



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**ELC CIVIL CASE NO. 58 OF 2014**

**CHANJE MUSSOLINI KERA.....PLAINTIFF**

**=VERSUS=**

**JONATHAN FURAHA NGUMBAO.....DEFENDANT**

**AND**

**SHIDA JONATHAN FURAHA.....INTERESTED PARTY**

**J U D G M E N T**

**Introduction**

1. According to the Plaint dated 26<sup>th</sup> March 2014, Plaintiff has averred that the Defendant was the proprietor of land known as portion number 10387, Malindi before he sold it to the him vide an agreement dated 18<sup>th</sup> July 2013.
2. According to the agreement, it was averred, the purchase price was Ksh.5,500,000/-.
3. However, the Defendant failed to furnish to the Plaintiff title documents and frustrated the completion of the agreement.
4. The Plaintiff is claiming for a refund of Ksh.3,300,000 being the amount due and owing from the Defendant.
5. In the Defence, the Defendant averred that it is the Plaintiff who breached the terms of the agreement when he started collecting rent after only paying a deposit of the purchase price; that no completion could have been done after the Plaintiff unequivocally rescinded the agreement and that the agreement of 18<sup>th</sup> July, 2013 is illegal and not enforceable.
6. The Defendant filed a counter-claim for Ksh.418,000 being rent for eleven months from July, 2013 to May 2014 and for vacant possession.
7. The Interested Party, who id the Defendant's wife, averred in her Defence that she is not ready to give a spousal consent because she was not consulted and that the transaction is null and void from the very beginning.

**The Plaintiff's case**

8. The Plaintiff, Pw 1, informed the court that the Defendant's agreed to sell to him the house standing on the suit premises. It was his evidence that they entered into an agreement dated 18<sup>th</sup> July, 2013 in which the purchase price was agreed at Ksh.5.5 Million.
9. The Plaintiff paid to the Defendant Ksh.550,000 being the 10% deposit which amount the

- Defendant acknowledged. It was the evidence of Pw 1 that the Defendant was to pass to him the title deed upon receipt of the said deposit. However the title deed was with a Mrs. Priscilla Mugambi who was holding it as lien.
10. It was the evidence of Pw 1 that he paid to the Defendant a further sum of Kshs.1,450,000 on 26<sup>th</sup> July, 2013 which money the Defendant used to settle the money he owned the lady who was holding the title deed.
  11. A further Ksh.300,000/- was paid to the Defendant's agents and an agreement for the said amount was duly executed.
  12. It was the evidence of Pw 1 that he deposited on the Defendant's account a further sum of Ksh.1,000,000 on 4<sup>th</sup> September, 2013 for the purchase of the suit property.
  13. According to Pw 1, there was a prohibitory order registered against the title deed by the firm of Khaminwa and Khaminwa advocates which the Defendant was supposed to lift before the transfer of the property could be effected in his favour.
  14. The Plaintiff also settled electricity bill that the Defendant owed and the water bill of Ksh.50,000 and 40,000 respectively.
  15. Pw 1 informed the court that the Interested Party, who is the Defendant's wife, was aware of the sale. However, she has now frustrated the agreement by stating that she was not consulted before the agreement of the sale of the house was entered into.
  16. The Plaintiff wants a refund of the money he has paid to the Defendant together with interest because the sale has been frustrated by the Defendant and his wife.

#### **The Defendant's case**

17. The Defendant, Dw 1 agreed that he entered into an agreement with the Plaintiff for the sale of the suit property and received a total of Ksh.3,300,000/-. However, it was his evidence that even before the Plaintiff finished paying the purchase price, he started collecting rent from his tenants.
18. Dw 1 stated that the Plaintiff is entitled to the refund of the money that he paid him.
19. The Interested Party, Dw 2, stated that she only knew about the sale of the house when she was told to sign the transfer document which she refused. It was her evidence that she was not involved in the said sale thus her refusal to sign the transfer document.

#### **Analysis and findings**

20. The Plaintiff produced in evidence the Sale Agreements of 22<sup>nd</sup> March 2014 between himself and the Defendant for the sale of the suit property for Ksh.5,500,000/-.
21. The Plaintiff also produced in evidence the bank deposit slips of Kshs.550,000, 1,450,000 and Kshs.1,000,000/-.
22. The Defendant's agent, Pw 2, testified and acknowledged having received Ksh.300,000/- on behalf of the Defendant.
23. The Defendant has acknowledged receipt of the money paid to him by the Plaintiff amounting to Ksh.3,300,000/-. That is the amount that has been pleaded by the Plaintiff in the Plaintiff.
24. The Plaintiff has proved that the agreement of sale has been frustrated by the Defendant and the interested party. In the circumstances, he is entitled to a refund of Ksh.3,300,000. On the hand, the Defendant has not proved his Counterclaim.
25. For those reasons, I dismiss the Defendants Counter claim dated 22<sup>nd</sup> May 2014 with costs and allow the Plaintiff's claim in the following terms;-

- (a) **The Defendants do pay to the Plaintiff a sum of Kshs.3,300,000/-.**
- (b) **The Defendants to pay to the Plaintiff interest on the said sum at court rates from the date of filing this suit until payment in full.**
- (c) **The Defendants to pay to the Plaintiff the costs of the suit.**

Dated and Delivered in Malindi this 31<sup>st</sup> day of **October**, 2014.

**O. A. Angote**

**Judge**