



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.19 OF 2013

PATRICIA OBAR ONYANGO PLAINTIFF

VERSUS

ISAAK ODHIAMBO..... 1ST DEFENDANT

JOSEPH OKINYI ODHIAMBO..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants on 21st January 2013 seeking;-
 - a. **A declaration that the plaintiff is entitled to a portion of all that parcel of land known as LR No. Kasgunga/Kamreri/784 (hereinafter referred to as “the suit property”) measuring three (3) hectares and that the defendants have held and the 2nd defendant still holds the same in trust for her.**
 - b. **An order for the rectification of the register for the suit property by subdivision of the same into two (2) portions measuring 3 hectares and 1.4 hectares and thereafter registering the portion measuring 3 hectares in the name of the plaintiff and the remainder portion measuring 1.4 hectares in the name of the 2nd defendant.**
 - c. **A permanent injunction to restrain the defendants from entering into, cultivating, erecting structures or in any way dealing with the said portion of the suit property that belongs to the plaintiff in any manner adverse to the interest of the plaintiff.**

In her plaint dated 7th January 2013, the plaintiff averred that in the year 1969, she entered into a levirate union with the 1st defendant through which they had two (2) issues namely, Justus Odhiambo and Joseph Mboya (deceased). Following this union, the 1st defendant put up a homestead for her on a parcel of land that was owned by the 1st defendant. In the year 1971, one, Eliakim Okelo (hereinafter referred to only as “Okelo”) laid a claim over the 1st defendant’s said parcel of land and the 1st defendant sought financial assistance from the plaintiff to defend the claim. The plaintiff and the 1st defendant entered into an agreement that the plaintiff would give to the 1st defendant four (4) cows, one (1) bull, thirteen (13) goats and Kshs. 5,500/= in cash to be utilized in defending Okelo’s claim over the 1st defendant’s land a portion of which was occupied by the plaintiff. The cattle aforesaid and the sum of Ksh. 5,500/= in cash were given by the plaintiff to the 1st defendant in consideration of the 1st defendant agreeing to transfer to the plaintiff a portion of the said parcel of land measuring 3 hectares upon successful determination of the dispute in the 1st defendant’s favour. The plaintiff averred that she fulfilled her part of the bargain but the 1st defendant failed to do so.

2. The plaintiff averred that during land adjudication and demarcation in Kasungu-Kamreri Adjudication section, the whole parcel of land that belonged to the 1st defendant and which measured 4.40ha. a portion of which was to be transferred to the plaintiff pursuant to the aforesaid agreement was registered as **LR No. Kasungu/Kamreri/784 (“the suit property”)** in the names of the defendants as joint proprietors in equal shares. The plaintiff averred that the 1st defendant has since then refused to sub-divide the suit property and have the 3 hectares that he had agreed to transfer to the plaintiff transferred to her. The plaintiff averred that on or about 1st February 2012, the 1st defendant with intent to defraud the plaintiff of her share in the suit property caused his half undivided share in the suit property to be transferred to the 2nd defendant who now owns the entire parcel of land. The plaintiff averred that despite demand and notice of intention to sue having been given, the defendants have refused and/or neglected to transfer to her the said portion of the suit property measuring 3 hectares thereby rendering the filing of this suit necessary.

3. The defendants were served with summons to enter appearance but failed to do so within the prescribed time. Interlocutory judgment in default of appearance was entered against them on 15th October 2013 after which the suit was fixed for formal proof on 23rd June 2014. The plaintiff gave evidence and called no witness. In her evidence, the plaintiff told the court that the 2nd defendant is the son of the 1st defendant with whom she entered into a levirate union in the year 1969. She told the court that the 1st defendant had settled her on a parcel of land in respect of which a dispute arose and the 1st defendant sought her financial assistance to enable him to deal with the said dispute. Following that request from the 1st defendant, she gave the 1st defendant four (4) cows, one (1) bull, thirteen (13) goats and Kshs. 5,500/= in cash on the understanding that the 1st defendant would transfer to her a portion of the said parcel of land measuring 3 hectares. The agreement that was reached between her and the 1st defendant was reduced into writing on two occasions.

4. The first agreement in writing was made on 5th June 1973 and the second one was made on 3rd May 1984. The agreement that was made on 5th June 1973 was in Luo language and as such the same was not produced in evidence as it had no English translation. The second agreement of 3rd May 1984 was in English language and was produced in evidence as P.Exhibit 1. The plaintiff told the court that although the 1st defendant was successful in the dispute that he had with Okelo over the suit property, he failed to keep his part of the agreement with the plaintiff in that he failed to transfer to the plaintiff a portion of the said parcel of land measuring 3 hectares as had been agreed. Instead, the 1st defendant transferred the entire parcel of land to the 2nd defendant. The plaintiff told the court that the parcel of land a portion of which was to be transferred to her is the suit property. The plaintiff produced in evidence a copy of a certificate of official search and a copy of the register of the suit property as P.Exhibit 2 and P.Exhibit 3 respectively. The plaintiff stated that before she brought the dispute to court, the same had been referred to the chief of their Location for arbitration before whom the 1st defendant recorded a statement admitting that he had agreed to transfer to the plaintiff a portion of the suit property. She produced a copy of the said statement as P.Exhibit 4.

5. The plaintiff told the court that she has occupied the disputed portion of the suit property since the year 1969 and that she was not aware that the 1st defendant had transferred his half undivided share in the suit property to the 2nd defendant. In examination by the court, the plaintiff stated that she owns another parcel of land that belonged to her late husband's family which is registered in her name and the name of her brother in law. The plaintiff told the court further that the defendants are also occupying the suit property and that the portion occupied by the defendants is bigger than hers. After the close of the plaintiff's case, the plaintiff's advocates made closing submissions in writing.

6. I have considered the plaintiff's case as pleaded and the evidence that was adduced in proof thereof. I have also considered the written submissions by the plaintiff's advocates and the authorities cited in support thereof. The plaintiff's case is that, before land adjudication and demarcation process commenced at Kasungu-Kamreri area, the 1st defendant owned a parcel of land in the area on which he settled the plaintiff with whom he had entered into a levirate union in the year 1969. The plaintiff has contended

that following a dispute that arose between the 1st defendant and Okelo over the said parcel of land that was owned by the 1st defendant and on which he had settled the plaintiff, the plaintiff gave the 1st defendant four (4) cows, one (1) bull, thirteen (13) goats and kshs. 5,500/= in cash to assist him defend his proprietary interest in the said parcel of land on the understanding that the 1st defendant would transfer to her a portion of the said parcel of land measuring 3 hectares.

7. This agreement is said to have been made in the year 1973 and confirmed in writing in the year 1984. The plaintiff has contended that although the 1st defendant successfully defended his title over the said parcel of land against Okelo's claim over the same, the 1st defendant failed and/or refused to transfer to the plaintiff a portion thereof measuring 3 hectares in accordance with the agreement aforesaid that the plaintiff had entered into with the 1st defendant. The plaintiff has contended that during the land adjudication process at Kasungu-Kamreri area, the entire parcel of land hitherto owned by the 1st defendant and a portion of which he was to transfer to the plaintiff pursuant to the agreement aforesaid was registered in the names of the 1st and 2nd defendants as joint proprietors in equal undivided shares on 1st September 2008. The plaintiff has contended that this registration was undertaken without any regard to the plaintiff's interest in the said parcel of land which was registered as LR. No. Kasungu/Kamreri/784("the suit property") measuring 4.40 hectares. The plaintiff has contended that, although the suit property was registered in the names of the defendants, they held a portion thereof measuring 3 hectares in trust for her which trust according to her arises from the agreement aforesaid that she had with the 1st defendant. The plaintiff has contended that with a view to defeat the plaintiff's interest in the suit property, the 1st defendant transferred his half undivided share in the suit property to the 2nd defendant on 1st December 2012. The 2nd defendant now owns the whole of the suit property. The plaintiff has contended that the 2nd defendant holds a portion measuring 3 hectares of the suit property in trust for her.

