Oseko v Ochako & another (Environment & Land Case 447 of 2014) [2023] KEELC 18632 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18632 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 447 OF 2014

M SILA, J

JULY 5, 2023

BETWEEN

JOSECK NYABWARI OSEKO ..... PLAINTIFF

AND

AGNES SONOI OCHAKO ..... 1ST DEFENDANT

DENNIS MOSE OCHAKO ..... 2ND DEFENDANT

JUDGMENT

(Counterclaim by 1st defendant contending that she had an oral agreement with plaintiff in 1997 where she sold a portion of her land to plaintiff but plaintiff obtained title that is bigger than what she sold; oral agreement over land incapable of being enforced; no evidence that plaintiff obtained the title fraudulently as counterclaimant received her title without complaint upon subdivision and even proceeded to sell other portions of it; in any event counterclaim time barred having been filed in 2015, more than 12 years after plaintiff got his title in 1997; counterclaim dismissed with costs).

1. This suit was commenced through a plaint which was filed on 19 November 2014 which plaint was subsequently amended on 10 November 2017. The 1st defendant is mother of the 2nd and 3rd defendants. In the amended plaint, the plaintiff has pleaded that the defendants sold to him a portion of land measuring 50 X 150 feet out of the land parcel Bassi/Bogetaorio II/3057. It is averred that the defendants later subdivided this land into two portions without the knowledge of the plaintiff to produce the land parcels Bassi/Bogetaorio II/4177 and 4178 with the portion of 50 X 150 feet that the plaintiff alleges to have bought falling within the parcel Bassi/Bogetaorio II/4177. In his plaint, the plaintiff sought orders for this portion of 50 x 150 feet to be excised from this land parcel No. 4177 and title be issued to him.

2. The defendants filed a joint statement of defence denying the plaintiff's claim. It is pleaded that there was initially a land parcel Bassi/Bogetaoriro II/2958 registered in name of one Jerusa Mongina Ochako

and subsequently transferred to the 1st defendant as daughter in law. It is pleaded that on 15 January 2007, the 1st defendant gave a specific power of attorney to the plaintiff over this parcel of land No. 2958 and she does not understand how he caused it to be subdivided into the parcels No. 3043 and 3044. She nevertheless contends that this was done fraudulently by the plaintiff inter alia by presentation of forged documents. The defendants thus contend that the plaintiff has trespassed into their parcel No. 3044 which forms part of the parcel No. 2958 belonging to the 1st defendant. The 1st defendant lodged a counterclaim repeating the above and pointing out that parcel No. 2958 measured 3.08 Ha and that the plaintiff subdivided it on 27 May 1997 to produce the parcels No. 3043 measuring 2.83 Ha, and No. 3044 measuring 0.37 Ha, without her consent. It is pleaded that in the year 2007, the plaintiff trespassed into this portion measuring 0.37 Ha and unlawfully transferred it to himself. In the counterclaim, she seeks the following orders :-

a. Eviction against the plaintiff from the land parcel Bassi/Bogetaorio II/3044 measuring 0.37 Ha.

b. General damages for trespass.

c. Interest at court rates.

d. Costs.

e. Any other relief deemed fit.

3. A reply to defence and defence to counterclaim was filed which more or less joins issue with the pleadings of the defendants.

4. On 18 October 2018, the plaintiff withdrew his suit and what was left pending was the counterclaim. This judgment is therefore in respect of the counterclaim.

5. In her evidence, the 1st defendant testified that she did sell to the plaintiff land measuring 100 feet by 200 feet out of the land parcel Bassi/Bogetaorio II/2958. The said agreement was oral and was not put down into writing. She added that no consent of the Land Control Board was obtained and she did not transfer the land to the plaintiff. She testified that she has a problem with the size of land that the plaintiff has title to since it is bigger than what she sold to him. She stated that she was not aware of the new numbers issued after subdivision. She testified that she leased part of her land to H. Young Company Limited (H. Young) when the company was constructing the Kisii-Kilgoris Road, and they built some houses on the land leased. She did give a Power of Attorney to the plaintiff to deal with H. Young. She stated that after H. Young left, the plaintiff took possession of the houses they had developed and he has continued to be in occupation. She revoked the Power of Attorney on 19 August 2010. She wanted the plaintiff evicted from what she described as 'the extra portion of land that he is occupying' as she only sold to him land measuring 100 by 200 feet. She wanted the plaintiff's title cancelled so that he can be given a title measuring 100 X 200 feet.

