



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Case 131 of 2007

**PERES AWITI OYAMO(Suing as the Administratrix of
the Estate of GEORGE BARRACK OYAMO) PLAINTIFF**

VERSUS

OUMA KUMBA DEFENDANT

JUDGMENT

The plaintiff Peres Awiti Oyamo brings this suit as the Administratrix of the Estate of her late husband George Barrack Oyamo seeking the basic order for the discharge of a caution lodged by the defendant in respect of a parcel of land known as KISUMU/NYALENDA 'B'/1883.

It is the plaintiff's contention that on or about the 23rd September 2000, the said parcel of land was purchased by the plaintiff's late husband from the defendant and another free from any encumbrances. After full payment of the purchase price the title was transferred into the names of the plaintiff's late husband. However, on the 18th September 2007, the plaintiff conducted a formal search at the land registry and discovered that the defendant had placed a caution on the land claiming an interest thereon. The plaintiff therefore prays for the discharge of the caution and costs of this suit. The defendant's statement of defences is essentially a contention that the plaintiff has applied a wrong procedure for the removal of a caution and that the plaintiff obtained a titled deed to the suit property by fraud. The defendant therefore prays for the dismissal of this suit with costs and for the cancellation of the plaintiff's title deed.

Basically, the fact that there was a sale agreement for the sale of the suit property to the plaintiff's late husband by the defendant Ouma Kumba and another Isaya Ooko Kumba is not at all or substantially disputed. The said sale agreement or memorandum of agreement was produced herein [Pex 2]. It shows that the agreement was made on the 23rd September 2000, and was duly signed by the vendors and the purchaser. It was duly witnessed and counter signed by an advocate called Amit R. Gadhia. The purchase price was set at Kshs. 160,000/= payable at specified times in specified instalments. The issuance of a title deed [Pex 3] in the name of the plaintiff's late husband was a confirmation that the full purchase price was paid.

In her evidence, the plaintiff Peres Awiti Oyamo (PW1) stated that possession of the land was not taken immediately after the sale agreement even though the agreement indicated that the land was sold with vacant possession.

Nonetheless, the plaintiff stated that the land remained under the occupation of the vendors even after the death of her husband in August 2005 and even after the death of the first vendor Isaya Ooko Kumba said to be the father of the second vendor, the defendant herein. The plaintiff further stated that from the month of April 2007 she made efforts to fence the land and eventually take possession but was met with resistance in one way or the other from the defendant who continued occupying the land with his mother. She referred the matter to the area chief who directed her to the lands office where she conducted a search and found a caution lodged by the defendant.

The defendant Isaac Ouma Kumba (DW1) disowned the agreement (PEX 2) and stated that he knew nothing about it. He said that the land belonged to his late father who later substituted his name for that of his (defendant) and his brother Isaya Ooko Kumba. He said that Isaya Ooko Kumba was not his father but brother who also passed away. He said that the land was registered in his name and that of his late brother as per the title deed dated 24th August 2000 [Dex 1). He denied having signed the sale agreement (Pex 2) and said that he was in school at the time. He contended that he was not a party to the agreement and came to know the plaintiff only after this matter came to court. He said that he lives on the subject land, which is his homestead.

The issue arising for determination is whether the defendant has a lawful interest in the suit land to justify the lodge of the caution by himself. A copy of the register annexed to a copy of the title deed dated 24th August 2000 (Dex 1) shows that the suit land was originally described as **KISUMU/NYALENDA 'B/1791** registered in the names of ISAYA OOKO KUMBA and OUMA KUMBA way back in 1998. Later, the land was sub-divided and new title numbers were given on the 11th August 2000. The new title numbers included the subject number 1883. The title deed (DEX 1) was issued a few days after new numbers were given. It was issued in the names of ISAYA OOKO KUMBA and OUMA KUMBA of P. O. Box 679, KISUMU.

The proprietorship section of the said title deed contains entries made on the 11th August 2000, 24th August 2000 and 6th November 2000. However, and interestingly, whereas the entry dated 11th August 2000 is in relation to the registered proprietors and that dated 24th August 2000 is in relation to the issuance of the title deed, the entry dated 6th November 2000 is blank. It does not identify the transaction which occurred on that date. The identification of the missing transaction is seemingly contained in a subsequent title deed dated 7th November 2000, produced herein by the plaintiff

[i. e. PEX 3]. The subsequent title deed (PEX 3) shows that what occurred on the 6th November 2000 is that the name of the plaintiff's late husband was entered in the register. The title deed was thereafter issued on 7th November 2000.

The entry of the plaintiff's late husband as the proprietor of the suit land on 6th November 2000 and the issuance of the title deed (PEX 3) in his name on the 7th November 2000, effectively extinguished previous rights over the suit land held by ISAYA OOKO KUMBA and OUMA KUMBA.

Consequently, the defendant Ouma Kumba would have no lawful interest in the land. His current occupation of the same renders him a trespasser. His spirited effort in disowning the sale agreement (PEX 2) entered between himself, Isaya Ooko Kumba and the plaintiff's late husband could not rescue him. If he had the intention to challenge the validity of the said sale agreement or even the plaintiff's title deed (PEX3) then this court was the wrong forum. His hostility towards the plaintiff during cross – examination and his obvious denial that ISAYA OOKO KUMBA was his father and his assertion that he ISAYA OOKO KUMBA was his brother was a clear demonstration of his dishonesty. He did not impress the court as being a credible witness.

Most likely than not, the said denial and assertion were afterthoughts such that no attempts were made to lead any other evidence in support thereof. The defendant would have called his mother, relatives, neighbours, village elders or even the area chief to credibly and cogently establish his said denial and assertion. The plaintiff has on the balance of probabilities established that the defendant was not justified

in lodging a caution respecting the suit land. His action was illegal and a callous attempt to renege on an agreement, which he was undoubtedly privy to. Judgment is therefore entered for the plaintiff against the defendant in that the caution lodged by the defendant be and is hereby discharged. Costs of the suit are awarded to the plaintiff.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 9th day of May 2008.

J. R. KARANJA

JUDGE