



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 39 OF 2011

CHARLES ASIKOWA OKOLO PLAINTIFF

VERSUS

BENJAMIN NYAMUMBO OONGE}

AGRICULTURAL FINANCE CORPORATION.....} DEFENDANTS

J U D G M E N T

The Plaintiff Charles Asikowa Okolo brought this suit against three Defendants namely; Benjamin Nyamumbo Oonge, Agricultural Finance Corporation and Emkos Ltd. Claiming the following reliefs:-

1. *An order for a Permanent injunction against the Defendants barring them from disposing, alienating, selling and/or in any way interfering with the suit property that is LR No. 8994/20.*
2. *An order for the 2nd Defendant to release the title which is in the name of the 1st Defendant on LR No. 8994/20 to the Plaintiff's Advocates upon payment of the outstanding loan owed to them by the 3rd September.*
3. *An order for the said title to be held by the Plaintiff's Advocates until the 1st and 3rd Defendants repay the Plaintiff the amounts to be settled on their behalf.*
4. *An order directing the 1st and 3rd Defendants to subdivide and transfer the property to the Plaintiff.*
5. *In default of the said 1st and 3rd Defendants failing to do the respective subdivisions and transfers, the Deputy Registrar be mandated to execute the relevant documents for effecting the transfers.*
6. *A refund of Kshs. 7,360,000 plus interest at commercial rates effective May, 2005 until payment in full.*
7. *Costs of the suit.*

On diverse dates between the year 2005 and 2006, the Plaintiff and the first Defendant Benjamin Nyamumbo Oonge entered into a Sale Agreement where the Plaintiff purchased 39 acres from the first Defendant. The Plaintiff paid Kshs. 7,360,000 for the said acres. The first Defendant had entered into the Sale Agreement with the Plaintiff purporting that he was the registered owner of Plot No. 8994/20 at Sabata Farm. It later turned out that the land was not registered in the name of the first Defendant but was registered in the name of Emkos Ltd the 3rd Defendant herein. The said property had also been charged to the Agricultural Finance Corporation the second Defendant herein to secure a loan of Kshs. 2,304,445 advanced to the third Defendant.

The Plaintiff testified that he tried to have the land subdivided so that he could get title but the

Plaintiff remained evasive prompting him to file this suit. The Defendants filed their respective statements of defence but none gave evidence during the hearing.

I have considered the Plaintiff's case as well as the statements of the Defendants. The first Defendant does not deny that he received Kshs. 7,360,000 from the Plaintiff. The question which arises for determination is whether the Plaintiff is entitled to the prayers in the Plaint against one or all the Defendants in this suit.

The Plaintiff seeks an order for permanent injunction against the Defendants barring them from in any way interfering with the suit property. This prayer cannot be granted. There is evidence that the suit land is registered in the name of the third Defendant. The property was charged to the second Defendant to secure a loan of Kshs. 2,304,445. The second and third Defendants were not party to the Sale Agreement between the Plaintiff and the first Defendant. They cannot therefore be barred from dealing with the property. In any case, the Plaintiff was purporting to sell that which did not belong to him.

There is also a prayer seeking to compel the 2nd Defendant to release title in respect of Plot No. 8994/20 to the Plaintiff's Advocate upon payment of the outstanding loan owed to them by the 3rd Defendant. This prayer cannot be granted. Even if the loan owed to the second Defendant by the third Defendant was to be cleared, the title to the suit property could only be released to the third Defendant and not any other party.

The Plaintiff is also seeking an order that the title deed to the suit property to be held by the Plaintiff's Advocates until the first and third Defendants repay the Plaintiff the amount to be settled on their behalf. This is simply not possible. The Court cannot allow a party who is a stranger to the agreement between the second and third Defendant to offset a loan due to the second Defendant in exchange for retention of title until the money is repaid to the Plaintiff. Granting such an order will amount to interference with contracts entered by parties independently and will have no basis in law.

The Plaintiff also prays for an order directing the first and third Defendants to subdivide and transfer the suit property to the Plaintiff failing which the Deputy Registrar of the Court be allowed to execute the relevant documents to facilitate transfer. It is clear that the property is registered in the name of the third Defendant. The third Defendant was not party to the Sale Agreement between the Plaintiff and the first Defendant. The property was charged to the second Defendant by the 3rd Defendant. There is no way the 3rd Defendant can be compelled to subdivide and give land to someone it does not know. Unless and until the property is discharged by the second Defendant or the 3rd Defendant gets consent of the second Defendant to deal with the property, the third Defendant has no power to deal with the same. The third Defendant cannot therefore be compelled to subdivide its land and give it to strangers.

There was no evidence adduced to show that the 1st Defendant has any relationship with the 3rd Defendant and even if he had any, the third Defendant is a separate legal person capable of doing its own affairs. The sale between the Plaintiff and the first Defendant was a non starter. There was no consent of Land Control Board obtained. The Plaintiff and his witness admitted that the first Defendant did not take the Plaintiff to the Land Control Board for consent to subdivide and transfer the land into the Plaintiff. The agreement is therefore null and void. The only remedy available to the Plaintiff is refund of the purchase price of Kshs. 7,360,000. The first Defendant obtained the money on the pretext that he was the registered owner of the land. He did not disclose to the Plaintiff that the property was registered in someone else's name and had been charged to the Agricultural Finance Corporation.

I find that the Plaintiff's suit against the second and third Defendant was misplaced. The same is hereby dismissed with costs to the second and third Defendants. The Plaintiff is entitled to refund of his Kshs. 7,360,000 from the first Defendant. I enter judgment in favour of the Plaintiff against the first Defendant in the sum of Kshs. 7,360,000 with interest at Court rates from May 2005 until payment in full. The Plaintiff shall have costs of this suit.

Dated, signed and delivered in Open Court on this 29th day of August, 2013.

E. OBAGA

JUDGE

In the presence of M/S Wafula holding brief for Mr. J. M. Wafula for third Defendant and M/S Kibe for first Defendant and the Plaintiff.

Court Clerk: Kassachoon.

E. OBAGA

JUDGE

29/08/2013