6. Cross-examined, she acknowledged selling to the plaintiff a portion of land out of the land parcel No. 2958. This was in the year 1997. She testified that those present when she sold the alleged 100 X 200 feet portion were Daniel Nyauncho, Zedekiah Ondari and Ocharo Ondabu. She was cross-examined on the mutation form dated 27 May 1997 subdividing this land parcel No. 2958 and she contended that the signature therein is not her signature. When H. Young came to the land, the plaintiff had been in occupation for 10 years. She had no dispute with the plaintiff from 1997 to 2007. What she leased to H. Young was parcel No. 3057 and they entered into a written agreement. She had donated a Power of Attorney to the plaintiff to deal with H. Young as it was the plaintiff in contact with them. She testified that the dispute in court relates to the houses constructed by H. Young and the size of land occupied

by the plaintiff though she did agree that H. Young constructed houses on the plaintiff's portion of land and built offices on her portion. Apart from selling land to the plaintiff, she agreed also selling land to one Elijah Nyamao, but she did not know if he has title to what was sold to him.

7. . She acknowledged selling land to Tabitha Joseck measuring 50 X 100 feet which she claimed was a vacant portion. She also sold land to Councilors Nyariki and Nyangau but she stated that she later refunded them. She similarly sold land to one Daniel Ondari who is now owner of the land parcel No. 4178. She remained with title to parcel No. 4177. Cross-examined on the consent of the Land Control Board, she acknowledged going to Nyamache Land Control Board in the year 1997 but denied that the signature in the application for consent was hers. A transfer form was put to her and she denied signing it. She averred that she is ready and willing to give the plaintiff a portion of 100 X 200 feet out of parcel No. 3044. She was cross-examined on the relationship she had with the plaintiff and acknowledged that he had helped his son get a job in Kisumu but denied that he helped pay school fees for her daughters.

8. Re-examined, she testified that she does not know where the plaintiff got his title deed from.

9. DW- 2 was Bismark Onsare Ochako, a son to the 1st defendant. He mentioned that his father died in the year 2011. He testified that his mother sold to the plaintiff land in 1997, measuring 100 feet by 200 feet, out of the land parcel No. 2958, but did not transfer title to him. He testified that parcel No. 2958 was subdivided into the parcels No. 3043 and 3044; and that parcel No. 3044 was transferred to the plaintiff. He testified that after the plaintiff sued his mother, he went to check at the Lands Registry and found that the plaintiff had acquired title to a portion bigger than what had been sold to him. He testified that parcel No. 3044 measures 0.37 Ha which translates to 140 X 320 feet. He testified that his mother never obtained consent of the Land Control Board thus the title was obtained fraudulently. He wished to have the plaintiff's title rectified so as to read 100 X 200 feet.

10. Cross-examined, he revealed that in 1997, he was aged only 16 years old. He nevertheless claimed that he was aware of the sale. He also denied that his mother signed the transfer instruments. He acknowledged that after he finished his Form 4 education, the plaintiff helped him in getting a job. He affirmed that his mother gave the plaintiff a power of attorney to deal with H. Young though he claimed that the plaintiff misused the power of attorney. He alleged that the plaintiff extended the boundary for parcel No. 3044 between 2008 and 2011. He affirmed that parcel No. 3043 which was registered in name of his mother does not exist any more as his mother subdivided it into five portions and sold to four people. They however reside on one subdivision i.e parcel No. 4177. He claimed that his mother did not know that the acreage of parcel No. 3043 was less than it should be. He affirmed that H. Young built five houses on parcel No. 3044. He never went to verify with the Land Control Board that the LCB consent presented was fraudulent. He conceded than other than his words, he had no document to prove any fraud. Re-examined, he stated that his wish is to have his mother get a portion of 40 X 120 feet from the plaintiff's land which has the 5 houses and borehole built on them.

