REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC NO. 101 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 3 of 2019}

HON. JIMMY NURU ONDIEKI ANGWENYI.....PLAINTIFF

=VRS=

DICKSON OMARI RAYORI (Sued as legal administrator of the estate of

MILKA BOCHERE RAYORI (Deceased).....DEFENDANT

JUDGMENT:

The Plaintiff's claim is for:

> **(a) A declaration that the Plaintiff is a bona fide purchaser for value of all that parcel of land known as ISOGE SETTLEMENT SCHEME/1000 measuring 10.9 Hectares.**
>
> **(b) An order for specific performance against the Defendant to transfer land parcel No. ISOGE SETTLEMENT SCHEME/1000 measuring 10.9 Hectares.**
>
> **(c) Costs of the suit.**
>
> **(d) Any other order this Honourable Court may deem fit to grant.**

In his written statement and evidence in court, the Plaintiff states that the Defendant is the widow and administratix of the Estate of Winston Rayori who died sometime in 1980 after he had sold to the Plaintiff a parcel of land out of ISOGE SETTLEMENT SCEHEME/79 & 80 at an agreed purchase price of Kshs. 75,000/= which he paid for in full so that the property could be discharged from Industrial & Commercial Development Corporation to which the deceased, Winston Rayori had given the property as collateral for loan facilities advanced to him. The boundaries were curved out and the Plaintiff has always confined himself to these boundaries to date. The Plaintiff further states that he paid what he had been told was the loan balance of Kshs. 35,000/= directly to Settlement Funds Trustee Offices on Account of the late Winston Rayori. He further paid an extra Kshs. 134,000/= because the entire outstanding loan turned out to be Kshs. 169,000/=, a fact he discovered later and which the Vendor had not noted. He paid the entire sum to Settlement Funds Trustee save the Kshs. 40,000/= which he gave to the deceased. He was then given possession of the parcel of land he occupies today, a total of 27 Acres which acreage came to be determined when the Title Deeds were issued. This was sale by description.

Initially, they had transacted using the language of 1/5 of the entire land. It is also his evidence that it is the deceased vendor who did the surveying of the land and marked the boundaries with the assistance of his (the Deceased's) surveyors. Since then the Plaintiff has confined himself within these boundaries. But whilst the parties thought the entire land was 100 Acres it turned out to be 132 Acres and therefore the purchased land was now 27 and not 20 Acres. The Plaintiff says that he was not even there when the survey exercise was taking place. When the Title Deeds were issued, the portion occupied by the Plaintiff came out in the name of the deceased's widow Milka Bochere Rayori who is also now deceased despite the Plaintiff having paid to her Kshs. 30,000/= to enable her process the letters of administration and transfer to him his share. He concludes by reiterating the fact that he has always occupied 27 Acres without being questioned nor any interruption and openly since 1980. The dispute only arose after the death of the vendor and after the letters of administration had been issued.

The Defendant (initially his mother who died when this suit was in Court) denied the claim in the Plaint in its entirety and asked the Court to dismiss the same with costs. He also filed a counterclaim for:

> **1. An order declaring the intended sale and transfer of portion of land parcel hitherto known as LR NO. ISOGE SETTLEMENT SCHEME/79, measuring 20 Acres to the plaintiff has since been rendered null and void by the preemptory provisions of Section 6 and 22 of the Land Control Act and thus incapable of enforcement of giving effect.**

2. A declaration that the license and permission to occupy and utilize portion of LR NO.ISOGE SETTLEMENT SCHEME/79, in furtherance of the intended sale and transfer has since determined by the Defendant withdrawing same owing to subversive conduct of the plaintiff and the plaintiff together agents , employees or persons deriving tittle and rights from the plaintiff who are in occupation thereof to be evicted therefrom forthwith, that is , from the suit land now existing as LR NO.ISOGE SETTLEMENT SCHEME/1000.

3. Cost of the suit and interests be borne by the plaintiff.

He states that what the Plaintiff had contracted for was 20 Acres. He says that the Plaintiff was to occupy the portion he occupies today subject to survey being carried out at the 'opportune time'. The Defendant claims that the Plaintiff would want to unlawfully enrich himself by acquiring 7 Acres in excess of the 20 Acres he contracted for. The Defendant DW1 maintains that the Plaintiff owed his deceased father unspecified balance of the consideration and that is why the latter could not have the land transferred to him. The 2nd Defendant's witness, his younger brother, claims that the outstanding balance was Kshs. 25,000/=. In the counter-claim the Defendant says that they required 2 consents of the Land Control Board, one for the sub-division and the second one for transfer and that this was not done. He further says that the deceased's family later withdrew their intention of transferring to him the suit property. The Defendant finally prays for an order of the dismissal of the Plaintiff's case and an order to annul and reverse the earlier contract of selling and transferring to the Plaintiff 20 Acres out of L.R. No. ISOGE SETTLEMENT SCHEME.79. He also seeks costs of the suit and that of the counter claim.

