



**Odilo & another v Ouma (Environment & Land Case 26 of 2018)
[2022] KEELC 12684 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12684 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 26 OF 2018
AA OMOLLO, J
SEPTEMBER 27, 2022**

BETWEEN

MICHAEL EKOMBE ODILO 1ST PLAINTIFF

FREDRICK EKOMBE ODILO 2ND PLAINTIFF

AND

FREDRICK WABWIRE OUMA DEFENDANT

JUDGMENT

1. The two plaintiff filed this suit on April 10, 2018 and impleaded against the defendant that in 2013 they purchased two (2) plots of land each measuring 0.025ha being LR Nos Bukhayo/Kisoko/6866 and 6867. That previously the suit plots had been sold to Aloyce Omachar by the defendant and the defendant consented to the subsequent sale between Omachar and the plaintiffs. The plaintiffs pleaded further that the defendant executed documents of transfer and indeed transferred LR Bukhayo/Kisoko/6866 to the 1st plaintiff but failed to transfer LR No 6867 to the 2nd plaintiff. Now the defendant is threatening to evict both of them from the suit plots.
2. The plaintiffs claim against the defendant is for:
 - a. An order of injunction restraining the defendant and all who claim through him from entering, evicting, charging, disposing off or in any manner dealing with the 2 plots of land in question.
 - b. An order to sign the transfer documents in respect of land plot Bukhayo/Kisoko/6867 in favour of the 2nd plaintiff.
3. The defendant entered appearance and filed a defence on May 7, 2018, denying the plaintiffs claim in toto. He pleaded that there is no contractual obligation between him and the plaintiffs neither do they have any cause of action against him. The defendant stated that this suit is frivolous, and a clear abuse of the court process and of the law. He urged the court to dismiss or strike out the suit.



4. The plaintiffs called three (3) witnesses while the defendant relied on his sole witness. Aloyce Komen Omachari giving evidence as PW1 stated that he knew the defendant as he had sold him the suit land. PW1 stated that he paid the defendant the agreed purchase price in full. However because he was unable to develop the plot, he decided to sell the plot to the two plaintiffs. He produced the sale agreement executed between him and the defendant as Pex 1, and the agreement between him and the plaintiffs as Pex 2(a) and (b).
5. In cross-examination by the defendant, PW1 said when they transacted, the defendant had title bearing his name. That he paid the entire purchase price agreed and that the plaintiffs also owe him nothing.
6. On October 18, 2021 the 1st plaintiff gave evidence on his own behalf (as the attorney of Edmond Ekombe) and on behalf of the 2nd plaintiff. PW2 stated that the defendant sold to him a portion of LR Bukhayo/Kisoko/6084. That the portion purchased had been sold to Aloyce (PW1) measuring 50ft x 100ft. That when Aloyce met Edmond, he did not have enough money to buy the whole plot so he was introduced to the 2nd plaintiff who agreed to buy the other half plot. That Edmond followed due process and obtained title for his portion but the 2nd plaintiff did not receive his because the defendant became uncooperative.
7. PW2 continued in evidence that the plaintiffs fenced off the sold plot which the defendant later destroyed as he wanted to sell the plot to another person. He produced the power of attorney as Pex 3(a) & (b), mutation form as Pex 4, sale agreement as Pex 2(a) & (b), searches as Pex 5, land control board application and consent as Pex 6 & 7 and copy of title to 1st plaintiff as Pex 8.
8. Felix Wandera Wachilonga testified as PW3 and affirmed that the defendant sold land to the 1st plaintiff as he was one of the witnesses to the agreement dated April 17, 2009. He confirmed witnessing the payment of Kshs 30,000 to the defendant. The defendant did not ask this witness any questions.
9. The defendant gave his evidence on December 2, 2021 wherein he stated that he does not know Edmond & Fredrick very well. DW admitted selling land to Aloyce (PW1) in the year 2007 or thereabouts measuring 50ft x 100ft. According to him, the portion claimed by the plaintiffs is not what he sold to PW1. He also confirmed he had not given Aloyce (PW1) title for the sold portion but acknowledged signing documents for processing title of the half plot to Edmond. DW admitted that he refused to sign papers a second time because he did not understand why he was required to sign again.
10. After close of defence case, the parties agreed to meet the county surveyor on the ground for identification of boundaries of the suit plot. The surveyor visited on the December 20, 2022 and made a report which was filed on January 21, 2022. In the report, the surveyor found that all the plots lie along the 6m road on the North of Nambale Market Center. Both parties could identify the location of their boundaries but the defendant claimed that his land overlapped into parcel No 6866. When the report was read out to the defendant in court, he said he did not agree with it.
11. The plaintiff filed their submissions on March 1, 2022 which submissions I have read and considered. The plaintiffs stated their case as purchasers of a portion of land owned by the defendant. The defendant conceded that he sold to Aloyce Omachari a plot measuring 50ft by 100ft. A sale agreement between the two was produced as Pex 1. Although the defendant pleaded in his statement of defence that the purchase price was not paid in full, he never pursued this limb of defence during cross-examination of the plaintiffs and their witnesses or in his evidence in chief.
12. Aloyce gave evidence to say that the land he purchased from the defendant is what he later sold to the plaintiffs. There is produced a sale agreement between him and the 2nd plaintiff made on October 15, 2015 for sale of LR Bukhayo/Kisoko/6867 registered in the defendant's name. It is stated in evidence



that it is the 1st plaintiff who facilitated the sub-division of the original No Bukhayo/Kisoko/6084 to create new numbers including for the sold plots. The mutation for the sub-division was also produced in evidence as (Pex 4). The defendant has not contested these documents and the stated facts. He said that he did not sign transfer the documents in favour of the 2nd plaintiff because he did not understand why he was signing transfer forms twice for the same person. The inference drawn is that the defendant thought he was signing a transfer twice to Aloyce.

13. When the surveyors visited the disputed plots, he confirmed their existence on the ground. In light of the evidence presented, I am satisfied that the plaintiffs have proved a case against the defendant. The defendant has not provided sufficient reason why he should not execute transfer in favour of the 2nd plaintiff. His explanation of not understanding why he should sign twice is discharged by the fact that the plot sold which was measuring 50ft by 100ft was divided into two between the two plaintiffs and the boundaries are visible on the ground.

In the case of *Reliable Electrical Gaginness Ltd v Mantrack Kenya Ltd* (2006) eKLR where Maraga J (as he then was) stated that “..... I find in the instant case, there is no alternative remedy other than specific performance.”

14. The defendant did not deny the allegation that he destroyed the fence put up around the plots or that he intended to evict the plaintiffs from the suit plots. He must be restrained from carrying out the unlawful interferences of the plaintiffs’ user of the sold plots. Consequently, I enter judgment for the plaintiff per plaint that;
- i. An order of permanent injunction be and is hereby issued against the defendant and or his representatives restraining them from entering, evicting, disposing off or in any manner dealing with land reference No Bukhayo/Kisoko/6866 and 6867.
 - ii. An order be and is hereby issued directing the defendant to forthwith sign transfer documents in respect of plot No Bukhayo/Kisoko/6867 in favour of the 2nd plaintiff. In default, the Deputy Registrar to so execute.
 - iii. Each party to bear their costs.

DATED, SIGNED AND DELIVERED IN BUSIA THIS 27TH DAY OF SEPT., 2022.

A. OMOLLO

JUDGE

