



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 70 OF 2013.

**ABRAHAM GINA ADAMS (Suing as the Administrator of the estate of the late
GEOFFREY ADAMS OGWA.....PLAINTIFF/APPLICANT**

VERSUS

JAMES OUMA NATOLIODEFENDANT/RESPONDENT

J U D G M E N T

ABRAHAM GINA ADAMS (Suing as the administrator of the estate of the late **GEOFFREY ADAMS OGWA**) hereinafter referred to as the Plaintiff, through the plaint dated 27th August, 2013 sued **JAMES OUMA NATOLIO**, hereinafter referred to as the Defendant, for the transfer of land parcel Bunyala/Bulemia/2678, costs and interests.

The Plaintiff avers that he obtained grant of letter of administration of his late father's estate on 3rd June, 2013. That his late father, had through an agreement of 10th March, 1991 bought a portion of land measuring 2.4 hectares out of land parcel 2242/LCR 218/Bulemia from the Defendant. That the portion was later registered as Bunyala/Bulemia/2678 which his late father took possession of, settled on and buried relatives there. That the Defendant has refused to transfer the said land to the Plaintiff and hence this suit.

The Defendant filed a statement of defence dated 24th September, 2013 denying the Plaintiff's claim. The Defendant averred that the plaint does not disclose a reasonable cause of action and further that the suit is scandalous, frivolous and an abuse of the process of the court. The Defendant indicated at paragraph 7 of the defence that he would raise a preliminary objection on a point of law to have the suit struck out and or dismissed.

Mr. Makokha and M/S. Ashioya advocates appeared for the Plaintiff and Defendant respectively, during the hearing. The Plaintiff testified as PW 3 and called three witnesses, namely James Omondi, John Ouma and Alex Olaba Wanzala who testified as PW 1, PW 2 and PW 4 respectively. The Defendant testified as DW 1 and called Michael Ogada, Patrick Lumumba and Geoffrey Ogaba, who testified as DW 2, DW 3 and DW 4 respectively.

SUMMARY OF PLAINTIFF'S EVIDENCE.

1. That the Plaintiff is a son of the late Geoffrey Adams Ogwa who died on 17th May, 2006 and for whose estate he is the administrator.
2. That the Plaintiff was 18 years old when his father died. That when preparing to file a succession

Cause, his brother in law (PW 1) handed to him land sale agreement dated 10th March, 1991 for parcel 2242/LCR 218/Bulemia, mutation forms dated 13th November, 1991 and several other documents that forms part of list of documents dated 27th August, 2013. That from the said documents, the Plaintiff discovered that the late Geoffrey had bought the suit land from the Defendant.

3. That the late Geoffrey Adams Ogwa had taken possession of the portion he acquired from the Defendant under the agreement dated 10th March, 1991. That the late Geoffrey had built a home on the suit land that neighbored that of the Defendant and buried his relatives there, including his late wife, Regina Anyango in 1994, and late daughter Veronicah Akumu in 1995.

4. That in 2004, the late Geoffrey started ailing and left the suit land to stay at his mother's home which is about 5 km away, where he later died in 2006 and was buried in accordance with the Muslim faith.

5. That after the death of the late Geoffrey, the houses he had constructed on the suit land collapsed with time. The Defendant then started claiming the suit land making the family of PW 1, who had been using, it to stop working on it in 2009.

6. That in 2013, the plaintiff received a notice from the Land Registrar, addressed to the late Geoffrey on the Registrar's intention to remove the caution to pave way for a transfer. The Plaintiff filed an objection to the removal of the caution. The Plaintiff then filed Busia H.C. Succession Cause No. 24 of 2013 and was appointed administrator of the late Geoffrey's estate. He then filed the current suit as he has a duty as an administrator under the Law of Succession Act to collect the assets of the estate and account to the court.

SUMMARY OF DEFENDANTS EVIDENCE.

1. That Defendant did not enter into a written agreement with the late Geoffrey Adams Ogwa over sale of land. He however said that he had a gentlemen's agreement that he would sell him one acre for Kshs.30,000/= out of the portion he would inherit from his father's estate .

2. That the late Geoffrey paid him a deposit of Kshs.5,000/=. The Defendant allowed the late Geoffrey to take possession of the one acre. The late Geoffrey was to pay the balance during the distribution of the estate so that an acre of the land could be subdivided and transferred to him directly, but he failed to pay. The Defendant therefore got registered with the whole of his portion being Bunyala/Bulemia/2678.

