



Aloo - Suing as the legal representative of the Estate of Francis Okeyo Onyango (Deceased) v Taro (Environment & Land Case 14 of 2021) [2023] KEELC 20206 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20206 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 14 OF 2021
GMA ONGONDO, J
SEPTEMBER 26, 2023**

BETWEEN

**JAMES ONYANGO ALOO - SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF FRANCIS OKEYO ONYANGO (DECEASED) PLAINTIFF**

AND

TITUS ABONGO TARO DEFENDANT

(FORMERLY MIGORI ELC NO. 636 OF 2017)

JUDGMENT

A. Introduction

1. The present suit concerns land reference number Gem/Kajulu/616 measuring approximately four decimal two hectares (4.2 Ha) in area (The suit land herein). The same is located within Homa Bay County.
2. The plaintiff is represented by the firm of GS Okoth & Company Advocates.
3. The defendant is acting in person.
4. Originally, the matter was filed at Kisii Environment and Land Court but was transferred to Migori Environment and Land Court and subsequently to this court on September 22, 2021 for hearing and determination.

B. Summary Of The Parties' Respective Cases

5. On January 26, 2021, the plaintiff, through his Advocates, filed the suit by way of an amended plaint dated December 18, 2020 seeking the orders infra:



- a. A declaration that the agreement dated February 4, 2010 is now null and void ab initio and consequently the same is not enforceable by way of specific performance.
 - b. An order of eviction directed at the defendant removing him and any structures erected and being thereon from land parcel no. number Gem/Kajulu/616 or any portion thereof.
 - c. General damages and or mesne profits together with interest thereon at 12% pa from the date of judgment until payment in full.
 - d. Costs of this suit together with interest thereon at 14% pa from the date of filing suit until payment in full.
 - e. Such further or other alternative relief as this honourable court deems fit to grant.
6. The plaintiff contends that on or about February 4, 2010, with full knowledge of the mental incapability of Francis Okeyo Onyango (the deceased), the defendant entered into an agreement of sale of land whereby the deceased was purported to have sold to the defendant a portion of the suit land measuring two (2) acres in area at a price of Kshs 180,000, which sum the defendant allegedly paid in full. That thereafter, the defendant, without consent of the deceased, entered into the said portion of land, fenced the same, erected semi-permanent buildings and planted trees thereon.
 7. The plaintiff asserted that no consent of the Land Control Board had been obtained by the time the instant suit was filed in the year 2012. That the defendant has refused to vacate the suit land, despite demand being made, and claims specific performance against the defendant.
 8. The plaintiff herein, James Onyango Aloo (PW1), testified on 8th March 2016. He stated, *inter alia*, that the deceased herein was his uncle who had a mental illness. That the defendant took possession of the suit land in 2010 after he entered the disputed sale agreement with the deceased. That parties did not obtain consent of the Land Control Board. That he reported the matter to the area chief and the clan elders who resolved the dispute and the defendant agreed to accept a refund of the purchase price, being Kshs 180,000, but later declined and demanded specific performance. He produced in evidence a search certificate of the suit land, copy of elders' report, a letter from the defendant's advocate dated March 6, 2012, a letter from the plaintiff's advocate dated 20th March (PEXhibit 1 to 4 respectively).
 9. During cross-examination, PW1 asserted that he did not accompany the defendant to the land control board. That the family of the deceased had not been consulted prior to the sale.
 10. PW2 Margaret Atieno Okeyo, wife to the deceased, testified that the defendant purchased a portion of the suit land from the deceased for Kshs 180,000, which the defendant paid. That the deceased had been unwell for a long time. That she executed the agreement at the request of the deceased. That later, the family resolved to refund the defendant the purchase price but the latter declined to accept the same.
 11. On cross-examination, PW2 admitted that she signed to acknowledge payment of the purchase price. That however, she believed that the same was given to cater for treatment expenses of the deceased and not as payment for the portion of the suit land.
 12. The defendant opposed the suit vide a statement of defence and counterclaim dated November 19, 2012, which he later abandoned. He then filed a fresh statement of defence and counterclaim dated June 10, 2022 on June 14, 2022.
 13. In the counterclaim, the defendant averred that on or about February 4, 2010, he entered into a contract for sale and purchase of a portion of the suit land measuring approximately 2 acres from the



