



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

CIVIL CASE NO. 196 OF 2017

ALLOYCE ITIENG ORIAS.....PLAINTIFF

VERSUS

DOUGLAS KHATITI TATIDEFENDANT

J U D G E M E N T

1. The plaintiff Alloyce Orias Ityeng commenced this suit vide Bungoma CMCC 683 of 2009 vide a plaint dated 2nd September 2009 which was transferred to this Court and registered as Busia ELC 196 of 2017. The plaintiff pleaded that the defendant sold to him land title No. S. Teso/Amukura/1747 on February 2005 at a consideration of Kshs.112,000/= . That he received his title on 20th April 2007 and the defendant was to give vacant possession of the suit property on completion of the purchase price. However todate the defendant has failed to do so necessitating the filing of this suit.

2. The plaintiff filed this suit seeking the following reliefs;

- (a) Eviction of the defendant, his family and or servants from L.R. No. S. Teso/Amukura/1747.***
- (b) Costs of the suit.***
- (c) Any other or further relief the Honourable Court may deem fit to grant.***

3. In his defence, the defendant filed a statement of defence and counter-claim dated 30th September 2009. The defendant admitted part of the claim which said he was to give vacant possession of the plot upon payment of full purchase price but denied that he has refused to give vacant possession stating that the plaintiff has only paid Kshs.101,490/= leaving a balance of Kshs.7,510/=. The defendant also admitted that the matter had been referred to the administrative authorities by the plaintiff.

4. The defendant denies the plaintiff is entitled to eviction orders. He counter-claimed that the plaintiff breached their agreement as he only sold 4 portions of 50ft x 100ft plots and not the entire land. He pleaded fraud against the plaintiff accusing the plaintiff of;

- a) The defendant failed to follow the proper procedure in transferring the plot.***
- b) Failing to notify the defendant of the transfer of the Plot No. South Teso/Amukura/1747.***
- c) Failing to obtain consent of the owner of the plot before transferring the same to himself.***
- d) Fraudulently transferring the entire South Teso/Amukura/1747 to himself.***

5. The defendant prays for judgment in his favour for;

- (a) An order of specific performance compelling the plaintiff to pay the balance of purchase price Kshs.7,510/=.***
- (b) An order of revocation of the registration of South Teso/Amukura/1747 in the plaintiff's name.***
- (c) Interest and cost of counterclaim.***