Under Section 3 (3) of the Law of Contract Act:

(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

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

with the following Proviso:

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.**

The above proviso has been repeated under sub-section (4)

(4) Subsection (3) shall not apply to a contract made in the course of a public auction by a licensed auctioneer within the meaning of the Auctioneers Act **nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.**

Under Sub-Section (5)

(5) The terms of a contract may be incorporated in a document either by being set out in it or by reference to some other document.

There was a valid agreement between the parties to sell the land in question and one of the terms of this agreement was that the Plaintiff pays the sum of Kshs. 75,000/=. He ended up paying on behalf of the Deceased the sum of Kshs. 169,000/= to the Settlement Funds Trustee and Kshs. 40,000/= directly to the Deceased (Vendor), a total of Kshs. 209,000/= and a further Kshs. 30,000/= to the Vendor's wife meant to facilitate the Succession Cause. But the Deceased's wife caused the Title Deed, approximately 27 Acres, to come out in her name.

The Defendant's witnesses had the sense of the agreement alright by saying the parties entered into a valid agreement in their evidence in chief, and as a result, a valid and enforceable contract came into existence. Save that the same was not concluded, Section 3 (3) of the Law of Contract Act does not therefore arise for Decision. From the evidence of both parties, for over 32 years since 1980 when the Agreement was entered into and the Plaintiff took possession of the suit land, to the time the Vendor died in 2012 there were no complaints from either side yet the Plaintiff was occupying the 27 Acres he claims to have bought. Even in 2013 when the Vendor's wife took out letters of administration with the suit property falling as part of the Estate the 2 parties co-operated, with the Plaintiff shouldering the burden of paying for the process of probate. When the confirmation of Grant was issued, the land was divided into more than 1 portion with one Title Deed for 27 Acres issued and the other ones for the balance of 105 Acres. The Defendant cannot now be heard to say that the Plaintiff's portion was supposed to be 20 Acres. Why then didn't the second Title Deed come out measuring 20 Acres yet it was the Defendant's family and not the Plaintiff which was in control of the process save for the expenses. The 27 Acres happened to be what the Plaintiff was all along occupying. This cannot be a coincidence.

The Defendant and his brother, Henry Miregwa have testified that the Plaintiff owed their Deceased father some balance of the purchase price which the latter claims was Kshs. 25,000/= and the former says he did not know how much it was yet he testified that he was the elder brother who understood the transaction more than any other member of the family. The two went ahead to claim that they refused to transfer the suit land to the Plaintiff because of the "outstanding balance". Nothing can be further from the truth. Firstly, the Plaintiff gave unchallenged evidence that he paid a total of Kshs. 209,000/= in the lifetime of the Vendor and a further 30,000/= for Succession purposes, far above the agreed consideration of Kshs. 75,000/=. Secondly, nowhere have I come across any letter from the family of the Defendant demanding for the balance of the purchase price. The only letter (of protest from the family is the letter dated 10/10/16 from the firm of Wambasi & Co. Advocates purely on the issue of acreage and with not a single mention of the balance of the purchase price. Not even any implication of the same. And this came long after the Vendor's demise. The other letter and which speaks volumes is the one dated 6/11/1975 authored by the Defendant herein on behalf of his mother, his 9 siblings and himself addressed to the chairman of the Land Control Board, Kisii which was written in the lifetime of the Deceased Vendor. It is in the Defendant's bundle of Documents at page 39. The same reads:

> ***"We have learned with much concern that our father Councillor Winston Rayori Obara, who is the owner of the above piece of land (PLOT NO. 79 ISOGE SETTLEMENT SCHEME), has entered into a Sale Agreement to sell the same without our consent.***
>
> ***On behalf of my 5 brothers and 4 sisters, my mother and myself as the eldest son are writing to protest and oppose the sale of the said land.***
>
> ***We have lived on this land since the land was allocated over 14 years ago and indeed some of us were born there. We have no other home therefore where we can settle should this transaction go through.***
>
> ***We pray and appeal to your Board not to allow the transaction of the said piece of land in whole or part thereof. We look forward, Sir, to your kind assistance in the matter and trust you will hear our petition.***
>
> ***Yours faithfully,***
>
> ***Dickson Omari Rayori – Eldest Son.***
>
> ***Mrs. Milcah Bochere Raroyi – Mother."***

In a nutshell the authors admit that they have learned that the Deceased Vendor had indeed entered into a sale agreement to sell the suit land to which they were opposed. They were now appealing to the Land Control Board not to grant consent to their father to sell the land as they claimed it was their only land.The only invariable interpretation to this letter is that the Defendant and his mother and siblings were opposed to the sale right from the inception of their father's intention to sell the same. Hence the hostility now that their father is deceased.

Did the Defendant and his siblings know what acreage their father had sold to the Plaintiff?

The answer to this question is to be found in the undated letter from Arch Surveys to the Rayori family, I believe written early 2017. The Rayori family is of course the Defendant, his late mother and his siblings. The Surveyor has responded to the Defendant's request for survey work which was carried out on 27/1/2017.

> REF: ***"SURVEY REPORT FOR PARCEL NO. ISOGE SETTLEMENT SECHEME NO. 1000."***
>
> The same reads as follows: -
>
> **"Following your request to assist in determining the acreage of the above mentioned parcel of land, we carried out the exercise on 27th January, 2017.**
>
> **Observations:**
>
> **(i)** The land is bounded by the two roads, one on the northern side and the other on the other on the southern side.
>
> **(ii)** The other edges are fenced with barbed fence that have since intertwined with live fence.
>
> **(iii)** The land has a permanent homestead compounded from the northern side.
>
> **(iv)** The land is under tea farming grazing area and subsistence farming in some part.
>
> **Findings**:
>
> Using a hand held G.P.S. receiver, the measurements were and the following deductions was made: -
>
> - The acreage of the parcel of land is 10.5 Hectares.
>
> Kindly find the attached drawings showing the configuration of the land.

Onyango N. Raymond

Arch Surveys - Kisii Branch"

The Report is on the acreage of ISOGE SETTLEMENT SCHEME NO. 1000 which the Plaintiff claims against the Defendant, it was found by the Defendant's own surveyor to be 10.5 Hectares which is approximately 27 Acres. From the Report there was a road on the northern side of the land clearly demarcating it from the other larger portion of the land. It was also shown to be fenced with barbed fences intertwined with live fences on the other 2 edges. It had a permanent homestead compound on the northern side and under tea bushes, a grazing area and subsistence farming was carried thereon.

This was a survey carried out on the instructions of the Defendant, his mother and his 6 siblings. This makes this Court to arrive at the inescapable conclusion that the Defendant and his people did not know how much their late father had sold to the Plaintiff. The survey instructions served as a fishing expedition particularly after they learnt that their land was bigger than they all along thought, by a whole 32 Acres.

This Survey was carried out on the instructions of the Defendant and his mother's family. This is a clear indication that the Defendant did not know what their father had sold to the Plaintiff. I cannot understand why the Defendant did not attach to this letter the drawings attached to the same showing the configuration of the land. Why were these documents not produced in court? Could they be prejudicing the Defendant's case?

This leads us to the mutation forms produced under the list of documents by both parties which also show parcel number ISOGE SETTLEMENT SCHEME/1000 as 10.9 Hectares which is 27.25 Acres. This confirms the Plaintiff's case.

The Defendant and his siblings can therefore not and have no mandate to rewrite what their father had agreed with the Plaintiff decades ago. If all along they, including their late parents also knew the land allocated to them to be 100 Acres 1/5 of which was sold to the Plaintiff are they ready to surrender the 32 Acres over and above to the allocating authority? I also believe the Plaintiff's evidence that in all settlement schemes, any area that was either riparian, marshy, swampy or rocky the same was not considered in the measurements. It was considered unproductive and therefore inconsequential. The Plaintiff is on record as having testified that a big chunk of the land sold to him was rocky just as that of the Defendant.

In the minutes of 28/7/2018 by the Defendant's family produced in court by the Defendant, the family thanked the Plaintiff for having contributed nearly Kshs. 200,000/= required for the survey of the whole piece of land registered as Plot No. 79 at ISOGE SETTLEMENT SCHEME. This corroborates the Plaintiff's evidence that he had indeed paid the Kshs. 169,000/= required to offset the loan. I will not buy that the same was for survey. It would be more accurate to say that their father entered into an agreement with the Plaintiff and that the Plaintiff overpaid the Deceased. Even today, Kshs. 200,000/= is too much for the survey of a 132 Acre land. This also negates paragraph 19 of the Defendant's Defence and Counterclaim. Parties are bond by their pleadings.