- deceased and he paid the full amount of the purchase price upon execution of the agreement. That the deceased used the proceeds of the sale to discharge the suit land which had initially been used to secure a loan at the bank. That the deceased was of sound mind during the transaction as he could remember the details of his bank account, charged title deed and even transacted by himself.
14. The defendant averred that the plaintiff failed to book and attend the land control board meetings thereby breaching the contract. That he has erected his homestead on the subject portion of the suit land and planted trees, flowers, napier grass and crops thereon. Therefore, the defendant sought that the plaintiff's suit be dismissed with costs and judgment be entered for the defendant against the plaintiff thus:
 - a. A declaration that the agreement for sale of the suit land was duly executed by the plaintiff and the defendant is valid.
 - b. An order of permanent injunction restraining the plaintiff, his agents, servants and/or employees from trespassing, further encroaching, disposing, alienating, transferring, leasing and/or in any other way interfering with the portion of the suit land sold to the defendant.
 - c. A declaration that the rescission notice by the plaintiff was null and void and an order of specific performance to compel the plaintiff to complete the sale of the suit property to the defendant.
 - d. General damages for breach of contract, punitive or exemplary damages and costs of the suit and the counterclaim.
 - e. Costs of the suit and the counterclaim.
 - f. Any other relief the honourable court deems just and expedient to grant.
 15. DW1, Titus Abongo Taro (the defendant herein), relied on his statement of defence and counterclaim dated June 10, 2022 and list of documents of even date, Serial Numbers 1 to 9 (DExhibits 1 to 9 respectively). He testified that on February 4, 2010, he purchased a portion of the suit land measuring approximately 2 acres in area at a purchase price of Kshs 180,000 from the deceased.
 16. On cross-examination, DW1 stated that he conducted due diligence before purchasing the said portion of the suit land. That the deceased failed to procure consent of the land control board so as to effect transfer of the said portion to the defendant.
 17. DW2, Elijah Juma Ojwang', relied on his statement dated 14th January as part of his evidence. He stated that he knew the deceased sold land to DW1.
 18. During cross-examination, DW2 averred that PExhibit 1 (DExhibit 1) was drafted at a hotel owned by the deceased. That the same was done in the presence of the area chief, the deceased, PW2, DW2 and others. He averred that the deceased was of sound mind and not sick.
 19. Alloys Otieno Nyariang, the area chief, testified as DW3 and relied on his statement dated February 20, 2023 as part of his evidence. He stated that he signed and stamped PExhibit 1.
 20. In cross-examination, DW3 stated that he knew the deceased for 30 years. That he was of sound mind. That DExhibit 1 (PExhibit 1) was made at the business premises of the deceased in the presence of DW3 and others. He averred that the deceased did not lodge any complaint over the sale of the portion of the suit land during his life time.
 21. On February 27, 2023, the honourable court directed parties to file and exchange submissions.



22. Accordingly, learned counsel for the plaintiff filed submissions dated April 5, 2023 on April 12, 2023 and framed three issues for determination, to wit, whether the agreement for sale is valid, what remedies should be granted in the circumstances and who meets the cost of the suit? Counsel submitted that the deceased was suffering from nervous breakdown due to a stroke he suffered in 1971. That the defendant admitted that it was in fact, the deceased's family that approached him with the intention of selling a portion of the suit land. That therefore, the deceased lacked capacity to enter into a contract for sale of land. Thus, the agreement dated February 4, 2010 is null and void. To buttress the submissions, counsel relied on the case of *African Cotton Industries Limited -vs- Rural Development Services Limited* (2021) eKLR, among other authoritative pronouncements.
23. The defendant filed submissions dated June 15, 2023 and identified three issues for determination thus: whether there was a valid sale agreement between the defendant/counter-claimant and Francis Okeyo Onyango- deceased, whether the defendant/ counter-claimant is entitled to title and ownership of a portion of the suit property and occupation of the same measuring approximately 2 acres and whether the plaintiff should be granted the orders sought. Briefly, the defendant submitted that at the time of execution of DExhibit 1, the deceased was healthy and gave the defendant vacant possession of the portion of the suit land purchased. Thus, the defendant urged the court to grant him the relief of specific performance. To fortify the submissions, reliance was placed on various authorities, including the case of *Wagiciengo vs Gerrard* CA No 49 of 1981.

C. Issues For Determination

24. It is trite law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See *Galaxy Paints Co Ltd vs Falcon Guards Ltd* (1999) eKLR.
25. I have duly considered the entire pleadings, the testimonies of PW1 and PW2 as well as DW1 to DW3 and the parties' respective submissions. So, the following issues fall for determination:
- a. Whether there was a legal, binding and enforceable contract for disposition of a portion of the suit land between the deceased and the defendant herein capable of being enforced;
 - b. What orders can this court issue to meet the ends of justice?

D. Discussion And Determination

26. This court is cognizant of Section 3(3) of the *Law of Contract Act* Chapter 23 Laws of Kenya, which provides that:
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (iii) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.