3. That after the late Geoffrey used the land for two years without paying the balance, the Defendant asked him to vacate from the land but he declined demanding refund of Kshs.5,000/= he had paid. The Defendant declined to refund the Kshs.5,000/= and the late Geoffrey took the matter to the Provincial Administration using forged documents to compel the Defendant to transfer the land to him. The Defendant stated that he resisted the pressure.

4. That in May, 2004, the late Geoffrey approached DW 3 to talk with DW 4 to purchase the portion of land he (the late Geoffrey) had purchased from Defendant claiming that the Defendant had signed a document denouncing any claim over that portion. That DW 4 paid the late Geoffrey Kshs.500,000/= as purchase price but when he went to the Defendant for the transfer, the Defendant denied having signed the disclaimer document.

5. That the late Geoffrey agreed with DW 4 that he would vacate from the land on the understanding that he would not be pursued for the money received. Thereafter DW 4 and the Defendant entered into a fresh sale agreement over the said portion.

SUMMARY OF THE PLAINTIFF'S COUNSEL'S SUBMISSIONS.

1. That the Plaintiff, as administrator of the late Geoffrey's estate, had a duty to collect and preserve the assets of the estate in accordance with the Law of Succession Act, chapter 160 of Laws of Kenya. The

late Geoffrey had bought an interest over Bunyala/Bulemia/2678 during his lifetime which is now in the names of the Defendant, but died before he could have the interest transferred to his names and hence this suit.

2. That though Order 37 of the civil Procedure Rules contemplates claims of this nature to be commenced through originating summons, the Plaintiff foresaw a contest in this matter and initiated it through a plaint and in view of Article 159 (d) of the Constitution, the pleadings as filed are proper.

3. That the evidence of PW 2 and PW 4 confirms the contents of document number 6 in the Plaintiff's list of documents in accordance with Section 66 (e) of the Evidence Act as they were participants in the deliberations of 24th April, 1992. The document shows that a committee appointed by the Chief Bunyala to listen to the dispute between the Defendant and the late Geoffrey over land parcel '**2678 Bulemia Bunyala West**' had awarded the land to the late Godfrey. The committee also found that the late Geoffrey was yet to pay the Defendant the outstanding balance of Kshs.794/=.

4. That the documents listed as number 12 and 14 on the Plaintiff's list of documents and dated 5th February, 2002 and 5th April, 2013 respectively, confirms that the late Geoffrey had lodged a caution over the suit land before he died.

5. That the evidence of the defence confirms that indeed there was a land sale agreement between the late Geoffrey and Defendant pursuant to which, the late Geoffrey took possession of the suit land.

6. That the Defendant conceded having received some payment from the late Geoffrey over the sale agreement and is yet to refund the same and that orders of specific performance should issue.

SUMMARY OF THE DEFENDANT'S COUNSEL'S SUBMISSIONS.

1. That no evidence was adduced to show that the Defendant was at any time the registered owner of land parcel Bunyala/Bulemia/2242. The Defendant could therefore not have made a valid sale agreement over that parcel with the late Geoffrey.

2. That the agreement of 23rd March, 1991 if at all it existed, was void and amounted to intermeddling with the estate of a deceased person, contrary to Section 45 of the Law of Succession Act Chapter 160 of Laws of Kenya.

3. That Section 82 (b) (ii) of the Law of Succession Act does not allow disposition of immovable property by the administrator until after the grant is confirmed and therefore any sale agreement that may have been there between the late Geoffrey and Defendant over Defendant's late father's land was in contravention of the law. The counsel referred to the Court of Appeal decision in **Simiyu -vs- Watambamala (1985)eKLR where Nyarangi Ag J.A** stated.

“the mere anticipation the land would devolve on the respondents didn't confer on them any rights on the land.....”

to support their contention that the Defendant had no locus standi to enter into a land sale agreement with the late Geoffrey over land that was not in his names. The counsel added that under section 108 of the Evidence Act, the burden to prove that the late Geoffrey had lawfully bought the suit land lay on the Plaintiff and that he had failed to discharge that duty.

4. That the copies of the mutation forms showing that parcel 2678 was hived from parcel 2242 were not certified by the Registrar and hence are inadmissible under Section 65 of the Evidence Act.

5. That as there was no written agreement over sale of Bunyala/Bulemia/2678, no suit can be based on such a contract as it would be in contravention of Section 3 (3) of the Law of Contracts Act.

6. That the agreement of 10th March, 1991 had an alteration adding figure “2678” which was not countersigned and hence unreliable.

