



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**IN BUSIA**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 5 OF 2015**

**SIMON EROT AJEKO.....1<sup>ST</sup> PLAINTIFF**

**IBRAHIM ETYANG AJEKO.....2<sup>ND</sup> PLAINTIFF**

**= VERSUS =**

**ROBERT OKELLO.....1<sup>ST</sup> DEFENDANT**

**LYDIA AMOIT OTIGIL.....2<sup>ND</sup> DEFENDANT**

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

1. The two Plaintiffs – **SIMON EROT AJEKO** (1<sup>st</sup> Plaintiff) and **IBRAHIM ETYANG AJEKO** (2<sup>nd</sup> Plaintiff) – initially filed this suit in the lower court on 28/6/2010 vide a plaint dated 14/6/2010. At the time, they sued two defendants – **ROBERT OKELLO** (1<sup>st</sup> Defendant) and **LYDIA AMOIT OTIGIL** (2<sup>nd</sup> Defendant) – who they accused of illegal purchase of portion of land parcel No. SOUTH TESO/AMUKURA/140 (“suit land” hereafter). The 1<sup>st</sup> Defendant was said to have purported to purchase the land from its deceased registered owner – ERNEO AJEKO EROTI – while the 2<sup>nd</sup> Defendant allegedly purchased from the widow of the deceased owner – JOYCE AJUTAT AJEKO. The two Plaintiffs are sons of both ERNEO AJEKO EROTI and JOYCE AJUTAT AJEKO.

2. The illegalities attending the purported purchase impelled the Plaintiffs to file this suit seeking, *inter alia*, eviction of the Defendants from the suit land and a permanent injunction to prevent further dealings with the suit land. In a more specific way, the Plaintiffs were seeking the following:

- (a) Eviction form the suit property
- (b) Permanent injunction
- (c) Costs of the suit
- (d) Any other relief the court may deem fit to grant.

3. The matter was later transferred to the High Court where it became HCC No. 51/2010. When Environment and Land Courts were set up, the matter was transferred to the new court where it was

registered as it is now.

4. Only the 2<sup>nd</sup> Defendant responded to the suit. And she did so vide a defence and counter-claim dated and filed on 20/12/2010. In her response, she denied the Plaintiffs claim and dispelled the impression created in the Plaintiff's pleadings which seemed to show that she and the 1<sup>st</sup> Defendant bought different or separate portions of the suit land. It became clear that the 1<sup>st</sup> Defendant had bought a portion from the deceased father of the Plaintiffs but the said father died before effecting transfer to him. Then later on, there developed bad blood between the 1<sup>st</sup> Defendant and the Plaintiffs over the same piece of land. The 1<sup>st</sup> Defendant then asked to be refunded his purchase money in order to leave the land to the family. The Plaintiffs had no money and that is how the 2<sup>nd</sup> Defendant came on board.

5. It appears clear that the 2<sup>nd</sup> Defendant got to know that the 1<sup>st</sup> Defendant wanted to sell his portion so that he could leave the land. Deliberations were then entered into between the Defendants and the Plaintiffs family and an understanding was reached that the 1<sup>st</sup> Defendant could sell the land to the 2<sup>nd</sup> Defendant who would become the registered owner of the portion after succession proceedings were done. The transaction that ensued was conducted solely on that understanding and the 1<sup>st</sup> Defendant sold the land to the 2<sup>nd</sup> Defendant for 75,000/=. The 1<sup>st</sup> Defendant was in possession of the purchased land. He left the land and the 2<sup>nd</sup> Defendant went into possession. She used the land for some time but the Plaintiffs turned against her. They filed this suit to claim the portion.

6. The 1<sup>st</sup> Defendant is not party to the suit now. The Plaintiff failed to serve him and the suit against him was dismissed for non-service. And in the 2<sup>nd</sup> Defendants counter-claim, she claimed ownership of the portion she purchased and asked the court to declare as such or order a refund of the purchase money to her with interests at 26% per annum. She asked also for costs of the suit and interests or other just relief.

