



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 100 OF 2001

JOHN ATIEMI AGWA
1ST PLAINTIFF

SHADRACK OKOKO TAMBA 2ND
PLAINTIFF

STEPHEN MUKUNA INZAKWE
3RD PLAINTIFF

V E R S U S

LABAN FRANK ODINGA 1ST
DEFENDANT

WYCLIFFE SIANZWE OMUSI 2ND
DEFENDANT

THE DISTRICT LAND REGISTRAR – VIHIGA M. N. EMBALALA 3RD
DEFENDANT

J U D G M E N T

1. In the Plaint dated 29.8.2007, the Plaintiffs seek the following orders;
 - a. *“A permanent injunction be issued against 1st and 2nd defendants from alienating, wasting and interfering with the quiet possession and enjoyment of L.R. NO. E/BUNYORE/MAKUNDA/998.*
 - b. *An order of prohibition do issue prohibiting the 3rd defendant from registering any further dealings in the land.*
 - c. *An order be issued directing the 3rd defendant to cancel all titles issued to the 1st and 2nd defendants herein.*

d. Costs.”

2. In response and while denying the claim, the 1st Defendant filed a counter-claim dated 31.7.2006 and sought the following orders;

a. “Specific performance of the land sale Agreement entered on 5th February, 1997 or declaration that L.R. NO. EAST BUNYORE/EMAKUNDA/1350 was lawfully acquired by the 1st defendant and or refund of the full purchase price paid to the 3rd plaintiff as consideration plus interest at Bank rates.

b. General damages for breach of contract together with value of the improvements and developments he has so far made on the land.

c. And any other or further relief that this Honourable court may deem just to grant.”

3. The 2nd Defendant also filed a defence and counter-claim on 28.4.2005 and sought the following orders;

“21. The 2nd Defendant’s claim against the Plaintiffs jointly and severally is for specific performance of the said land sale agreement entered into on 17th July 1994 and/or a declaration that L.R. NO.E/BUNYORE/EMAKUNDA/1349 was lawfully acquired by the 2nd Defendant.

22. Alternatively and without prejudice to the above foregoing, the 2nd Defendant prays for the refund of the full sum of KShs.74,000/= paid to the 2nd Plaintiff as the purchase price plus interest at bank rates.

23. The 2nd Defendant also claims for the value of the improvements and developments that he has so far made on the land with the 2nd Plaintiff’s consent, the particulars of which shall be proved at the hearing hereof.

24. The 2nd Defendant further claims general damages for breach of contract.”

4. From the pleadings filed by the Plaintiffs as well as the Defendants and in oral evidence before this court, the following facts are expressly admitted;

i) that the dispute relates to land parcel number East Bunyore/Emakunda/998 which was originally registered in the names of one Omulama Okoko (deceased). His registration was obtained on 15.3.1965 and he died on 4.8.1991.

ii) on 5.2.1997 and while the land was still in the deceased’s name the 3rd Plaintiff entered into a Sale Agreement on 5.2.1997 with the 1st Defendant. The portion to be sold was 1.5 acres at a consideration of KShs.70,000/=. An initial payment of KShs.33,000/= was made on execution of the agreement and a

further and final payment of KShs.37,000/= was made on 5.1.1998.

iii) on 17.7.1994, the 2nd Plaintiff entered into an agreement with the 2nd Defendant whereby he was to purchase 1.65 acres to be excised out of land parcel no. 998 aforesaid at a consideration of KShs.74,000/= which was paid in full.

iv) the 1st Defendant obtained registration of the land in his names, sub-divided it and transferred a portion to the 2nd Defendant which became title no. East Bunyore/Emakunda/1349. It was registered in the 2nd Defendant's name on 13.7.2001. His portion became land parcel no. 1350.

v) the grant of letters of administration to the estate of Omulama Okoko (deceased) was made to the Plaintiffs on 15.3.1999.

5. I have read the evidence tendered by PW1, Shadrack Otombo Tamba, PW2, John Atieli Agwa, DW1, Laban Frank Odinga and DW2, Wycliffe Paul Sianzi Omusi and the only issues to address are these;

i) was the transfer of the land to the Defendants' lawful or not?

ii) are the Plaintiffs entitled to orders that the titles be cancelled and the land should revert to its original state?

iii) are the Defendants entitled to orders as are set out in their respective counter-claims?

iv) Costs.

6. On (i) above, it is the Plaintiffs' case that the sale agreements with the Defendants were made when the former had no lawful title to pass onto anyone.

7. I see no credible reason to find otherwise because the Defendants knew or ought to have known that the 1st and 2nd Plaintiffs had no lawful title to land parcel number 998. The land was in the names of the deceased, Omulama Okoko and any purported sale prior to 15.3.1999 was in contravention of section 45 of the Law of Succession Act which provides as follows;

“S.45 (1) Except so far as expressly authorized by this Act, or by any other written, or by a grant of representation under this Act no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this shall –

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

(b) be answerable to the rightful executor or administrative to the estate of the assts with which he has intermeddled after deducting any payments made in the due course of administration.”

8. The above section criminalizes the intermeddling with a deceased's estate and although I see that Shadrack Okoko Tamba was charged in SRM's Court, Vihiga in its Criminal Case no.588/2000 with obtaining the purchase price of KShs.74,000/= from Wycliffee Paul Omusi and later acquitted, from where I sit, any purported sale as above was unlawful and I so find.

9. On (ii) above, one must ask the question, how did the Defendant's obtain title? They did so on the basis of the Sale Agreements which I have held to be unlawful. Any action thereafter would equally be unlawful and it matters not that later, a consent was obtained from the relevant Land Control Board. What is ab initio unlawful, cannot be validated by a subsequent lawful act.

10. Lastly, on (iii) above, the Defendants obtained title by unlawful means and this court will not give them the benefit of benefitting from an illegal transaction. Their counter-claims cannot succeed for that reason alone.

11. Having so said, I will make the following orders;

i) Let the 1st and 2nd Plaintiffs refund the sums of **KShs.70,000/=** and **KShs.74,000/=** to the 1st and 2nd Defendants respectively.

ii) The said sums shall be refunded together with interest at court rates from **5.2.1997** and **17.7.1994** until payment in full.

iii) The said sums shall be paid within **45** days of today's date and no extension of time shall be granted in view of the time this matter has taken.

iv) Upon payments being made as above, the titles to land parcels nos. **East Bunyore/Emakunda/1349** and **1350** shall be cancelled and the land shall revert to the names of the deceased, Omulama Okoko.

v) Should the Plaintiff be unable to comply with Order (iii) above then Order no. (iv) shall lapse and titles shall remain in the names of the Defendants absolutely.

vi) The parties are each to blame for their predicament and so each shall bear the burden of its costs.

12. Orders accordingly.

Delivered, dated and signed at Kakamega this 14th day of April, 2011

ISAAC LENAOLA

JUDGE