7. That the sale agreement being over an agricultural land was void as no consent was obtained from the Land Control Board as required under the Land Control Act, Chapter 302 of the Laws of Kenya.

8. That possession of the suit land by the late Godfrey was with the Defendant’s licence and therefore did not confer any proprietary interest on him. Furthermore, the entire period of possession was not enough to confer the late Geoffrey with prescription rights over the suit land.

9. That the act of the late Godfrey of moving out of the suit land in 2004 shows that he had no further interest over the suit land and that was why he was not buried there.

10. That an order of specific performance is not available in favour of the Plaintiff as the agreement was invalid. The counsel referred to ***Chitty on Contract, 30th Edition volume 1*** where it states; ***The jurisdiction to order specific performance is based on the existence of a valid and enforceable contractit will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable .”***

The counsel also referred to the following three cases;

- a. ***Gitanga Mwaniki & Another -vs- Annunciata wiathira Kibue [2013]eKLR.***
- b. ***Fiat Kenya Ltd –vs- Ali Juma Robie [1973]E.A. 11.***
- c. ***Dulu Lawo -vs- Lydia Wangui Kamau & Anor. [2013]eKLR.***

11. That the Defendant had taken possession of the suit land as confirmed by DW 2 who said he cultivated on it from 2005 to 2010 on request of DW 4. That the court should make a finding that the Plaintiff had acknowledged that the suit land did not belong to his deceased father.

12. That the fact that the late Geoffrey was buried next to his father about 5 KM away and not on the suit land is an indication that he had relinquished all interest over the suit land.

13. That specific performance, as an equitable remedy, is not available to the plaintiff as the balance of the purchase price stated to be Kshs.794/= in the document dated 24th April, 1992 was not paid. That the sale agreement was not valid as the Defendant did not have a confirmed grant to distribute his father’s estate. That the agreement had been frustrated, and counsel referred the court to the Court of Appeal case of ***Charles Mwirigi Miriti –vs- Thananga Tea Growers Sacco Ltd., & Anor [2014]eKLR*** where the court held as follows;

“.....based on the foregoing we find that the agreement was not capable of being enforced through specific performance This is because specific performance is based on the existence of a valid and enforceable contract”

14. That this suit was statute barred and contrary to section 7 of Limitation of Actions Act Chapter 22 of Laws of Kenya that requires actions for recovery of land may not be commenced after the expiry of 12 years from the date the right accrued. That taking it that the time started running from the date of the agreement, being 10th March, 1991, the twelve years lapsed in March, 2003. The counsel referred to the Court of Appeal decision in ***William Gathui Murathe –vs- Gakuru Gathimbi 1998 (eKLR)*** where the court held that;

“.....Section 7 of the Limitation of Actions Act, provides that(an action to recover land) may not be brought after the end of twelve years from the date on which the right accrued. This means that the Appellant having bought and having been registered as the proprietor of the suit land and thereby claiming ownership in the suit land, could seek to recover it from the Respondent, but only if he did so within twelve years after he accrued the suit land.”[emphasize mine]

That the late Geoffrey was barred from instituting any legal action against the suit property after 2003 to the time of his death and that the Plaintiff, as administrator of his estate, is equally barred as he can only enforce what the late Godfrey could lawfully have enforced.

15. That the Plaintiff's suit lacks merit and the prayers sought cannot be awarded and therefore the suit should be dismissed with costs.

Having perused the pleadings filed herein, the following are the four main issues for the determination of the court.

1. Whether or not there was a land sale agreement between the late Godfrey and the Defendant and if so, its terms.
2. Whether the late Godfrey acquired any defined rights over the suit land under the agreement.
3. Whether the late Godfrey had performed all his obligations under the agreement and if so, whether specific performance as a remedy was available to him.
4. Whether the Plaintiff, as administrator of the late Godfrey's estate is entitled to the orders sought.

CONCLUSION.

1. That from evidence presented by both the Plaintiff and the Defendant, it is obvious that there was an agreement of sale of land between the late Geoffrey and the Defendant. This is discernable from the evidence of PW 1, PW 3, and DW 1 and the documents dated 10th March, 1991, 10th May, 1996, 24th April, 1992, 30th June, 1996, 1st June, 2002 and 29th October, 200, among others in the list of documents dated 27th August, 2013 filed by M/S. Ario & company advocates, for the Plaintiff but erroneously indicated as Advocates for the Defendant. That what is however not clear is the date of the initial agreement and whether it was in writing as claimed by the Plaintiff or a gentlemen agreement as claimed by the Defendant.