6. During the hearing, the plaintiff called 3 witnesses and the defendant also called 3 witnesses. **PW1** said that while he was working at St. Mary's Amukura School, Linet Tati approached him and told him of a land that was being sold by someone who needed money for school fee. Linet is wife of the defendant who was selling the land. **PW1** said he told Linet to come with the husband who also came with a title deed. That they negotiated and agreed at a price of Kshs.27,000 per acre.
7. **PW1** continued that the money was used to pay school fees for the defendant's daughter named Caroline which he paid until the year 2004 and on 23/10/2004 they entered into a formal agreement. The agreement was produced as **Pex 1**; search done on 11/10/2004 as **Pex 2**. **PW1** stated that on 26/2/2005 he made additional payment of Kshs.30,640 of which 20,640 was paid as fees and Kshs.10,000 cash given to the defendant. That he paid the balance of Kshs.10,510/= on 14/10/2005.
8. It is the plaintiff's case that they went to Amukura Land Control Board where the defendant signed all the necessary papers; gave a copy of his ID, PIN certificate and passport size photographs. He presented these documents in respect of LR No. 1748 and they discovered that LR. No. 1748 was not in the defendant's name. That the error came during sub-division of parcel No. 1632. This problem was solved and **PW1** got registered as owner of LR No. 1747/S. Teso/Amukura. He produced the documents executed by the defendant as **Pex 4, 5 and 6** and search showing the land entered into his name as **Pex 7**.
9. **PW1's** further evidence is that when the defendant was to give vacant possession, he started becoming difficult. **PW1** made two formal demands for vacant possession (**Pex 8(a) & (b)**) and also lodged a complaint with the area chief – **Pex 9**. The plaintiff denied the defendant's claim that he was buying the land in form of plots.
10. In cross-examination, **PW1** said it is the defendant's wife who went and told him about the land. That he paid for the defendant's daughter school fees from the year 2002 until she finished. **PW1** said he would pay and give receipts to the defendant. That the sale agreement was witnessed by 5 people i.e. Alex Barasa Okoit (village elder); Lawrence Inguta, Joseph, Priscilla Tati (defendant's daughter) and Linet Tati. That the defendant signed all documents voluntarily and only became difficult after everything else was done.
11. Alex Barasa Okoit testified as **PW2**. He confirmed being present when the land was being sold. **PW2** in cross-examination said that the defendant's wife approached him on 23/10/2004 and told him they were selling land to somebody who had paid school fees for their daughter. **PW2** said he went to the defendant's home accompanied by the area chief where the sale agreement was drawn.
12. Lawrence Emukol Ing'ura gave evidence as **PW3**. He was the area chief of Kamolo location until 2016. **PW3** said he became a chief in the year 2000. He knew the defendant and the plaintiff. **PW3** confirmed being present when the sale agreement was drawn. That he is the one who drew the agreement and also wrote the letter dated 27/8/2009 (**Pex 9**) after the defendant refused to surrender vacant possession to the plaintiff. This marked the close of the plaintiff's case.
13. Douglas Khatiti Tati gave evidence on 15/10/2019 as **DW1**. He comes from Onyunyur sub-location in Amagoro and married to two wives; blessed with nineteen children. **DW1** said he had a daughter learning at St. Mary's Amukura School in the year 2002. His evidence is that he paid her fees and produced receipts as **Dex 1**. In 2003, **DW1** said he agreed with the plaintiff to pay for his daughter's fees but the plaintiff never gave him any receipts. It is also **DW1's** evidence that he sold to the plaintiff 4 pieces of 50ft x 100ft plots with each plot costing Kshs.27,000. That the plaintiff paid fees totalling to Kshs.58,940 and they made an agreement.
14. **DW1** stated further that the agreement produced by the plaintiff had the part of 100 feet crossed. He produced his copy as **Dex 2**. **DW1** denied receiving Kshs.10,000 from the plaintiff. He also denied that the chief was present when the agreement was signed. The defendant also denied taking the plaintiff before the Land Control Board. His evidence is that the plaintiff should get only 4 plots not 4 acres.
15. In cross-examination, **DW1** said he worked as a primary school teacher and retired in the year 2015. That it is the plaintiff who asked him to get him land to buy. **DW1** admitted the plaintiff paid all the fees for his daughter. **DW1** confirmed he had not subdivided the suit land into plots. As per his agreement, he acknowledged payment of Kshs.80,850 and Kshs.30,640 on 26/2/2005 leaving a balance of Kshs.10,510 which gives a total of Kshs.112,000. **DW1** also admitted they met at the Divisional Officer's office on 11/8/2006 where he signed a form but according to him the form was to exchange the numbers. That a consent was given between him and Panyako. He denied attending Land Control Board meeting on 14/10/2005. **DW1** admitted the passport photo on the transfer form is his, the ID number and PIN is also his. He has not reported the fraud to the police.
16. Linet Khatiti Tati was called as **DW2**. She is the wife of the defendant. She said that on 9th July 2009 she saw a message on her husband's phone asking them to move out from the land. She reported the plaintiff to the area chief and later sued him before Malaba Land Dispute Tribunal. That he only knew the plaintiff when the area chief summoned him.
17. In cross-examination **DW2** said the suit land was bought for her by her father. That it was however registered in **DW1's** name. She admitted her daughter went to St. Mary's Amukura but denied she ever went to that school. She never attended the meeting concerning the suit land held in her house. **DW2** agreed that the suit land is not marked into plots.
18. **DW3** was Nancy Priscilla Tati who is a daughter to the defendant. She said that she currently lives where she is married. However before getting married, she remembered seeing the plaintiff; Omusugu and Alex visit their home on 26/2/2005. That **DW1** asked her to prepare tea for them. **DW3** said she was told by the defendant that he was selling part of his land to pay school fees. Later she was called to read some document which she also signed as a witness when his father received Kshs.30,640. That his father said he was selling 4 plots of 50ft x 100ft. In cross-examination, **DW3** confirmed witnessing the sale agreement between the plaintiff and the defendant. This marked the close of the defendant's case.
19. The parties filed written submissions which I have read and considered. From the evidence adduced, the questions I frame for my determination are;

- (a) Whether the land was matrimonial property therefore not capable of being sold.
- (b) Whether or not the defendant sold 4 portions of 50ft x 100ft plots or the entire suit land.
- (c) Whether the plaintiff acquired his title through fraud.
- (d) What orders this Court ought to grant.

20. It is trite law that parties are bound by their pleadings. Order 2 rule 10 provides that;

“every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded”.

The statement of defence and counter-claim filed by the defendant did not plead anything to do with the suit land being matrimonial property. No proceedings were commenced by the defendant to establish that the suit land was matrimonial property which required spousal consent. Furthermore the issue of spousal consent was introduced by the Land Registration Act 2012 which was not in operation when the impugned transaction was entered into in the years 2002 – 2005.

21. Consequently the submissions on behalf of the defendant invoking the provisions of Section 2 of the Matrimonial Property Act to these proceedings are of no application/relevance. Similarly the provisions of Section 28 of the Land Registration Act cannot apply retrospectively to the plaintiff's title which was obtained on 20th April 2007.

22. The second issue is what size of land was sold to the plaintiff. The defendant admitted he sold to the plaintiff a portion of the suit land which he describes as 4 portions of 50 x 100ft plots. This evidence was corroborated by **DW3**. The plaintiff on his part claims that the whole land measuring 1.64Ha was sold. Both parties produced sale agreements in their possession to prove their version of events.

23. The plaintiff produced as **Pex 1** sale agreement in respect of LR. No. 1748 for a portion measuring 1.64Ha giving purchase price at Kshs.27,000 per acre. The agreement is executed by the plaintiff and witnessed by Tati Priscilla, Joseph Omusugu and a village elder. The defendant claimed that the number 100 was erased on **Pex 1**. On the face of **Pex 1**, there was no such erasure visible.

24. The defendant also filed a list of documents dated 12th May 2014 and filed on 15th May 2014. Document No. 6 is the sale agreement which I find as similar to the one produced by the plaintiff. Besides this agreement, no one document was presented to the court. The plaintiff explained that when they visited the lands office to register his transfer, they discovered L.R. No. 1748 was registered in the name of Joseph Panyako who was the defendant's neighbour. Both of parties agreed there was a mistake made during the registration of the subdivisions of 1747 and 1748. That a rectification was made on the two titles and thereafter transfer effected in favour of the plaintiff as owner of L.R. No. S. Teso/Amukura/1747.

25. To further support his claim for the 1.64Ha, the plaintiff produced copies of application for Land Control Board consent (**Pex 3**), Letter of Consent (**Pex 4**) and signed transfer (**Pex 5**). Although the defendant denied taking the plaintiff before the Amukura Land Control Board, he did not deny the signatures appearing on these documents. The defendant admitted the details of photo, PIN number and ID number on the transfer are his. The defendant said he is a retired primary school teacher hence this Court takes it that he must have known what he was signing for. The defence that he sold 4 plots each measuring 50ft x 100ft is an afterthought as the defendant and his witness conceded that the suit land was not marked into plots of 50ft by 100ft. The defendants never presented any agreement for the sale of plots measuring 50ft by 100ft.

26. The 3rd question was whether the defendant has proved the fraud he alleged against the plaintiff. Allegations of fraud must be specifically pleaded and strictly proved. One such allegation made was that the plaintiff did not follow due process in obtaining registration of the suit land. The plaintiff produced letter of consent of the relevant land control board and an executed transfer by the defendant. On his part, the defendant did not present any document from the Amukura Land Control Board to support his averment that there was no meeting held by that board on 14th October 2005 when the consent to transfer was issued to the plaintiff. Neither did the defendant lead evidence that the plaintiff illegally obtained a copy of his ID, PIN certificate and passport size photograph.

27. The defendant also pleaded that he was not notified of the transfer. In his evidence, he said that he appeared before the Land Board only to rectify the mistake of his title and that of his neighbour i.e. 1747 and 1748. The correction of the names between him and his neighbour Joseph Panyanko was indeed done. However he failed to present any evidence to contradict the documents produced by the plaintiff. His not attending Land Control Board for transfer remained as a mere allegation yet the burden of proof was on the defendant. I am therefore not satisfied that the defendant proved the particulars of fraud he alleged against the plaintiff.

28. What orders ought this Court to make? After analysis of the evidence presented by both parties I am persuaded that the plaintiff has proved his case within a balance of probabilities. The counter-claim by the defendant however fails for lack of proof within the required standards. Accordingly I enter judgment for the plaintiff directing the defendant to surrender vacant possession of L.R. No. South Teso/Amukura/1747 within 90 days of this judgment. In default the plaintiff is at liberty to evict him using lawful process. The plaintiff having served the defendant with several notices for the defendant to surrender vacant possession which the notices were ignored is entitled to costs incurred. Therefore I shall award the plaintiff costs of this suit.

Dated, signed and delivered at BUSIA this 20th day of February 2020.

A. OMOLLO

JUDGE