

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Case No. 136 Of 2012

JOSEPH WANYONYI WAMALWA PLAINTIFF

VERSUS

JAMES WANYONYI KISIELO DEFENDANT

JUDGMENT

1. By a plaint filed in this court on 22nd September 2012, Mr. Joseph Wanyonyi Wamalwa hereinafter referred to as the plaintiff has asked the court for the following prayers;

a). An order compelling the defendant to surrender the original land title deed in respect of Kimilili/Kamukuywa/2749 to the Land Registrar Bungoma district to facilitate new parcel numbers.

b). costs of the suit

c). Any other relief this honorable court may deem fit to grant.

2. Together with the plaint, the plaintiff filed copies of documents and statements of witnesses. He caused service of summons to enter appearance, plaint and copies of documents and witnesses statements to be served upon the defendant on 1st October 2012. The process server who served the documents filed his return of service on 23rd October 2012. Despite being served, the defendant did not enter appearance or file any defence within the prescribed time. The matter was set down for hearing. The hearing notice was served upon the defendant's wife but the defendant failed to appear in court on the date set. The matter has therefore proceeded unopposed.

3. The plaintiff testified and called two other witnesses to establish his case. He told the court that on 29th October 2011 he purchased a portion of land measuring about 1 acre comprised in title no. Kimilili/Kamukuywa/2749 from the defendant. He paid the agreed purchase price of Kenya shillings one hundred forty thousand only (Kshs. 140,000/=). He produced the sale agreement as Pex. 1. He continued that the defendant signed all the requisite documents to secure the transfer of the sold portion into his name. Subsequently he made payments for the surveyor's fees and fee for obtaining Land Control Board consent. He produced receipts issued by Makos Surveyor services dated 29th October 2011 as pex. 3. They later appeared before the land board and were granted Land Control Board consent to subdivide the land. He produced copy of the consent as pex 5

4. The defendant also signed the mutation form prepared by the surveyor. The documents were presented to the Land Registrar Bungoma but they could not be registered as the defendant failed to avail the original title deed. He produced the mutation for as Pex. 2. He is asking the court to enable him get a title deed for his land. He has severally asked the defendant to surrender the title deed but he has refused and or neglected to do so.

5. The second witness Everlyne Shirachi said she is a surveyor working with Makos Surveys. She knew both parties. She was instructed by the plaintiff to survey the land he had purchased. She visited the land and had the defendant sign the mutation, transfer and sub-division forms. She carried out the work but could not complete it as the original title deed was not made available. The buyer (plaintiff) then decided to file this case PW3 is Richard Nakibongochi Lazaro who stays in Naitiri. He knew the plaintiff bought land from the defendant as he was a witness in the sale transaction for the buyer. He

knew the parties got a surveyor who took the measurements. He did not go where the title deed was to be obtained. That is all he knew. The plaintiff then closed his case.

6. Has the plaintiff established his case within the balance of probabilities as required by law? The sale agreement produced as Pex. 1 which was confirmed as made on 29th October 2011 by the Assistant Chief of Musembe sub-location. It was witnessed by six people i.e 3 witnesses on each side for the buyer and the seller. It thus fulfilled the requirements of Sec. 3 (3) of the Law of Contract Act as regards dispositions in land. The plaintiff also produced as pex. 2 a mutation form prepared by a licensed surveyor. The mutation form is dated 20th February 2012 and received by the District Surveyor Bungoma on 6th September 2012. In the mutation form, the suitland L.R. Kimilili/Kamukuywa/2749 has been subdivided on paper and given three new parcel numbers as Kimilili/Kamukuywa/3896, 3897 and 3898. According to PW2, these numbers cannot be entered into the register by the land registrar unless the original title for L.R. no 2749 is surrendered.

7. The plaintiff also produced a copy of application form and Land Control Board letter of consent to subdivide the suit part parcel. The defendant himself appeared before the Land Control Board to obtain this consent. The defendant had also executed transfer form in favour of the plaintiff and made available his passport size photograph as seen in the bundles of documents presented by the plaintiff. The plaintiff issued demand notice to the defendant (pex. 4) asking him to surrender the title deed as per the letter from Ndegwa Waweru & Co. advocates dated 21st September 2012 but the defendant did not respond to that demand. This court asked the plaintiff to make available the current certificate of official search for the suit property. The certificate of official search revealed that as at 30th Sept 2014, the defendant is still registered as owner of this property free from any encumbrances. It can be inferred that he has intentionally declined to perform his obligations as contained in their agreement of 29th October 2011. With all these documentary and oral evidence on record, I am satisfied the plaintiff has proved his case. Consequently I grant him the prayers sought in the plaint.

8. For completeness of this judgment I hereby decree that the defendant James Wanyonyi Kisielo do surrender within 14 days the original title deed for land parcel Kimilili/Kamukuywa/2749 to the District Land Registrar Bungoma to enable registration of the mutation form dated 20th February 2012. In default of the defendant surrendering the said title within the specified period, the District Land Registrar Bungoma be and is hereby authorized to carry on registration of the mutation form dated 20th February 2012. The plaintiff is also awarded costs of this suit.

DATED and DELIVERED in Bungoma this 21st day of October 2014.

A. OMOLLO

JUDGE.