



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**

**ELC NO. 59 OF 2021**

**{Formerly at Environment and Land Court at Kisii Case No. 13 of 2018}**

**ENOCK NYABUTI OOGA (Suing as the legal representative**

**of the estate of JOSEPH OOGA.....PLAINTIFF**

**VERSUS**

**ZACHARIAH AGWATA NYANCHAMA.....1<sup>ST</sup> DEFENDANT**

**TIMOTHY NYAKUNDI KEA.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR – NYAMIRA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

This case proceeded undefended after the Defendants failed to enter appearance. By a Plaint filed on 11/05/2018, the Plaintiff, an Advocate of the High court of Kenya, sued the Defendants herein in his capacity as the legal representative of the Estate of his late father, JOSEPH OOGA who according to the death certificate registered on 11/6/04 with serial number 779040 died on 30/5/04 aged 54 years. The death certificate is marked Exhibit 1. The Plaintiff took out letters of Administration *Ad Litem* which were issued on 31/01/2019 by the Principal Magistrate Nyamira in Succession Cause No. 29 of 2017. The same was produced as Exhibit 2. The Plaintiff's claim is based on a Sale Agreement dated 08/12/00, Exhibit 3, where he avers that his late father bought a parcel of land from one Momanyi Getaga, now deceased, on 08/12/00 after making payments to the latter. The purchase price was paid by instalments as shown in Exhibits 3(a), (b), (c) (d) and (e) respectively:

- On 8/12/00 the sum of Kshs. 10,000/=
- On 12/12/00 the sum of Kshs. 30,000/=
- On 9/2/01 the sum of Kshs. 16,000/=
- On 5/3/01 the sum of Kshs. 14,500/=

and the last payment of Kshs. 7,000/= was paid by the Deceased's wife, Mrs. Jemima Nyaboke Ooga on 31/1/2005 after the death of Mr. Ooga. Although the Agreement talks of the consideration of Kshs. 80,000/=, the aforesaid payments total to only Kshs. 77,500/= leaving a shortfall of Kshs. 2,500/=. The land being purchased was said to be LR. NO. SUB/LOC. MAGWAGWA II 527/11. The land is now occupied by the deceased's eldest child one Norah Momanyi Ooga. The vendor, Mr. Momanyi Getaga also later died intestate and was not survived by any wife or children. However, we are not told when Mr. Momanyi died. But all subsequent official documents, including the letter dated 12th April 2017 from the Assistant County Commissioner, Nyamusi, refer to Mr. Getaga as deceased. The Plaintiff has identified the parcel out of which the suit property was to be excised as NORTH MUGIRANGO MAGWAGWA II/527 initially registered in the name of Gitaga Otero, the late father of Momanyi Getaga.

The aforesaid parcel was sub-divided into various parcels and titles issued in respect thereof. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants benefitted from some of the parcels. 2 of the parcels excised from NORTH MUGIRANGO MAGWAGWA II/527 include NORTH MUGIRANGO MAGWAGWA II/1255 and 1351. The 3<sup>rd</sup> Defendant is said to have carried out the sub-division and later transferred the same to several people without anyone having acquired probate. NORTH MUGIRANGO MAGWAGWA II/1255 was transferred to Timothy Nyakundi Kea, the 2<sup>nd</sup> Defendant on 8/1/2014 and NORTH MUGIRANGO MAGWAGWA II/1256 to the 1<sup>st</sup> Defendant Zacharia Agwata Nyanchama on 31/3/14 as is shown in the certificates of official search produced as Exhibits 4(a) and 4(b) respectively. Exhibit 4(c) is a copy of the official search in respect of Title No. NORTH MUGIRANGO MAGWAGWA II/1351. From the above NORTH MUGIRANGO MAGWAGWA II/1255 measures 1.54 Hectares, NORTH MUGIRANGO MAGWAGWA II/1256 measures 0.44 Hectares and NORTH MUGIRANGO

MAGWAGWA II/1351 which is still in the name of the late Gitaga Otero measures 0.948 Hectares. The late Joseph Ooga took possession of the suit land upon making the first payment, started cultivating the same and grew maize on the parcel of land until his death in 2004, uninterrupted. The only time there was interruption is in 2017 long after his death when unknown goons came to destroy the Plaintiff's sister's crop of maize. The 1<sup>st</sup> Defendant never appeared before the Third Defendant when required to do so in order to explain how he had the land transferred without letters of administration.

The plaintiff has already identified the parcel NORTH MUGIRANGO MAGWAGWA II/1256 as the one that was bought by his late father where the deceased's daughter resides. The same is described in the sale agreement dated 8/12/00 as Egentonto sub/loc MAGWAGWA II 527/11. This description of the property tallies with the description of the title that was issued later on i.e NORTH MUGIRANGO MAGWAGWA II/527. It is interesting to note that the 2<sup>nd</sup> Defendant was also a witness to the agreement of sale dated 8/12/00 between the deceased and the late Momanyi Getaga.

The Plaintiff also prays for damages for trespass, special damages "as pleaded" and costs of the suit. He has testified that the crop destroyed was a maize plantation of Kshs. 18,240/= and even produced several documents as proof of the destruction and value of the maize crop respectively.

I find that the Plaintiff has satisfied this court on a balance of probability that his late father Mr. Joseph Ooga Juma bought a portion of the parcel of land known as NORTH MUGIRANGO MAGWAGWA II/527.

#### **Under Section 80 of the Registration of Land Act;**

***(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.***

***(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.***

The registration of the suit property herein i.e. NORTH MUGIRANGO MAGWAGWA II/1256 was actuated by fraud where all the Defendants herein must have participated since there were no letters of Administration nor was there any consent to sub-divide or transfer.

I do not understand how the said property was sub-divided and transferred in the names of 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively and 0.948 Hectares registered in the name of the late Gitega Otero who had already died at the material time i.e. 28/7/16. The Plaintiff has already identified the portion NORTH MUGIRANGO MAGWAGWA II/1256 measuring 0.44 Hectares which is 1.0 Acre or thereabout as the parcel bought by his late father and whereon the family dug a pit latrine at the time of purchase and which is still on the land which they have been cultivating since then. The Defendants were given a chance to come and defend this suit but chose not to. I feel that the conduct of the 3<sup>rd</sup> Defendant, the Land Registrar, Nyamira regarding this matter is wanting. It is unfortunate that after he summoned all the parties herein among others to his office with severe consequences in default thereof in a letter dated 16/5/17 a month later, on 7/6/17 he concluded that he had ascertained that the Plaintiff's father had indeed purchased the suit property but that the family of the late Momanyi Getaga was now siding with others rather than the Plaintiff. The Land Registrar Mr. Mutua, in his letter dated 21/6/2017 asked the chief, Borangi Location to establish and maintain the Status Quo on the ground until the matter was finalized. He also advised the Plaintiff herein to refer the matter to court for solution. Why do I say that it is unfortunate? Although under Land Registration Act, No. 3 of 2012 the Land Registrar does not have powers to rectify the register under circumstances such as are evident in this case, he has a duty when sued in court to appear and answer to the accusations under the particulars in paragraph 17 of the Plaintiff that he conducted sub-division and transfer on NORTH MUGIRANGO MAGWAGWA II/527 in the absence of a Grant of letters of Administration from the court thus making all his activities a nullity and void *ab initio* and for registering conveyances over LR. NO. NORTH MUGIRANGO MAGWAGWA II/527 without consent of the Land Control Board. Any resultant Titles out of LR. NO. NORTH MUGIRANGO MAGWAGWA II/527 therefore qualifies for cancellation.

How should the court treat the issue of the balance of the purchase price. As shown above, the consideration paid was Kshs. 77,500/= which was less Kshs. 2,500/= out of the agreed total purchase price of Kshs. 80,000/=. What is the effect of an agreement where the consideration has not been paid in full such as this one?

In this case the agreement does not talk of the completion date. Time was therefore not made of essence. Although the Plaintiff has taken too long to pay to the vendor the Kshs. 2,500/= being the balance of the consideration, the vendor can only rescind a contract after serving the purchaser with a Notice to complete where the latter gives the former some reasonable time to complete the contract. The Plaintiff has never been served with a Notice of completion.

The purchaser can only be guilty of unnecessary delay when he drags his feet and does not want or is unable to pay the balance but not in a case such as this where the vendor's personal representatives have behaved in such an irresponsible manner so as to keep off the purchaser from his entitlement. The vendor passed on before this balance was paid to him. Tracing the Vendor's personal representatives was hence an uphill task. The delay here is excusable because of the several efforts made by the Plaintiff's late father and mother to complete the contract. The delay is therefore not attributable to the purchaser. Till death the purchaser was always able, ready and willing to complete his part of the contract. He acted responsibly and reasonably in all the circumstances. His personal representatives did likewise. The Plaintiff's Estate did everything within their reach in ensuring that the contract of sale was successfully completed. This included his wife paying a further Kshs. 7,000/= after the purchaser's demise. The family also unsuccessfully sought the intervention of the local administration. Does this then mean that the Plaintiff is released from the payment of Kshs. 2,500/= being the balance of the purchase price? Certainly not. Parties in a contract must fulfill their part of the bargain and I accordingly order that the Plaintiff deposits in court the sum of Kshs. 2,500/= plus interest at 12% per annum from the date of the Sale Agreement i.e. 08/12/2000 to the date of this Judgment. The same will remain in court and form part of the Estate of the late Momanyi Getaga until such time as the beneficiaries of the said Estate will lay a claim over it.

On the issue of Special Damages, Special Damages must not only be pleaded specifically as has been meticulously done herein but the same must also be proved on a balance of probabilities. It is indeed not in dispute that the Plaintiffs' sister's crop was destroyed and the destruction has been valued at Kshs. 18,240/=. What is not clear and cannot be implied is the identity of who destroyed the crop. What has been proved herein is only the damage but the same cannot be attributed to the Defendants herein. The fact that 2 of the Defendants herein have frustrated the Plaintiff for long does not necessarily mean that they were connected to the damage. They do not possess the monopoly of inflicting the pain to the Plaintiff's family all the time.

Although the Plaintiff has exhibited a letter from the office of the Director of Public Prosecutions, Nyamira dated 5/12/17, no one was charged and the court cannot speculate as to who carried out the damage or who sent the perpetrators of the damage of the crop. This head of prayer must therefore fail and the same is disallowed. I will spare the Plaintiff the costs since the anguish and pain of losing a crop is excruciating.

On General Damages for Trespass, the Plaintiff has also not proved the Defendants were responsible and I as well disallow the prayer with no orders as to costs. Having said so, I enter Judgment for the Plaintiff against the Defendants for the following orders: -

- a) The Plaintiff shall deposit in court the sum of Kshs. 2,500/= plus interest at 12% per annum from the date of the Sale Agreement i.e. 08/12/2000 to the date of this Judgment the same being the balance of the Purchase price.
- b) The above money will be held by the court as part of the Estate of the late Momanyi Getaga until such time as the rightful beneficiaries of the said Estate will lay a claim over it.
- c) A declaration that the Estate of the late Joseph Ooga is the legal owner of the parcel of land known as NORTH MUGIRANGO MAGWAGWA II/1256.
- d) A declaration that the transfer of Title to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant of NORTH MUGIRANGO MAGWAHWA II/1256 on 31/03/14 was fraudulent and unlawful.
- e) The Title Deed issued by the 3<sup>rd</sup> Defendant to the 1<sup>st</sup> Defendant of the parcel of land known as NORTH MUGIRANGO MAGWAGWA II/1256 on 31/03/14 be cancelled forthwith.
- f) Upon proof of (a) above, the 3<sup>rd</sup> Defendant shall forthwith rectify the Title Deed in respect of LR. NO. NORTH MUGIRANGO MAGWAGWA II/1256 to read the name of the Plaintiff in trust for the Estate of the late **JOSEPH OOGA** and/or the Deceased family's nominee, the latter to be approved by this Court.

I will also award the costs of this suit to the Plaintiff against the Defendants.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 16TH DAY OF NOVEMBER 2021.**

**MUGO KAMAU**

**JUDGE**

**IN THE PRESENCE OF: -**

**COURT ASSISTANT: MOBISA.**

**PLAINTIFF: PRESENT ONLINE IN PERSON**

**DEFENDANTS: N/A**