2. That under section 3 (3) of the Law of Contract Act, the suit for disposition of land cannot be commenced unless the contract under which the suit is based is in writing, signed by the parties and their signatures attested by a witness who was present when the contract was signed. Though the Defendant has consistently denied having signed any of the documents presented by the Plaintiff in these proceedings, including the one dated 10th March, 1991 and the disclaimer dated 10th October, 2004, there is nothing before this court to show what action the Defendant took, like reporting to the police when he got to know of their existence for investigations to be carried out with a view of prosecuting the late Geoffrey or any other person found culpable in relation to the making of those documents. The Defendant only concedes receiving Kshs.5,000/= out of what he stated was the agreed purchase price of Kshs.30,000/= for one acre. The Defendant, unlike the Plaintiff did not avail any document to confirm that the purchase price was Kshs.30,000/= and that he had only received Kshs.5,000/=.

3. That the document dated 10.3.1991 that was availed by the Plaintiff indicates that the purchase price was Kshs.14,000/= but Kshs.15,400/= had been paid in three instalments of Kshs.5,700/=, 1200/=, 1100/=, and 7,400/=. The dates for the payments are not indicated. This shows that, if there was a written sale agreement, then it must have been of a date before 10th March, 1991. The court cannot work on conjecture or assumptions but on evidence that has been availed. The only conclusion that the court can come up to from the evidence availed by both parties is that the initial agreement between the late Geoffrey and the Defendant was verbal. That by the time the late Geoffrey and the Defendant decided to reduce the transaction between them into writing, vide the document of 10th March, 1991, the amount of the purchase price paid was Kshs.15,400/=. The agreed purchase price for the 2.4 hectares out of parcel 224/LCR/218 Bulemia was indicated in the document as Kshs.14,000/=. The changes in the purchase price captured in the documents dated 24th April, 1992 indicates that the Defendant demanded an extra Kshs.10,000/= from the late Geoffrey out of which the elders found that he had been paid Kshs.9,206/=. through provision of building materials leaving a balance of Kshs.794/=. This document dated 24th April, 1992 contains the finding of the Chief's Committee and cannot be said to reflect the agreement between the late Geoffrey and Defendant.

4. That having found as in (2) above, the court finds that the late Geoffrey took possession of the land he was buying with the consent of the seller, who is the Defendant herein. The land was a portion parcel 2242/LCR 218/Bulemia, as described in the document dated 10th March, 1991. Had the late Geoffrey taken possession without the Defendant's consent, the Defendant or any of the other persons with beneficial interests over the parcel of land would have taken steps to stop him. The Court therefore finds that though the document dated 10th March, 1991 was ideally meant to be an acknowledgement of the payments of the purchase price received by the Defendant, it contains details like the purchase price, the parcel number, amount paid and purpose of the payment in addition to stating that the purchaser was at liberty to take possession and carry out developments on the portion. These are details one expects to find in a sale agreement. The document therefore amounts to a written sale agreement between the late Geoffrey and the Defendant over sale of a portion of land measuring **'2.4 hectares (6 Acres)'** out of parcel No.224/LCR 218/Bulemia at Kshs.14,000/= and acknowledgement of full payment of the purchase price by the Defendant.

5. That at the time the agreement dated 10th March, 1991 was made, the suit land as known today, Bunyala/Bulemia/2678, did not exist. The suit land's register was subsequently opened on 13th November, 1991 as shown in the copy of the certificate of official search in the Plaintiff's list of documents and copy of the title deed annexed to the affidavit of the Defendant (James Ouma Natolio) sworn on 26th September, 2013. There is however no doubt that the suit land came from the subdivision of Bunyala/Bulemai/2242, which had been described in the mutation forms of 13th November, 1991 as 2242/Bulemia/Bunyala West. The court finds that parcel is the same one described in the sale agreement dated 10th March, 1991 with the difference being the acreage. It is however not clear who inserted the figure '2678' on the agreement dated 10th March, 1991 without countersigning for it. In addition, the subsequently developments, including the hearing of the dispute by the Chief's Committee resulting to the document dated 24th April, 1992 and the other letters in the list of documents filed by the Plaintiff, confirms that Bunyala/Bulemia/2678 is the land the late Geoffrey had bought from the Defendant. The late Geoffrey even filed a caution over the title claiming purchaser's interest on 5th November, 2001 as confirmed in the certificate of official search. The size or acreage of the Defendant's land, had on distribution of his fathers' estate come to 1.04 hectares, which is less than the 2.4 hectares under the sale agreement which he was selling to the late Geoffrey.

