



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMABAY

ELC CASE 10 OF 2021

(FORMERLY MIGORI ELC CASE NO. 5 OF 2021)

JARED OBUDO AJORE.....PLAINTIFF

VERSUS

PENINA AOKO OWIDI.....DEFENDANT

JUDGMENT

A. Introduction

- 1) At the heart of the instant dispute is a portion of land measuring approximately zero decimal two zero hectares (0.20 Ha) in area to be curved out of a parcel of land, LR No. Kabondo/Kodhoch East/1437 measuring approximately four decimal zero eight hectares (4.08 Ha) in area (The suit land herein). The same is a sub division of LR No. Kabondo/Kodhoch/931 (The parent land). It is contained in Registry Map Sheet number 22 and located in Kabondo Sub County in Homa Bay County.
- 2) The plaintiff, Jared Obudo Ajore is represented by the firm of M/S Nchoe, Jaoko and Company Advocates.
- 3) The firm of M/S Sam Onyango is on record for the defendant, Penina Aoko Owidi.
- 4) This suit was originated at Migori Environment and Land Court on 11th December 2020. However, with effect from 28th July 2021, it was transferred to this court, upon its establishment, for hearing and determination; see **Articles 6 (3) and 48 of the Constitution of Kenya, 2010**.

B. The gist of the plaintiff's case

- 5) The plaintiff mounted the suit by way of a plaint dated 26th November 2020 filed on 11th December 2020 seeking the following orders;
 - a) An order directed at the defendant to immediately cause the transfer of the portion bought by the plaintiff into the names of the plaintiff, to be curved out of land known as **KABONDO/KODHOCH EAST/1437** (The suit land).
 - b) An order for specific performance against the defendant, compelling the defendant to cause the title to be transferred into the names of the plaintiff in respect of the portion bought by the plaintiff curved out of the suit land.
 - c) A permanent injunction restrain the defendant by herself, the successors in title assigns or however from interfering with the quiet possession and enjoyment of the plaintiff and/or alienating, selling, transferring or dealing with the suit property in any manner, in respect of the portion bought by the plaintiff curved out of the suit land.
 - d) Costs of the suit together with interest thereon at court rates.
 - e) Any such and further relief as this Honourable court may deem fit to grant.

6) Briefly, the plaintiff's lamentation is that on 14th May 2001 and 14th April 2003, he bought the portion of the suit land from the defendant at an agreed purchase price of Kshs. 60,000/= (Kenya shillings Sixty Thousand Shillings only) which he paid in full as per the agreements of said dates. That during the time of sale of the portion, the defendant gave him a temporary number, 179 for the purposes of making the agreements with a promise to provide the correct number for the portion upon completion of the subdivision of the suit land and its transfer to the plaintiff. That immediately, the plaintiff took possession and occupation of the portion and has done so to-date. The plaintiff further laments that the defendant caused the subdivision of the suit land but refused to transfer the portion of the suit land to him. Thus, it

precipitated the instant suit.

7) On 8th November 2021, the plaintiff (PW1) testified and relied on his statement dated 26th November 2020 as part of his evidence. He, too, relied on copies of the documents accompanying the plaint namely a sale of land agreement dated 14th April 2003, another agreement dated 2nd May 2001, a certificate of official search of June 2019, a green card, a mutation dated 17th March 2016, a consent dated 19th June 2019 and receipts showing payments made to land surveyor in respect of the suit land (P Exhibits 1, 2, 3, 4, 5, 6 and 7 respectively).

8) PW2, George Ochieng Ajore, a dental technologist told this court that he knows PW1 as well as the defendant and the suit land. That PW1 is in possession and occupation of the suit land since the year 2001 to date.

9) PW3, Richard Ajore, a pastor testified that the instant dispute involves PW1 and the defendant over the suit land. That the latter sold it to PW1 herein.

C. The gist of the defendant's case

10) By a memorandum of appearance dated 18th December 2020 and filed in court on 6th January 2021, the defendant expressed his intention to defend the suit. Be that it may, she failed to file any statement of defence or any documents in this suit.

11) On 8th November 2021, Mr Jaoko, learned counsel for PW1 informed this court that the defendant was duly served as discerned in the affidavit of service sworn on 5th November 2021 by Michael Cleophas O Odongo, an authorized process server. On that account, the suit proceeded to hearing pursuant to **Practice Direction number 31 of the Environment and Land Court Practice Directions, 2014 and sections 2 and 3 of the Environment and Land Court Act, 2015 (2011) which are targeted at meeting the spirit of Article 159 (2) (b) of the Constitution of Kenya, 2010**

12) On the same date, the court ordered for submissions. So far, there are no submissions filed by any party to this suit.

D. Points for determination

13) It is trite law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see the Court of Appeal decision in the case of **Galaxy Paints Ltd-vs-Falcon Grounds Ltd (2000) 2 EA 385**.

14) I have duly considered the plaint, the testimonies of PW1, PW2 and PW3 herein. Therefore, has the plaintiff (PW1) proved his case on a balance of probabilities to entitle him to the reliefs sought at the foot of his plaint in this suit?

E. Analysis and determination

15) It was the testimony of PW1 that he bought the portion of the suit land from the defendant at Kshs, 60,000 being full purchase price thereof. It was confirmed by PW3. Indeed, it is the duty of this court to rely on only the evidence before it; see **Great Lakes Company (U) Ltd vs KRA 2009 KLR 720**

16) PW1 lawfully purchased the portion of the suit land as shown in PExhibits 1 and 2 and in consonance with section 3 (3) of the Law of Contract Act, 2012 (2002) and I bear in mind the meaning of "Transfer" and "disposition" under section 6 of the said Act, 2012 (2002). PW1 is in possession and occupation of the same at the moment as affirmed by PW2.

17) Upon the sale and transfer of the portion of the suit land, did PW1 obtain the requisite consent to in order to complete the transaction? In the case of **Willy Kimutai Kitilit-vs-Michael Kibet e2018 KLR at page 15**, the Court of Appeal held;

"...the lack of consent of land control board does not preclude the court from given effect to equitable principles, in particular, the doctrine of constructive trust,,,"

18) So, the agreements (PExhibits 1 and 2) are valid and enforceable even without the consent of the local Land Control Board so long as full purchase price was paid by the purchaser (PW1 who is in possession of the portion of the suit land. In addition, PExhibit 6 (the consent) is part of the evidence of PW1 in this suit

19) Notably, the defendant was duly served as revealed at paragraph 11 hereinabove. It was the duty of the court to ensure that she was made aware of this matter and that she was duly served with the necessary papers. She had the option to appear or decline to appear to defend this suit; see **Ogada vs Mollin (2009) KLR 620**.

20) An order for Specific performance against the defendant is one of the orders sought at the foot of the plaint herein. **The Black's Law Dictionary 10th Edition at page 1617** has defined the term "Specific performance" thus;

"The rendering as nearly as practicable of a promised performance through a judgment or decree especially a court ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate"

21) As regards the permanent injunctive relief sought in the plaint, in **National Bank of Kenya Ltd vs Shimmers Plaza Ltd (2009) KLR**

278 at 283, the Court of Appeal held that the remedy is within the discretion of a trial judge. That it's duration depends on the circumstances of the case.

22) In **Nguruman Ltd-vs-Jan Bonde Nielsen and 2 others (2014) eKLR**, the Court of Appeal concluded that the foundation of the jurisdiction to issue injunctive orders vests on;

- a) The probability of irreparable injury,
- b) The inadequacy of pecuniary compensation and
- c) Prevention of the multiplicity of suits.

23) This court is conscious of the threshold for grant of injunctive relief; see the celebrated case of **Giella-vs- Cassman Brown and company Ltd (1973) EA 358**.

24) Moreover, this court has the mandate to grant preservation orders under **section 13 (7) (a) Environment and Land Court Act, 2015 (2011)**. Indeed, permanent injunctions are included thereunder.

25) **Sections 107, 108, 109 and 110 of the Evidence Act (Cap 80 Laws of Kenya)** provide for burden of proof, the incidence of burden, proof of particular fact and the proof of admissibility respectively.

26) It is trite law that the burden was always on the plaintiff to prove his or her case on a balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof; see **Kirugi and another-vs-Kabiya and 3 others (1987) KLR 347**.

27) In the instant suit, the plaintiff has demonstrated that he bought the portion of the suit land from the defendant at an agreed purchase price which he paid in full to the defendant and that he is in occupation of the same. She failed to transfer the portion to him. PExhibits 1 to 10 tell it all.

28) It is thus, the finding of this court that the plaintiff's claim herein is firm, unchallenged and cogent. The plaintiff has proved this suit against the defendant on a balance of probabilities. He is entitled to the reliefs sought in his plaint consistent with Article 40 (1) of the Constitution of Kenya, 2010.

29) Accordingly, I enter judgment for the plaintiff against the defendant in terms of orders (a) (b) (c) and (d) at the foot of his plaint dated 26th November 2020 and as captured at paragraph 5 (a) to (d) hereinabove.

30) For avoidance of doubt, if the defendant fails to comply with orders (a) and (b) sought in the plaint and granted as per paragraph 30 hereinabove, the Deputy Registrar of this court shall execute the requisite documents in respect of the portion of the suit land in favour of the plaintiff upon notice to the defendant.

31) It so ordered.

G.M.A ONGO'NDO

JUDGE

DELIVERED, SIGNED AND DATED IN OPEN COURT AT HOMA BAY THIS 29TH DAY OF NOVEMBER, 2021.

G.M.A ONGO'NDO

JUDGE

In the presence of;

i. The plaintiff

ii. A Okello, court Assistant