27. It is not in dispute that the deceased and the defendant herein entered into an agreement for sale of land dated February 4, 2010 (PExhibit 1 and DExhibit 1). Indeed, the said agreement met the threshold as stipulated under Section 3(3) (*supra*) as the same was in writing, signed by both parties and each signature attested by witnesses accordingly.
28. Besides, the plaintiff contends that the contract so executed was null and void as the deceased had a mental illness, information to which the defendant was privy. That the deceased was suffering from nervous breakdown due to a stroke he suffered in 1971.
29. Section 2 of the *Mental Health Act*, Chapter 248 Laws of Kenya, defines "person suffering from mental disorder" as follows; " a person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse."
30. Notably, the plaintiff did not adduce any medical report or expert evidence to buttress the averment that the deceased had a mental illness. That the deceased lacked capacity to enter into the alleged contract.
31. According to DW3, who was the area Assistant Chief and who witnessed the execution of PExhibit 1/ DExhibit 1, the deceased was of sound mind. DW3 testified that:
- “...Francis Okeyo Onyango (the deceased) was not sick. He was of sound mind. He rode a bicycle to his business premises. He signed DExhibit 1. I compared his signature with the one on his national identity card. He thumb-printed DExhibit 1...”
32. The plaintiff further stated that parties failed to obtain the consent of the land control board within the prescribed time. The defendant averred that the same was occasioned by refusal of the deceased to attend land control board meetings, even after the defendant had obtained dates for the same.
33. This court subscribes to the Court of Appeal decision in *Aliaza vs Saul* (Civil Appeal 134 of 2017) (2022) KECA 583 (KLR) wherein the court noted that a distinction must be made between two situations:
- a. Where the Land Control Board in a particular area refuses to give consent for good public policy reasons; and
 - b. Where a seller fails or refuses to apply for such consent.
34. The said Court succinctly stated that:
- “ ...There will be situations in which an application for consent under section 6 will be made but refused for good reasons as articulated in the Act. Then there will be situation in which the seller, as in this case, enters into a sale agreement with a purchaser, receives the full purchase price and gives vacant possession of the land to the purchaser, yet declines to apply for Land Control Board consent. As the prescribed form for applying for Land Control Board consent, form 1 in the Schedule to the Land Control Regulations, 1967, indicates, both the proposed seller and purchaser must sign the application for consent. If the seller decides not to apply for consent, then such consent has not been ‘refused’ within the meaning of section 9(2) of the Act, for the appropriate authority under the Act, the area Land Control Board, has not had an opportunity to consider and grant or refuse consent on the grounds set out in the Act. (Emphasis laid)



35. In the present case, it is evident that the deceased and the defendant entered into a sale agreement dated February 4, 2010 for a portion of the suit land measuring two (2) acres in area at a price of Kshs 180,000. That the deceased received the full purchase price for the said portion. That thereafter, the defendant took possession of the portion and carried out developments thereon.
36. Under cross-examination, PW1 stated that he did not accompany the defendant to the land control board because the family of the deceased was not consulted prior to the sale. This was confirmed by the defendant herein.
37. Clearly, failure to obtain the consent of the land control board so as to effect transfer of the said portion of the suit land was occasioned by refusal of the deceased to attend land control board meetings; see *Aliaza case (supra)*.
38. So, the said sale was valid and enforceable by virtue of equitable estoppel and constructive trust; see *William Kipsoi Sigei vs Kipkoech Arusei* (2019) eKLR.
39. In *Willy Kimutai Kitilit vs Michael Kibet* (2018) eKLR, the Court of Appeal held:
“...the lack of consent of the Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust...”
40. The Court further held that under Article 10 (2) (b) of the *Constitution* of Kenya, 2010, equity as a principle of justice has been elevated to a constitutional principle. That in exercising judicial authority, the courts are required to protect and promote the said principle, among others, in the spirit of Article 159 (2) (e) of the said Constitution.
41. Sections 107 to 109 of the *Evidence Act* Chapter 80 Laws of Kenya provide that he who alleges must prove.
42. Also, it is settled law that the burden was always on the plaintiff to prove his or her case on a balance of probabilities; see *Kanyungu Njogu vs Daniel Kimani Maingi* (2000) eKLR.
43. To that end, it is my considered view that the plaintiff has failed to prove his case on a balance of probabilities. His claim fails.
44. On the other hand, the defendant has proved his counterclaim against the plaintiff on a balance of probabilities.
45. In the counterclaim, the defendant prayed for an award of general damages for breach of contract, punitive or exemplary damages as well as costs of the suit and the counterclaim. Whereas this court is empowered under Section 13(7)(c) of the *Environment and Land Court Act*, 2015 (2011) to award damages, general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, but not general damages; see *Securicor Courier (K) Ltd vs Benson David Onyango & another* [2008] eKLR.
46. Further, the defendant has established that he has acquired 2 acres of the suit land by constructive trust as sought and envisioned in prayer (f) in the counterclaim. Therefore, the plaintiff is hereby ordered to execute all the requisite documents necessary to have the defendant be registered as owner of the portion measuring 2 acres of the suit land, Gem/Kajulu/616. In default thereof, the Deputy Registrar to execute all such necessary documents to give effect to this judgment.



47. A fortiori, the counterclaim dated June 10, 2022 and lodged by the defendant herein on June 14, 2022 hereby succeeds in terms of prayers (a), (b), (c), (e) and (f) sought on the face of the counterclaim-and as stated in paragraph 14 (a), (b), (c), (e) and (f) hereinabove.

48. The plaintiff to bear the costs of the suit and counterclaim.

49. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 26TH DAY OF SEPTEMBER 2023

G.M.A ONG'ONDO

JUDGE

Present

Mr. Bana holding brief for GS Okoth, learned counsel for the plaintiff

Plaintiff- present in person

Defendant- present in person

Luanga Terrence- Court Assistant

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