8. The plaintiff's claim against the defendants is based on trust. The onus was upon the plaintiff to establish the trust. The plaintiff has contended that trust can be implied from the agreement referred to herein above that she entered into with the 1st defendant. The defendants were registered as proprietors of the suit property on first registration as holding equal undivided shares in the suit property. That means that each of them was entitled to a share measuring 2.20 hectares in the suit property. The proviso to section 28 of the Registered Land Act, Cap 300 (now repealed) (hereinafter referred to only as "**the Act**") provides that; the fact that a person is registered as proprietor of land whether on first registration or through acquisition subsequently shall not relieve him from any duty or obligation to which he is subject as a trustee. It follows therefore that if the plaintiff establishes the trust on which she has founded her claim, the court can make appropriate declaration in relation to that trust and order the rectification of the register to give effect thereto. The plaintiff's contention is that having entered into an agreement with the 1st defendant whereby the 1st defendant had agreed to transfer to her a portion measuring 3 hectares of the then unregistered land which measured 4.40ha., upon registration of the entire parcel of land in the names of the defendants, the defendants must be taken to have been registered as proprietors of the portion of the said parcel of land measuring 3 hectares to hold in trust for the plaintiff. I am of the view that the plaintiff's claim is unsustainable for various reasons. First, the plaintiff did not enter into any agreement with the 2nd defendant who was registered as proprietor of half undivided share in the suit property on first registration.

9. There is no evidence before me upon which I can hold that the 2nd defendant held a portion of his then half undivided share in the suit property in trust for the plaintiff. The 2nd defendant did not acquire his initial half undivided share in the suit property from the 1st defendant with whom the plaintiff is said to have entered into an agreement on which the plaintiff's trust claim is hinged. That share was acquired on first registration. There is no nexus between the plaintiff and the 2nd defendant in relation to the suit property upon which a trust relationship can be founded or implied. The plaintiff's claim against the 2nd defendant in relation to the 2nd defendant's initial half undivided share in the suit property must therefore fail.

10. With regard to the plaintiff's claim against the 1st defendant, I am of the opinion that the same is purely contractual. The plaintiff is simply trying to enforce the agreement that she entered into with the 1st defendant in the year 1973. This agreement was time barred and was unenforceable as at 1st September 2008 when the 1st defendant was registered as the proprietor of half undivided share in the suit property. I am also of the opinion that the agreement having been entered into prior to adjudication, the plaintiff should have raised her claim against the 1st defendant during the adjudication process through the machinery provided for under the Land Adjudication Act, Cap 284 Laws of Kenya. I don't think that a person who has a contractual claim over land prior to adjudication and who fails to raise such claim during the adjudication process can be allowed to re-open the claim after the completion of the adjudication register and the issuance of titles under the guise of enforcing a trust.

11. I am not satisfied from the evidence placed before me by the plaintiff that the 1st defendant held half undivided share in the suit property that was registered in his name in trust for the plaintiff. That being my finding, it follows that the transfer by the 1st defendant to the 2nd defendant of his said half undivided share in the suit property was not carried out in breach of trust as contended by the plaintiff. The 2nd defendant cannot therefore be said to be holding the said half undivided share in the suit property in trust for the plaintiff.

12. Due to the foregoing, I am unable to grant the declaration of trust sought by the plaintiff. There is also no basis for the rectification of the register of the suit property. In addition to the declaration and an order for the rectification of the register, the plaintiff had also sought an order of a permanent injunction against the defendants. The plaintiff led evidence that she has occupied a portion of the suit property since the year 1969. She told the court that the defendants have subjected her to persistent acts of harassment. I am in agreement with the plaintiff that the defendants have no right to harass or intimidate her. From the evidence on record, the plaintiff entered the suit property with the permission of the 1st defendant. If the defendants feel that the plaintiff has no right to occupy the suit property, they have to follow the due process to have her evicted from the property. They have no right to take the law into their own hands. The plaintiff is therefore entitled to the injunction sought to restrain the defendants from interfering with her occupation and use of the suit property.

13. The plaintiff's suit therefore succeeds in part. I hereby enter judgment for the plaintiff against the defendants for an order of injunction to restrain the defendants jointly and/or severally by themselves or through their agents or employees from entering into, cultivating, erecting structures on or in any other manner dealing with that portion of the suit property that is occupied and used by the plaintiff as at the date of this judgment save as may be authorized by a lawful order from a court of competent jurisdiction. The plaintiff's other claims are dismissed. Each party shall bear its own cost of the suit.

Delivered, signed and dated at KISII this 20th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE