate charges for the preparation of this agreement.
32. The signing of the agreement therefore brought to a close the transaction between the parties. The Defendant was supposed to hand over the house and the documents upon signing the agreement. The agreement does not state that there was a balance of the purchase price that was to be paid at a later date.
33. Indeed, considering that the agreement had only those six conditions and the Defendant knew how to read, it is improbable that he could have signed it without insisting that a clause be introduced stating when the balance of the purchase price was to be paid. The agreement is clear that the balance of Kshs. 650,000 was to be paid before the agreement could be executed.
34. It therefore does not matter that the said Kshs. 650,000 was not paid before the advocate and at the time of executing the agreement. The fact that the Defendant executed the agreement was an acknowledgement that he had received the said Kshs. 650,000. That is why he agreed, according to one of the conditions in the agreement, to hand over to the Plaintiff the house unconditionally and the completion documents. If it was otherwise, then the agreement would have stated when the completion was to take place.
35. This position is fortified by the evidence of the advocate who prepared the agreement. The advocate informed the court that he inquired from the Defendant if he had been paid the full purchase price which he agreed. The advocate had no reason to prepare the agreement the way he did if the balance of the purchase price was to be paid at a later date.
36. This court is therefore satisfied that the Defendant signed the agreement dated 12th March, 2013

after he was paid the full purchase price and he acknowledged as much by signing the agreement. The Defendant's assertion that he was to be paid kshs. 650,000 on a date that is not stated in the agreement is a *red herring* meant to misled the court. The Defendant simply wants to earn twice from the sale of his house. The agreement is clear he had been paid fully and was to hand to the Plaintiff the house immediately and unconditionally.

37. For the reasons I have given above, I find that the Plaintiff has proved his case on a balance of probabilities. In the circumstances, I shall which I hereby do, allow the Plaintiff's Plaint dated 20th August 2013 in the following terms:

- a. **An order of specific performance of the agreement of sale dated 12th March, 2013 be and is hereby issued.**
- b. **An order of eviction of the Defendant from the suit property be and is hereby issued.**
- c. **An order of permanent injunction be and is hereby issued restraining the Defendant either by himself and or assigns, agents, employees and successors in title from interfering with the Plaintiff's quiet possession of the parcel of land known as plot No. 124 Watamu.**
- d. **The Defendant to pay the costs of the suit.**

Dated and delivered in Malindi this 4th day of July, 2014.

O.A. Angote

Judge