7. The Plaintiffs filed a reply to defence and defence to counter-claim on 15/2/2011. The averments of the 2<sup>nd</sup> Defendant both in the defence and the counter-claim were denied.

8. The hearing of the matter started on 12/11/2015. Two witnesses – first Plaintiff (PW1) and his mother (PW2) – testified. It was agreed that the evidence of the 1<sup>st</sup> Plaintiff be treated also as evidence of the 2<sup>nd</sup> Plaintiff, who never testified. The 1<sup>st</sup> Plaintiff said, inter alia, that his late father died on 28/9/2004. His evidence largely reiterated his pleadings. He faulted the agreement of sale between his mother (PW2) and 2<sup>nd</sup> Defendant, saying that his mother was not yet the administratrix of the estate of his late father and therefore had no legal capacity to purport to sell the land. He pointed out also that the parties had not gone to the Land Control Board to get the requisite consent.

9. This witness said that the 2<sup>nd</sup> Defendant was on the land for 3 years. He then confronted her and asked what she was doing there, upon which she said she had bought the land from the 1<sup>st</sup> Defendant but showed a sale agreement between herself and the Plaintiffs own mother. This prompted the 1<sup>st</sup> Plaintiff to ask his mother (PW2) about it, to which the mother said the 1<sup>st</sup> Defendant had taken her to court at Bungoma and the court had asked that the parties try to reconcile. To this effect, the parties went before the area chief to deliberate and the mother was asked to sign an agreement to end the case. She thumb-printed the agreement. The mother is said not to have known that Ksh.75,000 had changed hands and she even became confused when asked about the witnesses shown to have been present.

10. As pointed out earlier, the mother testified as PW2. She said that no succession has been done yet over the estate of her late husband. She also referred to the incident at the chief's office and said that she got to know that money had changed hands between the two defendants for sale of land but she did not witness it herself. She also referred to the case at Bungoma and said she was asked to sign an agreement so that the case could end. She signed the agreement believing it would end the case. She only got to know later that what she signed was a land sale agreement.

11. Both witnesses were cross-examined by Ikapel for the Defendants. From the 1<sup>st</sup> Plaintiff, we got to

know that he knew that it is 1<sup>st</sup> Defendant who sold the land to 2<sup>nd</sup> Defendant. From PW2, we get to know that the area chief told her that the 1<sup>st</sup> Defendant had sold the land to 2<sup>nd</sup> Defendant.

12. The Plaintiffs case was closed on 15/2/2016 and the hearing of the Defendants case started immediately. The 2<sup>nd</sup> Defendant (who is actually the only Defendant now in the case) testified as DW1. Her testimony is in general concurrence with her pleadings. She bought the land, she testified, from 1<sup>st</sup> Defendant who wished to get a refund of his money from the Plaintiffs in order to leave the land to them. The Plaintiffs had no money and a meeting was held involving the Plaintiffs, their mother, 2<sup>nd</sup> Defendant herself and 1<sup>st</sup> Defendant in order to agree on the way forward. At the meeting, it was agreed that the 1<sup>st</sup> Defendant could sell the land to the 2<sup>nd</sup> Defendant, who would become the new owner.

13. It was with that understanding that the parties went before the area local administration to transact the sale. The purchase price was 75,000/= and was paid in two unequal tranches, with Kshs.45,000 paid on 26/1/2008 while 30,000/= was paid three days later on 29/1/2008. All this happened in presence of witnesses from both sides. The size of the purchased land was 1½ acres said to be clearly marked on the ground. The 2<sup>nd</sup> Defendant is said to have gone into possession immediately after purchase. She used the land for a few years but the Plaintiffs forcibly stopped the use. This witness was cross-examined by Etyang for the plaintiffs and upon being asked why she was purchasing land in respect of which succession had not been done, she responded that they all knew succession had not been done but the understanding was that it would be done later and she would get her portion.

14. DW2 and DW3 are relatives and/or neighbours of the Plaintiffs. DW2 in particular is a step brother to the deceased registered owner. The deceased owner was father to Plaintiffs and husband to PW2. DW2 was clear that the deceased owner had sold the land to 1<sup>st</sup> Defendant. He could recall that the 1<sup>st</sup> Plaintiff and 1<sup>st</sup> Defendant fought over the land and 1<sup>st</sup> Defendant decided to leave the land if only he could get a refund of his money. That money was refunded by 2<sup>nd</sup> Defendant, who then became the new owner of 1<sup>st</sup> Defendant's portion.

15. The testimony of DW3 is not much different from that of DW2. Like DW2, he was aware of the sale of land to 1<sup>st</sup> Defendant by the deceased registered owner. Like DW2 too, he witnessed the refund of the purchase money to 1<sup>st</sup> Defendant by 2<sup>nd</sup> Defendant and was aware too that the 2<sup>nd</sup> Defendant went into possession of the land after refunding the money.

16. The final witness – DW4 – was the area assistant chief and he presided over the sale transaction or, if you like, refund of money to 1<sup>st</sup> Defendant by 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant was present and had his reservations about the transaction, but the transaction nevertheless proceeded with concurrence and participation of all others including the 1<sup>st</sup> Plaintiff's mother (PW2). The transaction had a two-fold purpose. First, to vest ownership of the portion in 2<sup>nd</sup> Defendant and, second, to achieve settlement of the case at Bungoma involving 1<sup>st</sup> Defendant and the family members.

17. Hearing over, both sides filed written submissions. The submissions filed contain essentially an overview of the case, with attempted expositions of applicable law to the positions espoused by each side. I have duly considered the pleadings, evidence and rival submissions.

18. It seems to me clear that the Plaintiffs have had great difficulty accepting that their late father sold a portion of his land. According to them, the 1<sup>st</sup> Defendant purported to have bought the land in year 2007, some three (3) years or so after their father's death. This suit itself was filed to contest that position. Unfortunately for the Plaintiffs, they did not prosecute the case against the 1<sup>st</sup> Defendant. They failed to serve him and the case against him was dismissed. The dismissal essentially means that the pre-suit position still remains. And that position was that the 1<sup>st</sup> Defendant had bought the land from the Plaintiffs late father.

19. But even without dismissal, credible evidence availed to court during hearing (see evidence of DW2

and DW3 for instance) point to the sale of a portion of the suit land by the Plaintiffs late father. The defence evidence was given by some witnesses who were either neighbours or close relatives of the Plaintiffs. One of them in fact – DW2 – was a step brother to the Plaintiffs late father.

20. The Plaintiffs case rests on the evidence of close family members. And these members are the Plaintiffs themselves and their mother. One notices an intention on their part to use trickery, deception, and the technicality of the law to advance their case. Their aim is clear: To retain the sold portion of land without refunding the money paid for it. If the court agrees with them, it will be abetting an injustice. And this is so because the evidence availed shows that the Plaintiffs attacked the first buyer intending to evict him from the land. The buyer relented and agreed to leave the land but on condition that his purchase money was refunded. It then turned out that the Plaintiffs could not raise the refund. The 2<sup>nd</sup> Defendant came to their rescue and offered to purchase the portion.

