



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 29 OF 2014

NDIEGE OACH ATIENO ALIAS CYPRIAN NDIEGE PLAINTIFF

VERSUS

NDIRE NYASORE DEFENDANT

JUDGMENT

1. The plaintiff by a plaint dated 3rd February 2014 filed in court on 4th February 2014 seeks an order of specific performance compelling the defendant to transfer land parcel **No. Kabuoch/Kobita Kawuor/615** (hereinafter referred to as “the suit land”) to the plaintiff and/or in the alternative the Executive officer of the court be directed to execute the transfer in place of the defendant.
2. The plaintiff by the plaint claims that he purchased the suit land from the defendant on or about 23rd April 1979 and took possession of the land immediately and thereat established his residential home. The plaintiff avers the defendant was to transfer the land to the him but the defendant has since failed and/or neglected to effect the transfer necessitating the institution of the instant suit.
3. The defendant was served with the summons to enter appearance together with a copy of the plaint, verifying affidavit, the plaintiff’s list of documents and the plaintiff’s witness statement on 5th February 2014 as per the affidavit of service sworn by one **Mwango Otieno Fredrick** on 3rd March 2014 and filed in court on the same date. The defendant did not enter appearance and/or file any defence and on application by the plaintiff interlocutory judgment was entered on 3rd March 2014. On 26th January 2015 the court gave directions for the suit to be fixed for hearing and the defendant to be served.
4. The suit was listed for hearing before me on 13th October 2015 and though the defendant had been served with a hearing notice he did not attend and I allowed the plaintiff to proceed with the hearing ex parte. The plaintiff testified as PW1 and he stated that from 1972/73 he was residing on the defendant’s land parcel number **Kabuoch/Kobita Kawuor/615** and that in 1979 the defendant decided to sell the suit land to him and that on 23rd April 1979 he and the defendant entered into a sale agreement whereby the defendant sold to him the suit land for the total of kshs. 2,000/= . The plaintiff stated the agreement was witnessed by **Samwel Otieno Odie** and **Samson Abich Agola** who unfortunately are now both deceased. The agreement was attested by the District Magistrate Rongo on the same date as per the payment receipt No. D596221 dated 23rd April 1979. The agreement for sale and court receipt were tendered and produced as Pex “1” and “2” respectively.
5. The plaintiff testified that he paid the full purchase price of kshs. 2,000/= against the signing of the agreement. The plaintiff stated that the defendant was to have the said land transferred to him but has not done so inspite of repeated demands and requests. The plaintiff states he has occupied and has been in occupation of the suit land since 1979 and he and his three adult sons have established their homesteads on the suit land. The plaintiff wishes the court to declare that he is entitled to be registered as the owner of the suit land in place of the defendant. The plaintiff

- asserts that the defendant has never resided on the suit land and that the defendant resides on another parcel of land nearby. The plaintiff following a request by the court that he avails a certified copy of the suit land, on 18th November 2015 furnished the court with a certified copy of land register in respect of land parcel number **Kabuoch/Kobita Kawuor/615** which confirmed that the defendant was registered as owner of the suit property on 20th April 1983 following completion of the land adjudication process. The plaintiff registered a caution against the suit property on 19th June 1991 claiming a purchaser's interest.
6. I have reviewed and considered the uncontroverted evidence of the plaintiff in support of his claim and the issue for determination is whether the plaintiff is entitled to be declared as entitled to be registered as the owner of the suit property. On the evidence adduced by the plaintiff it is not in doubt that the defendant though not then registered as owner of the suit property, he (the defendant) was the beneficial owner of the suit property as at 23rd April 1979 when he sold the property to the plaintiff. The agreement of sale was duly attested by the Rongo District Magistrate and I accept and find that the sale actually took place on the terms set out in the agreement for sale.
 7. The defendant was registered as owner of the suit property on 20th April 1982 as per the abstract of title and this was after he had sold the suit property and after he had been fully paid the purchase price. The plaintiff was in possession and occupation of the suit property following the purchase and for all intent and purposes was using the land as his own. The plaintiff has been using the land ever since he purchased the same and he and his children have built their homes on the suit land. There is no evidence that the defendant has at any time sought to recover the land from the plaintiff by way of eviction or otherwise. Any action by the defendant to seek to recover the suit land from the plaintiff would in all probability be statute barred in terms of section 7 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya.

Section 7 of the Limitation of Actions Act provides thus:

7. 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.

8. The plaintiff in the circumstances of this case may as well have been entitled to claim title to the suit property by way of adverse possession as it appears the possession by the plaintiff of the suit property was adverse to the interests and rights of the registered owner. However, the claim by the plaintiff is not predicated on adverse possession as the plaintiff is seeking specific performance of the April 1979 agreement for sale by requiring that the defendant executes the transfer in his favour and/or in default the Executive Officer of the court executes the transfer on behalf of the defendant. I am cognizant of the fact that the suit property being agricultural land would be subject to the provisions of Land Control Act, Cap 302 and that the consent of the Land Control Board of the area would be a prerequisite before any transaction relating to a sale or transfer of the land can be effectuated. As no consent of the relevant land control board was obtained the sale transaction would be void for all purposes and cannot therefore be enforceable.
9. Be it as it may, the defendant sold the suit property and was fully paid the purchase price. The defendant parted with possession of the suit property to the plaintiff. The plaintiff fully fulfilled his part of the bargain under the agreement and all that remained was for the defendant to transfer the land to the plaintiff. After the defendant was paid the full purchase price, the defendant in my view continued to hold title to the parcel of land in trust for the plaintiff.
10. I am mindful that the plaintiff was not represented by counsel in these proceedings and hence his pleadings may have fallen short of technically meeting the technical threshold in as far as pleadings are concerned. The court is faced with the situation where the plaintiff has demonstrated that he actually purchased the suit property, has been in occupation and possession since the date of the purchase and has used the suit land virtually as owner though he is not registered as owner. The defendant who lives in the same locality but on another parcel of land appears to have no interest with the suit property though he is still shown as the registered owner. The court is enjoined under article 159 2 (d) of the Constitution to strive to render justice

expeditiously and without undue regard to technicalities of procedure. Section 19 (1) of **Environment and Land court Act** equally enjoins the court to do substantive justice without undue regard to technicalities of procedure. Section 19 (1) provides:

“In any proceedings to which this Act applies, the court shall act expeditiously, without undue regard to technicalities of procedure...”.

Section 3 (1) of the **Environment and Land Court Act** states the overriding objective thus:-

3(1) The principal objective of this Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.

11. Having carefully considered and evaluated the evidence in this matter, I am satisfied that the plaintiff indeed purchased the suit property and that he occupies and uses the suit property as the owner thereof. The defendant after he was duly paid the purchase price and having parted with vacant possession of the suit property he continued to hold the title of the suit property as trustee for the plaintiff. The plaintiff is entitled to have that trust discharged by the defendant being ordered to transfer the suit property to the plaintiff. Thus even though the plaintiff had not pleaded trust, it is my finding that the defendant holds title to the suit property as trustee of the plaintiff and that the plaintiff is entitled to have the suit property transferred to him.
12. The net result is that I find and hold the plaintiff's suit against the defendant proved on a balance of probabilities. I accordingly enter judgment in favour of the plaintiff as against the defendant on the following terms:

1. **A declaration be and is hereby made that the defendant holds title number kabuoch/Kobita Kawuor/615 in trust for the plaintiff.**
2. **The defendant be and is hereby directed to transfer land parcel Kabuoch/Kobita Kawuor/615 to Ndiege Oacho Otieno the plaintiff herein forthwith.**
3. **The Deputy Registrar is hereby authorized to execute any necessary documents to effect the transfer of land parcel Kabuoch/Kobita Kawuor/615 to the plaintiff.**
4. **I make no order for payment of costs.**

Judgment dated, signed and delivered at Kisii this 12th day of February, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

J. M. MUTUNGI

JUDGE