The minutes of the Defendant's family held on 28/7/2018 at page 45 of the Defendant's Bundle talks of a report as follows: -

> ***"2. Records and documents from the Land Office/Settlement Trustee in Nyamira revealed that the late Mzee Rayori had entered into an agreement to sell 20.0 Acres of land. After getting the approval of the District Land Board, Hon. Angwenyi proceeded to hive off a piece of land of undetermined measurements and fenced it off around 1980.***
>
> ***3. The survey revealed that the piece of land measured 27.0 Acres and not 20.0 Acres approved by the Land Board.***
>
> ***4. The 27.0 Acre land is currently registered in the name of the Trustee (Mama Milkah) after sub-dividing the other portion to her children and was desirous of quick processing of documentation to release the 20.0 Acres to Hon. Angwenyi and retain the rest for her subsistence activities."***

It is also attributed to the Plaintiff that he said in the meeting that he was not sure of the total acreage of the land he fenced off as his own. He is also quoted to have said that "although the records show that the late Mzee sold him 20.0 Acres, he was entitled to more than that because part of the land lies on the hill side." The Plaintiff disowned the words attributed to him in court. I would have expected the Plaintiff to have signed these minutes. Or in the alternative the same should have been followed with a Demand Letter. If indeed the Plaintiff was entitled to 10 Hectares out of the entire 132 Acres which translated to 8 Hectares how come that in the mutation forms submitted to the lands office none of the portions hived out of the 52 Hectares measures 8 Hectares? What I find in the mutation forms by both parties is:

Parcel No.	**Acreage (by Hectares)**
988	**7.0**
989	**7.0**
990	**7.0**
991	**7.0**
992	**6.6**

993 1.75

994 1.75

995 1.75

996 0.60

997 0.60

998 0.40

999 0.40

1000 10.90

52.75 = 131.875 Acres

If we were to believe the Defendants' evidence is the 8 Hectares (20 Acres) that the Plaintiff had contracted for with his deceased's father not missing in the mutation forms? This gives credence to the Plaintiffs' evidence. The Defendants' Surveyors' Report also shows that what the Plaintiff has occupied all this time is the 8 Hectares he claims in this suit.

I do not also believe the claim that the Plaintiff was a Licensee under prayer No. 2 of the Counter claim yet all the letters from the Defendant talk of a sale agreement between the Plaintiff and the Defendant's father. As I have said above, the Defendant herein together with his mother and siblings were all along not for the sale of the land by their father to the Plaintiff. They never said they were against the licensee. The Sale took place and no one stopped the sale and those who opposed the sale now feel it is the time to hit back.

This court cannot allow this.

In a similar case, the case of ***Charles Kangayia v Alfred Musavi & another [2020] e KLR*** **Kakamega ELCA Case No. 14 of 2020 Judge N.A. Matheka held that:**

> ***"……..The appellant's father had put the respondents' father into possession of the suit property with the intention that he was to transfer the property purchased to them and as such, a constructive trust had been created and the appellant could not renege in 2009 by demanding the balance at market value. I come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable. The respondents in the instant case are beneficiaries of the estate of the buyer the late Timona Amukubi. The appellant's father all along acted on the basis and represented that the respondents were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention……."***

I must also express my displeasure with the very unfair comments used by the Defendant to describe the Plaintiff as greedy when for sure it is not in dispute that the Plaintiff came to the rescue of the family land of 132 Acres by paying the entire loan when they were unable to redeem it. He even paid more than double the agreed consideration without demanding an extra inch of the land.

In view of the Defendant's owning up and admitting that there was an Agreement between his father and the Plaintiff and that Kshs. 200,000/= changed hands between the two, I am persuaded to conclude that the Estate represented by the Defendant holds the property known as Land Parcel No. ISOGE SETTLEMENT SCHEME/1000 in trust for the Plaintiff.

In conclusion therefore, my Judgment is as follows:

1. I dismiss the Defendant's counterclaim with costs

and

2. I award Judgment in favour of the Plaintiff as follows:

   (a) A declaration that the Plaintiff is a bona fide purchaser for value of all that parcel of land known as ISOGE SETTLEMENT SCHEME/1000 measuring 10.9 Hectares.

   (b) An order for specific performance against the Defendant who is hereby ordered to transfer land parcel No. ISOGE SETTLEMENT SCHEME/1000 measuring 10.9 Hectares to the Plaintiff in default of which the Land Registrar, Nyamira do rectify the Register in respect of land parcel No. ISOGE SETTLEMENT SCHEME/1000 to read the name of the Plaintiff as proprietor.

Since costs follow the event and in view of the fact that the family of the late Winston Rayori has paid the good treatment accorded to them with disgrace, I will award the costs of this suit in addition to those of the counterclaim to the Plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF FEBRUARY 2022.

MUGO KAMAU

JUDGE

<u>In the Presence of:</u> -

Court Assistant: Sibota

Plaintiff: Mr. Ndege holding brief for Mr. Soire

Defendant: Ms. Opundo