



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 81 OF 2012

PETER ODERO OKOLO PLAINTIFF

VERSUS

HELLEN OGUTA ANGWEN DEFENDANT

JUDGMENT

1. The plaintiff by a plaint dated 5th March 2012 claims to have purchased a portion of 2 acres from Angwen Atonga for Kshs. 4,000/= which was to be excised from land parcel number **Kabuoch/K/K/Koguta/33**. The plaintiff avers that the defendant with intention to defraud the plaintiff had the land parcel **Kabuoch/K/K/Koguta/33** fraudulently registered in her name to the prejudice of the plaintiff.

2. The plaintiff by the plaint seeks judgment against the plaintiff for orders that:-

(a) A permanent prohibitory injunction to restrain the defendant from entering into land parcel No. Kabuoch/K/K/ Koguta/2276, cultivating or in any way dealing with the interest of the plaintiff earlier purchased.

(b) Costs of the suit with interest thereon at the rate of 14% p.a from date of filing suit until payment in full.

(c) Any other relief court may deem fit to grant.

The defendant filed a defence dated 3rd April 2012 through the firm of **H. O Mimba & Company Advocates** where she denies that Angwen Atonga (deceased) ever sold the piece of land to the plaintiff. The defendant alleged that the plaintiff had leased the land and denied all the allegations of fraud attributed to her in the plaint.

3. The suit was heard before me on 5th October 2015. The plaintiff testified in support of his case and called no witness while the defendant testified and called one witness. The plaintiff testified as PW1 and he stated that he purchased a portion of 2 acres of land from Angwen Atonga (now deceased) on 10th September 1989 and was granted possession. The portion of 2 acres was to be excised from land parcel 33 Koguta. The plaintiff testified that the defendant who is the wife of the said Angwen Atonga witnessed the agreement on the part of the seller while the plaintiff's witnesses were his father, Joram Okolo Okite (deceased) and his mother Ruth Akach. The plaintiff produced the agreements dated 10th September 1989 as an exhibit (PEx1). The plaintiff stated that he was using the land until 2012 for farming activities. He stated he was farming sugarcane on one acre and was doing subsistence farming on the other one acre. The plaintiff testified that he is presently not on the parcel of land as the defendant

through her agents in 2012 forcibly invaded his portion of land, damaged his sugarcane, crops and trees and injected him from the land and they have since prevented him from continuing in occupation and utilizing the land. The plaintiff reported the damage to the chief and Ndhiwa Police Station and had the damage assessed by the Agricultural Extension Officer for compensation purposes at kshs. 49,000/= as per the crop compensation report tendered in evidence. The plaintiff testified that he did not know how the defendant came to be registered as owner of the suit land. He produced copies of mutation forms as **PEx6** which shows that land parcel **Kabuoch/K/K/Koguta/33** was subdivided into Plot Nos. **2276, 2277** and **2278**. The plaintiff claims that his portion of land is comprised in land parcel number **2276** registered in the name of the defendant.

4. Under cross-examination the plaintiff stated that he did not know whether the defendant filed any succession cause in respect of her deceased husband's estate. The plaintiff stated he did not know when Angwen Atonga died and that following the agreement for sale they never sought any consent of the land control board. The plaintiff further stated under cross examination that although the chief was required at the time he bought his land to witness the agreement he had not, stating that they had sought the chief on various occasions without finding him. The plaintiff admitted that the defendant did not personally damage his crops but stated that it was her agents who did the damage though no criminal charges were preferred against any of the persons who caused the damage.

5. The defendant testified that the plaintiff had lent her mother in law kshs. 400/= and on that account was allowed to cultivate a portion of suit property. The defendant testified that the plaintiff was required to stop cultivation but he did not. The defendant denied that he damaged any crops of the plaintiff as alleged. The defendant stated she was registered as owner of the suit land following succession and that she is presently using the land for cultivation. She denied that the plaintiff purchased any land from her deceased husband. The defendant insisted that her husband only allowed the plaintiff to use a portion of the land because he had lent his mother a sum of kshs. 400/=. The defendant stated she is the registered owner of the suit property and averred that there was no basis for the plaintiff to get any part of it and she would not agree to give any part to the plaintiff.

6. DW2 Killion Nyongesa testified in support of the defendant's case and stated that the defendant's husband owned Plot No. 33 Koguta and supported the defendant's assertion that the plaintiff had lent a sum of kshs. 400/= to his grandmother and for that the plaintiff's father was allowed to cultivate a portion of the land. He testified the plaintiff continued cultivating the portion his father had been cultivating after the plaintiff's father died. DW2 stated that the defendant is his step mother and that she is now the registered owner of the land following a succession cause in Homa Bay court. The witness denied that the plaintiff had purchased the land from the defendant's husband who died in 1997.

7. Arising from the pleadings and the evidence adduced by the parties the issues that stand out for determination by the court are as follows:

(i) Whether there was a valid and enforceable agreement between Angwen Atonga (deceased) and the plaintiff and if so whether the defendant is bound to honour the agreement.

(ii) Whether the defendant acted fraudulently in having land parcel Kabuoch/K/K/Koguta/33 transferred to her name and subsequently subdivided.

(iii) Whether the plaintiff is entitled to the orders prayed for in the plaint.

(iv) Who bears the costs of the suit.

8. Issue Number One;

The plaintiff in this suit relies on the agreement dated 10th September 1989 produced as PEx1. The defendant denies there was such an agreement. The agreement was not witnessed by the local chief as was the practice at the time the agreement is said to have been entered into. Not all the witnesses said to have been present have signed the agreement. Two out of the 4 witnesses are shown to have thumb

printed the agreement but there is no attestation as to whose thumb prints they are. The agreement is shown to be in respect of land parcel No. 33 said to be owned by Agwen Atonga then. The plaintiff's pleadings do not show the defendant is sued as the personal legal representative of the late Agwen Atonga. The alleged agreement was not made with the defendant and she was not a party to the same. Indeed she has stated that the plaintiff brought her blank forms which he requested her to sign on the understanding that the plaintiff was going to assist her and others to secure donor funding. My view is that even if there was a valid agreement between the plaintiff and the late Agwen Atonga the same could not bind the defendant save as a personal legal representative provided the cause of action survived the death of Agwen Atonga. The agreement having been made on 10th September 1989 in law it became unenforceable after the expiry of six (6) years by virtue of section 4 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya. The enforcement of the contract became statute barred on expiry of six (6) years after the contract was entered into.

9. Section 4 (1) of the **Limitation of Actions Act** provides:-

4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

(a) Actions founded on contract;

(b) Actions to enforce a recognizance;

(c) Actions to enforce an award;

(d) Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) Actions, including actions claiming equitable relief for which no other period of limitation is provided by this Act or by any other written law.

10. It is clear the plaintiff has founded his action in this suit on the contract/agreement made on 10th September 1989. Even though neither party in the suit took up the issue of limitation, the court is satisfied the same goes to the jurisdiction of the court to grant the orders sought and consequently the court is duty bound to consider whether it has the jurisdiction to entertain the suit and to grant the relief sought. To the extent that the plaintiff founds his cause of action on the agreement dated 10th September 1989 the court finds that the suit by the plaintiff is statute barred by virtue of section 4 (1) (a) of the Limitation of Actions Act, Cap 22 Laws of Kenya and is unmaintainable. The defendant cannot be bound to honour an agreement that cannot be enforceable.

11. Issue Number Two;

The plaintiff alleged that the defendant acted fraudulently in having Plot No. 33 registered in her name and subsequently subdivided. The plaintiff alleged the defendant had forged documents to effectuate the changes. The plaintiff did not prove any fraudulent acts by the defendant. The burden to prove fraud on the part of the defendant rested with the plaintiff. It was not enough for the plaintiff to allege fraud against the defendant. He who alleges must prove. Proof of fraud in a civil case is on a standard higher than a mere balance of probabilities though not as high as to require proof beyond reasonable doubt as in criminal cases.

12. The defendant stated that she filed a succession cause in Homa Bay court pursuant to which she was appointed as personal representative of her husband and by reason thereof had the property parcel No. 33 transferred to herself. The certified copy of the register in respect of Land Parcel **Kabuoch/K/K/Koguta/33** produced in evidence by the plaintiff shows Angwen Atonga was registered as owner of the parcel of land on 9th July 2003 and on 23rd December 2010 Hellen Oguta Agwen was registered as owner following registration of form RL7 - **“Transfer by Personal Representative to**

person entitled under a Will or on an Intestacy”. This is evidence that the defendant became registered as owner of the parcel of land after a succession cause. There is therefore no basis to hold and find that the defendant acted fraudulently in dealing with the suit property.

13. Issue Number Three;

I have held that the plaintiff’s suit is statute barred and unmaintainable to the extent that it is founded upon a contract that has been caught by limitation. I have also held that the plaintiff has not proved that the defendant was culpable of any fraudulent acts. It follows therefore that the plaintiff has not proved his case on a balance of probability and he cannot therefore be entitled to the relief sought. I may mention that the plaintiff’s relief for a permanent injunction in his suit would be untenable without the plaintiff being declared as owner of the portion of 2 acres out of the suit land. The defendant is the registered owner and her rights of ownership under Sections 24, 25 and 26 of **Land Registration Act, 2012** are absolute and as such owner the defendant is entitled to exclusive rights of use. Even if the plaintiff had prayed for a declaration, the same would have been unavailable on the basis of the pleadings as the plaintiff’s action is without doubt time barred.

14. The upshot is that I find the plaintiff’s suit to be devoid of any merit and the same is ordered dismissed with costs to the defendant.

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