11. DW- 3 was Nathan Ocharo. He had a witness statement which he had recorded inter alia stating that he witnessed the sale agreement of 1997 between the plaintiff and 1st defendant. The agreement was oral. He stated that what was sold was land measuring 100 X 200 feet out of the land parcel No. 2859 and that the plaintiff agreed to construct two shops and four small rooms for the seller. In court, he testified that the plaintiff did construct the structures that he was required to erect for the 1st defendant and the 1st defendant gave out land. There was no problem between the parties until H. Young made developments on the land. When the company finished its work, the 1st defendant started claiming the land. He alleged that after the company moved out, the plaintiff took more land than was demarcated to him. Cross-examined, he testified that he is 50 years old thus he was 24 years when the sale agreement between the plaintiff and 1st defendant was entered into. He denied that he was nowhere in the sale. He

was not present when the land was surveyed and was not aware whether title had issued to the plaintiff. He affirmed that there was no problem between the plaintiff and 1st defendant until H. Young vacated the land.

12. With the above evidence, the 1st defendant/counterclaimant closed her case.

13. In his evidence in defence of the counterclaim, the plaintiff testified that he withdrew his suit so as to have the issues resolved at home but the 1st defendant declined to withdraw her counterclaim. He testified that he started the process of purchasing land from the 1st defendant in 1996. He stated that the plaintiff transferred title to parcel No. 3044 in May 1997. The land is 0.37 Ha and the 1st defendant remained with the rest. He testified that the 1st defendant applied for consent of the LCB which was obtained and she executed the transfer instrument. He produced these documents as exhibits. He testified that a mutation was done for the parcel No. 2958. The land parcel No. 2958 was subdivided into two parcels, i.e parcel No. 3043 and 3044. He testified that the plaintiff became registered as proprietor of parcel No. 3043 and they lived side by side without any problem until H. Young came into the picture. H. Young needed land and he engaged them so that they could lease some land from him, and he also assisted the 1st defendant so that her land could also be leased.

14. The 1st defendant and her brother in law, one Daniel Ocharo, donated to her a power of attorney to deal with H. Young on their behalf, which he did. H. Young thus leased land from him, the 1st defendant and Daniel Ocharo, and one lease instrument was drawn. H. Young took possession and constructed structures on the parcels of land leased. They left in the year 2015. He denied obtaining title by fraud in 1997. He pointed out that the 1st defendant also got her title and 5 months later she started selling portions of it. She subdivided the land into five portions. He reasoned that if he had fraudulently subdivided his land then the 1st defendant could not have obtained good title to enable her embark on further subdivision. He stated that until H. Young came into the picture the 1st defendant never accused her of trespass. Cross-examined, he testified that what was sold was 0.37 Ha and that is the title that he got. There was no written sale agreement. The power of attorney was donated to him in 2007 and the lease agreement with H. Young was entered into on 1 February 2007. It covered the parcel numbers 3044, 3047 and 3752.

15. With the above evidence, the plaintiff closed his case.

16. I invited counsel to file submissions and I have seen the submissions of Mr. Sagwe for the 1st defendant and Mr. Ayuka for the plaintiff. I have considered these submissions before arriving at my decision.

17. . I will be brief in my disposition because to me, the issues are clear.

18. It is common ground that the 1st defendant/counterclaimant did sell some land to the plaintiff around about the year 1997. What was being sold was a portion of the parcel No. 2958 which was then in the name of the 1st defendant. The parties however disagree on the size of the land that was sold. Whereas the counterclaimant contends that what was sold was land measuring 100 X 200 feet, the plaintiff asserts that what was sold was land measuring 0.37 Ha which is the size of land reflected in the title that he got which is the parcel No. 3044. The counterclaimant also denies proceeding to the Land Control Board to obtain consent to transfer land to the plaintiff and also denies signing any transfer instrument to the plaintiff. She alleges that the plaintiff obtained title through fraudulent means and that he forged the documents.

19. I will start by saying that if it is the wish of the counterclaimant to enforce an oral agreement entered into in the year 1997, irrespective of its terms, then she will fail.

20. Enforceability of contracts over land have been the subject of the *Law of Contract Act* Cap 23, Laws of Kenya. The applicable law in 1997 is Section 3 (3) of the *Law of Contract Act* as amended through Legal Notice No. 21 of 1990 which reads as follows :-

> (3) No suit shall be brought upon a contract for the disposition of an interest in land unless-
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> (a) the contract upon which the suit is founded-
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (iii) incorporates all the terms which the parties have expressly agreed in one document;

21. From the foregoing, it will be observed that to enforce a contract over the sale of land, such contract needed to be in writing. In our case, the counterclaimant concedes that the contract she had with the plaintiff was an oral one. The law doesn't allow her to try and enforce it, which means that if ever there was a breach, then the chips lie where they fall. If it is true that what the counterclaimant sold was only land measuring 100 X 200 feet that can't be enforced in the circumstances herein and it means that if the plaintiff obtained land measuring 0.37 Ha out of the oral contract, then that is what will remain, unless there is clear evidence of fraud of which in the instance of this case I find none.

22. In as much as the counterclaimant attempted to contend that she never signed the LCB consent and transfer to the plaintiff, I do not believe her. In any event, it was her claiming that she never executed these documents and therefore the burden of proof was on her. She could have discharged that burden by providing evidence that the writings and/or signatures on these instruments do not belong to her, which could easily have been done by providing a forensic report of a document examiner. None was presented and there is nothing before me to suggest that these documents were never signed by her.

23. In any case, it is the same documents which she is now recanting that brought forth her own title to parcel No. 3043 of which the counterclaimant appears never to have had a problem with. It will be recalled that the counterclaimant held title to the land parcel No. 2958 which is the land that was subdivided into the two parcels No. 3043 and 3044; title to the former being issued to the counterclaimant, and title to the latter being issued to the plaintiff. The counterclaimant received her title on 27 May 1997. She never complained that the title she has received is less than what she deserved after selling some land to the plaintiff. In fact, the evidence demonstrates that she was very comfortable with this title, for about a month later, she proceeded to subdivide it into the parcels No. 3057 and 3058. You would expect that if it was truly the case that what she sold was only land measuring 100 X 200 feet then she would be up in arms in the year 1997. She wasn't and the only reasonable conclusion one can reach is that it was because she was happy with the size of land that she got and with the size of land that the plaintiff received. She must have been having a very good relationship with the plaintiff for she even donated to him a power of attorney in the year 1997 to enable him deal with H. Young on her behalf. If she thought that the plaintiff had short-changed her in the year 1997 how could she now trust him with a power of attorney to deal with her land in the year 2007 ? This buttresses the position that she was more than happy with the manner in which the plaintiff dealt with her land in the year 1997 and with the manner in which the plaintiff got title.

24. It is clear from the above that I do not think that the counterclaimant has a good case. But even if she ever had a good case, that suit would be time barred. Section 7 of the *Limitation of Actions Act*, Cap

22, Laws of Kenya, provides for a limitation period of 12 years for any action for recovery of land. It provides as follows :-

> 7. Actions to recover land
> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

25. If ever there was excess land taken over from the counterclaimant, her action accrued from the time the plaintiff obtained title, which was in the year 1997. Any suit ought to have been filed by the year 2009. There is of course Section 26 of the *Limitation of Actions Act*, which does extend time in cases of fraud and/or mistake, so that time runs from the time of discovery of the fraud. The plaintiff cannot benefit from any extended time because the fact of the size of land that the plaintiff acquired must have come to her knowledge in 1997, when she herself got title to the land parcel No. 3044. Thus if she had any quarrel, such suit needed to be filed by the year 2009 at the latest. This counterclaim was lodged on 22 January 2015, way out of time. Even if there was merit in the counterclaim (and I have found none) it would still be struck out for being out of time.

26. I think the counterclaimant has been motivated by greed and is clearly coveting the portion of land falling within the plaintiff's title where H. Young developed some houses. She had no problem whatsoever with the plaintiff until H. Young built these structures. In fact, the greed of the counterclaimant and her sons was betrayed by the evidence of the 3rd defendant who it will be recalled stated in re-examination that they want the portion of land where H. Young had developed houses and a borehole which fall within the title of the plaintiff. If H. Young had never built any structures, there would be no quarrel from the counterclaimant and her sons. They now have bile which is borne out of jealousy and greed. I am afraid that this court cannot help them. They have to accept the fact that the plaintiff has derived benefit, as he is entitled to, out of valid use of his land.

27. The long and short of it is that I find no substance in the counterclaim and it is hereby dismissed with costs. The end game is that Joseck (the plaintiff) retains his land parcel No. 3043, as it is, that is, title bearing land measuring 0.37 Ha.

28. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 5 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII