



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC NO. 394 OF 2013

MARKO TOYO ONYONKAPLAINTIFF

VERSUS

INNOCENT CHANIA OKOA..... DEFENDANT

JUDGMENT

The Plaintiff brought this suit against the defendant on 24/9/2013 seeking the eviction of the defendant from all that parcel of land known as LR No. West Kitutu/Bogeka/1769 (hereinafter referred to as “the suit property”) and an injunction to restrain the defendant from continuing with construction of a building thereon. In his plaint dated 24/9/2013, the Plaintiff averred that he was the absolute registered owner of the suit property and that without any authority or consent from him, the defendant entered thereon and commenced the construction of a permanent building.

The Defendant filed a defence and counter-claim against the plaintiff on 20/11/2013. In his defence, the defendant admitted that the plaintiff was the registered owner of the suit property. The defendant contended however that the plaintiff had acquired the suit property fraudulently. In his counter-claim, the defendant averred that he was at all material times in possession of the suit property. He reiterated that the property was acquired by the plaintiff unlawfully and fraudulently. The defendant contended that his parents sold to the plaintiff another parcel of land which was not the suit property. The defendant contended that the plaintiff moved from the parcel of land which had been sold to him to the suit property.

The plaintiff filed a reply to defence and defence to counter-claim in which he reiterated the contents of the plaint and denied the defendant’s counter-claim in its entirety. At the close of the pleadings, the parties agreed on the following issues for determination by the court;

- i. Whether the plaintiff purchased a parcel of land from the defendant’s parents?
- ii. Whether the plaintiff is the registered proprietor of the suit property?
- iii. Whether the plaintiff was registered as the proprietor of the suit property fraudulently?
- iv. Whether the plaintiff altered the location of the parcel of land that he purchased from the defendant’s parents on the survey map?
- v. Whether the Plaintiff is holding the suit property in trust for the defendant?
- vi. Whether the Plaintiff is entitled to the reliefs sought in the plaint?
- vii. Whether the defendant’s counter-claim has merit?
- viii. Who is liable for the costs of the suit and the counterclaim?

When the suit came up for hearing on 25/2/2015 the plaintiff in his evidence gave a detailed account of how he purchased the suit property from the defendant’s parents. The plaintiff stated that apart from the suit property, he did not purchase any other parcel of land from the defendant’s parents, Nyaanda Marao

and Mary Nyaanda (Okoa) who are both deceased. The plaintiff produced in evidence as exhibits; a copy of certificate of official search on the register of the suit property dated 23/9/2013, a copy of the title deed for the suit property in his name dated 26/10/1989, a copy of letter of consent dated 27/4/1989 in respect of the sale of the suit property, a copy of the instrument of transfer of land dated 4/10/1989 through which the suit property was transferred to him and copies of demand letters that were addressed to the defendant through which the defendant was asked to stop interfering with the suit property or risk being sued.

In his defence and in proof of his counter-claim, the defendant gave evidence and called one witness. The defendant stated that his father had sold to the plaintiff a parcel of land which was adjacent to a parcel of land that his father had given him in the year 1988. His said parcel of land was known as LR No. West Kitutu/Bogeka/3605 (hereinafter referred to as “plot No. 3605”). He stated that the parcel of land that was sold by his father to the Plaintiff was along Kisumu – Kisii road while the property which is the subject of this suit is situated along Bogeka – Gesoni road. He contended that the suit property is not the same as the parcel of land that was sold to the plaintiff by his father. He stated that the parcel of land that the Plaintiff purchased from his parents had been developed by the plaintiff with rental houses. He contended that the plaintiff had neither occupied nor laid a claim to the suit property until he (the defendant) commenced construction of a house thereon. He contended that the plaintiff did not acquire title to the suit property lawfully. He claimed that his parents were illiterate and as such it was doubtful if they executed the mutation form that gave rise to the suit property. He termed the plaintiff’s title fraudulent and urged the court to cancel the same.

In cross-examination, he stated that the suit property was a sub-division of the original parcel of land then known as L.R No. West Kitutu/Bogeka/1713 (hereinafter referred to as “plot No. 1713”). He stated that after the sub-division of plot No. 1713, his parents retained a portion thereof that was registered as LR No. West Kitutu/Bogeka/1768 while the other portion known as LR No. West Kitutu/Bogeka/1769 (“the suit property”) was registered in the name of the plaintiff. He stated that when his parents sold land to the plaintiff, he was in school. He confirmed that all necessary procedures were followed before the plaintiff acquired title to the suit property. He contended that although the suit property was registered in the name of the plaintiff, the same belonged to him. The defendant’s witness was his brother, **CHRISANTUS OTERO OKOA (DW 2)**. He told the court that the defendant is his younger brother. He stated that his father and grandmother sold the suit property to the plaintiff.

After the close of the defendant’s case, the parties opted to make closing submissions in writing. Both parties filed their submissions and the same are on record. I have considered the Plaintiff’s claim against the defendant as pleaded together with the evidence that was tendered in proof thereof. I have done the same with regard to the defendant’s defence and counter-claim. Finally, I have considered the parties’ advocates respective submissions and the authorities that were cited in support thereof.

I am satisfied on the material before me that the Plaintiff has proved his case against the defendant on a balance of probabilities and as such he is entitled to the reliefs sought in the Plaint. At the same time, I have found no merit in the defendant’s counter-claim. From the evidence before me, there is no dispute that the plaintiff purchased a parcel of land from the plaintiff’s father, one, Nyaanda Marao and the Plaintiff’s grandmother, one, Kerubo Marao sometimes in the year 1988. The only issue that was disputed was whether the parcel of land that was sold to the plaintiff was the suit property or another parcel of land different and distinct from the suit property. The defendant had contended that his parents had sold to the plaintiff another parcel of land which the plaintiff fraudulently exchanged with the suit property. The plaintiff maintained in his testimony that the only parcel of land which he purchased from the defendant’s parents was the suit property. Neither the defendant nor his witness adduced any evidence of the existence of any other parcel of land that was sold by their parents to the plaintiff. In the circumstances, the only logical conclusion which I can make is that the defendant’s father and grandmother sold only one parcel of land to the plaintiff which is the suit property. The sale of the suit property by the defendant’s father and grandmother to the plaintiff was proved satisfactorily. The next issue that was framed by the parties was whether the plaintiff is the registered owner of the suit property. This should not have been made an issue at all. The defendant had admitted in paragraph 3 of his statement of defence that the plaintiff is the registered owner of the suit property. He did not change his position on the issue at the trial. It is my finding therefore that the plaintiff is the registered owner of the suit property. The issue that

was contested was the legality of the plaintiff's title. The defendant had contended that the plaintiff had acquired title to the suit property illegally and fraudulently. A part from pleading fraud and particulars thereof no evidence was placed before the court in proof the alleged fraud. As the court had held in the case of, **Koinange and 13 others vs. Koinange (1996) KLR 23**, proof of fraud is above a mere balance of probability. I am not satisfied that the defendant met this threshold. As I have mentioned earlier in this judgment, there was no evidence that the defendant's parents sold to the plaintiff any other parcel of land apart from the suit property. In the circumstances, the issue of the plaintiff having exchanged the location of the parcel of land that was sold to him does not arise. Having reached the conclusion that the plaintiff acquired the suit property lawfully, I must answer the issue as to whether the plaintiff is entitled to the reliefs set out in the plaint in the affirmative. The plaintiff has demonstrated that he is the registered owner of the suit property and that he acquired the property in a lawful and procedural manner.

With the disposal of the foregoing issues, I now turn to the defendant's counter-claim against the plaintiff. The suit property was registered under the Registered Land Act, Cap 300 Laws of Kenya (now repealed). Section 27(a) of the said Act provides that the registration of a person as proprietor of land shall rest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 28 of the said Act on the other hand provides among others that the right of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court shall not be liable to be defeated except as provided in the Act and shall be held together with all privileges and appurtenances belonging thereto free from all other interests and claims save for such interests which are shown in the register save for such interests that do not require noting on the register. The foregoing sections of the Registered Land Act are reproduced in Section 24 and 25 of the Land registration Act, 2012. The defendant has not satisfied this court that it has any interest in the suit property which can defeat the plaintiff's registered title over the same. I am alive to the fact that the rights of a registered proprietor of land is subject to any duty which such proprietor may have in relation thereto as a trustee. One of the issues which the parties had framed for determination was whether the plaintiff holds the suit property in trust for the defendant. Trust must be pleaded and proved. The defendant neither pleaded trust nor proved its existence at the trial. I am not satisfied therefore that the plaintiff holds the suit property in trust for the defendant. The defendant had also submitted that the agreement for sale between the defendant's parents and the plaintiff was null and void on account of the fact that the consent of the land control board was not sought and obtained within 6 months provided for in the Land Control Act, Cap 302 laws of Kenya. This submission must fail for three reasons. First, there was no clear evidence placed before the court as to when the agreement for sale between the plaintiff and the defendant's father and grandmother was made to enable the court to determine the period within which the consent of the land control board was to be sought. Secondly, the defendant did not plead the issue of lack of land control board consent. I am of the view that the defendant had a duty under Order 2 rule 4(1) of the Civil Procedure Rules to plead the fact that the plaintiff's title to the suit property was unlawful for want of land control board consent. In the case of, **Abdul Shakoor Sheik vs. Abdul Majid Sheik and 2 others, Court of Appeal, Civil Appeal No. 161 of 1991 (unreported)**, the court stated as follows:

“Pleadings play a pivotal role in litigation. As is stated in Bullen and Leake (12th edition) at page 3 under the rubric Nature of pleadings:

“The System of pleadings operates to define and delimit with clarity and precision the real matter in controversy between the parties upon which the court will be called upon to adjudicate between them. It thus serves two-fold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

In this case, the issue of land control board consent was neither pleaded nor framed as an issue for determination by the court. The third ground on which the defendant's argument about land control board consent fails is the fact that the defendant was not a party to the agreement for sale that his father and grandmother entered into with the plaintiff in respect of the suit property. In the circumstances, the defendant who is not a legal representative of his father and grandmother has no *locus standi* to challenge

the said agreement.

Due to the foregoing, it is my finding that the plaintiff has proved his claim against the defendant while the defendant's counter-claim is not proved. I therefore enter judgment for the plaintiff against the defendant as prayed in paragraph (a) of the plaint dated 24/9/2013. The defendant shall vacate and handover possession of the suit property to the plaintiff within thirty (30) days from the date hereof failure to which the plaintiff shall be at liberty to apply for his forceful eviction therefrom. There shall also be a permanent injunction restraining the defendant by himself or through his agents or servants from trespassing on the suit property. The plaintiff shall have the costs of the suit and the counter-claim.

Signed at Nairobi this.....day of2016

S. OKONG'O

JUDGE

Delivered, Dated and Signed at Kisii this **15th** day of **April** 2016

J. M. MUTUNGI

JUDGE

In presence of

.....for the Plaintiff

.....for the Defendant