6. That even though in law the Defendant could not have had capacity to sell his share of his fathers' estate before the grant was confirmed or the estate had been distributed and a specific portion registered in his names, he at least agreed in his defence to having received Kshs.5,000/= out of Kshs.30,000/= he expected for the one acre he was selling to the late Geoffrey. The court has found that he had received the amount totaling Kshs.15,400/= as set out in the document dated 10th March, 1991 and he has never refunded or offered to refund that amount or the Kshs.5,000/= he agreed to have received. He has also not transferred the land he was selling to the late Geoffrey in spite of the various interventions by the Provincial Administration. It would be unfair for the Defendant to claim that the agreement between him and the late Godfrey was an illegality ab initio and tantamount to intermeddling with the estate of a deceased when the suit property has been registered in his names since 13th November, 1991 unlike in the situation in the case of ***Simiyu -vs- Watambamala (Supra)***

7. That the sale agreement dated 10th March, 1991 was indicated to have been signed by the seller, purchaser and two witnesses, namely, John Maube Natolio and Cleophas Okhabedo Ogwa. The late Godfrey paid the agreed purchase price and took possession of the portion of land he had bought which was subsequently registered as the suit land. There is therefore no doubt that the late Geoffrey expected the Defendant to perform his part of the agreement and transfer the land to him. The late Godfrey died before the suit land was transferred to him and by then he had moved from the suit land his parents land in 2004. This act of the late Geoffrey moving from the suit land to his parent's land did not in any way reduce his claim or interest over the suit land that had legally accrued, and on his death it was now for the administrator of his estate to pursue such interest in accordance with the law.

8. That the Plaintiff claim as administrator of the late Geoffrey's estate is for specific performance orders

to have the suit land transferred to him. The Defendant's counsel has submitted that the Plaintiff's claim is time barred in view of section 7 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya. The court however notes that the claim herein is not based on adverse possession but is for specific performance in terms of the sale agreement dated 10th March, 1991. The court has already found that the Defendant had breached the agreement by failing to transfer the suit land to the late Geoffrey and the purchaser could have moved the court for specific performance orders in accordance with the law but did not do so in his lifetime. The Court of Appeal in the case of **Gurdev Singh Birdi & Anor –vs- Abubakar Madhbuti C.A. No.165 of 1996** held as follows;

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of volume 44 of Halsbury's Laws of England., Fourth Edition, a Plaintiff seeking the equitable remedy of specific performance of a contract:

“ must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the Plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation. Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.”

However, I hasten to add that an order of specific performance is a remedy or relief for breach of a valid and enforceable contract. The suit seeking the relief or remedy must in addition be filed within the period prescribed. The provision of Section 4 (1) of the Limitations of Actions Act Chapter 22 of Laws of Kenya provides as follows;

“ 4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action arose –

- a. ***Actions founded on contract.***
- b.
- c.
- d.
- e. ***actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”***

There is no doubt that the period of about twenty two years had lapsed from the date of the sale agreement to the date this suit was filed. No leave for extension of time to file the suit outside the six year period has been exhibited before this court. The late Geoffrey or anybody else claiming under him or for his estate on the agreement dated 10th March, 1991 needed to commence such a claim within the time prescribed under Section 4 (1) of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.

9. That the land subject matter of the sale agreement of 10th March, 1991 was agricultural land and subject the consent of Land Control Board being obtained as required under Section 6 (1) of the Land Control Act Chapter 302 of Laws of Kenya. There is no evidence of the consent having been obtained and the agreement between the late Geoffrey and Defendant was void. The monies paid under such a void agreement is recoverable as provided under section 7 of the said Act.

10. That for reasons set out in (8) and (9) above, the court finds as follows;

1. That the Plaintiff has failed to establish his case against the Defendant for reasons set out above and the suit is dismissed.
2. That though costs should follow the events, the tribulations the late Geoffrey went through in pursuit of the suit land from the Defendant without success, and the apparent reluctance by the Defendant to perform his part of the bargain makes this case an ideal one where an exemption should be made. I therefore direct that each party bears his own costs.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 23RD DAY OF FEBRUARY, 2015.

IN THE PRESENCE OF;...PRESENTPLAINTIFF

PRESENTRESPONDENT.

MR. BOGONKO FOR MAKOKHA FOR PLAINTIFF.

M/S. ASHIOYA FOR THE DEFENDANT.

JUDGE