21. It was the Plaintiffs position that the 2<sup>nd</sup> Defendant transacted the sale with their mother yet she had no capacity to do so since she was not the legal representative of her late husband. But the evidence on record paints a different picture. The 1<sup>st</sup> purchaser was 1<sup>st</sup> Defendant and he had bought the land from the Plaintiffs late father. In reality, the 2<sup>nd</sup> Defendant transacted with 1<sup>st</sup> Defendant but as 1<sup>st</sup> Defendant was leaving the land, an understanding was reached and a new arrangement made to include the Plaintiffs mother as the vendor in order to pass on ownership to the 2<sup>nd</sup> Defendant when succession is undertaken. It was as simple as that. But the Plaintiffs try to complicate it first by making it look in their pleadings that the 2<sup>nd</sup> Defendant was buying an entirely different portion and second by making it appear in their evidence that 2<sup>nd</sup> Defendant transacted with their mother (PW2) without first Defendant being in the picture. All this is a contrived stratagem by the Plaintiffs to try and obfuscate issues.

22. I note from the evidence adduced that the 1<sup>st</sup> Defendant and later 2<sup>nd</sup> Defendant were not on the land through trespassory designs on their part. They were there through permissive arrangement first from registered owner for 1<sup>st</sup> Defendant and second in a similar way from the family of the registered owner in case of 2<sup>nd</sup> Defendant (which included the Plaintiffs and PW2). This explains why each of the Defendant was on the land for several years.

23. It would be wrong in law to take the position that the 1<sup>st</sup> Defendants rights/interests did not survive the death of the registered owner. The fact of the matter is that the 1<sup>st</sup> Defendant was in actual possession of the land by the time the registered owner died and his rights remained intact and extant even after that death. And like all other rights and interests, the 1<sup>st</sup> Defendant could contract to sell them and did in fact sell them to 2<sup>nd</sup> Defendant for a consideration of 75,000/= . The inclusion of PW2's name as seller in the agreement was with her consent and served the convenience of leaving the 2<sup>nd</sup> Defendant in the hands of PW2 who, as wife to the deceased owner was foremost in line to succeed his estate. This arrangement was made because the 1<sup>st</sup> Defendant was leaving the scene after the refund of his money.

24. The Plaintiffs cannot be allowed to cause confusion by trying to hide behind the technicality of the law in order to defeat the interest of the second Defendant. I am unable, in light of the foregoing, to accede to the Plaintiffs submission to the effect that “Lydia Otigil (DW1) can pursue for a refund of her Ksh.75,000 from Robert Okello” or that “this counter-claim against the Plaintiff must fail, for they received nothing from Lydia Otigil”. On the contrary, and even though I do not agree with the Defendants on all her legal perspectives on the matter, I feel persuaded to agree with her counsel on the submission that “the Plaintiffs have violated the Defendant's rights to acquisition and ownership of property ...” and that “The Plaintiffs cannot take back the land and keep the Defendant money too. They should give the Defendant her 1.5acres. If the Plaintiffs must keep the land then they must refund the Defendant money”.

25. The upshot, in light of all the foregoing, is that the Plaintiffs have not proved their case on a balance of probabilities against the Defendant. Their case therefore must fail and I hereby dismiss it with costs.

26. Then there is the Defendant's counter-claim. I have already made my position clear. The totality of

the evidence adduced proved her counter-claim well. She is therefore entitled to keep the land or to have her money refunded. And it is the Plaintiffs, not the 1<sup>st</sup> Defendant, who are to refund the money if they want to keep the land.

27. I therefore make a finding that the counter-claim herein is proved. The Defendant is entitled to a refund of her money with interests. She wants the interest to be calculated at 26% per annum. I do not agree with her on this. The interest should be calculated at court rates (12% per annum). Such interest should run from the time Ksh.75,000/= was paid to the time when the refund is made. And as long as the refund is not made, the eye of the law will continue seeing the purchased portion as belonging to the Defendant. The Defendant also gets costs of the suit plus interests.

**Dated, signed and delivered at Busia this 25<sup>th</sup> day of September, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

1<sup>st</sup> Plaintiff: .....

2<sup>nd</sup> Plaintiff: .....

1<sup>st</sup> Defendant: .....

2<sup>nd</sup> Defendant: .....

Counsel of Plaintiffs: .....

Counsel of Defendants: .....