



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 98 OF 2014

JEREMIAH OMOLLO ONYANGO PLAINTIFF

VERSUS

JOSHUA OTIENO OWINO 1ST DEFENDANT

GEORGE ODHIAMBO OWINO 2ND DEFENDANT

JUDGMENT

1. The plaintiff filed the instant suit against the defendants vide a plaint dated 11th March 2014 filed in court on the same date. The defendants are brothers and the sons of the late Noah Owino Ogal (deceased) who until his death on 17th December, 1996 was the registered proprietor of land parcel **Central Kasipul/Kachieng/512** (hereinafter referred to as “the suit land”). The plaintiff by the plaint avers that he purchased land from the 1st and 2nd defendants as beneficiaries of the late Noah Owino Ogal portions out of land parcel **Central Kasipul/Kachieng/ 512** measuring 1 acre and ¼ acre respectively. The plaintiff states that the 1st defendant by an agreement dated 21st September 2011 agreed to sell him a portion of his entitlement out of land parcel **Central Kasipul/Kachieng/512** measuring 1 acre for the consideration of kshs. 280,000/= while the 2nd defendant by an agreement dated 22nd September 2011 agreed to sell him a portion of ¼ acre out of the same parcel of land at the agreed consideration of 50,000/=.
2. The plaintiff avers that the 1st defendant and the 2nd defendant in breach of the respective agreements with them failed and/or refused to cause the plaintiff’s portions of land to be excised out of land parcel **Central Kasipul/ Kachieng/512** after they obtained grant of letters of administration where the 1st defendant was appointed as administrator of his late father’s estate. The plaintiff claims the defendants breached the respective agreements with them and seeks judgment against the defendants jointly and severally for:-
 - a. **Declaration that the defendants breach of the sale of land agreements dated 21st September, 2011 and 22nd September, 2011 together with the acknowledgement dated 28th June, 2013;**
 - b. **That there be an order of specific performance by the defendants with regard to the sale of land agreements dated 21st September, 2011;**
 - c. **In the alternative, the defendants do refund the entire purchase price as paid in full compliance with the agreements dated 21st September 2011 and 22nd September 2011 plus acknowledgment of 28th June, 2013;**
 - d. **General damages for breach;**

e. Costs of this suit.

3. The defendants were served with summons to enter appearance together with the plaint on 14th March 2014 as per the affidavit of service sworn by one Caroline Mmbone Diwa on 15th October 2014. The defendants did not enter an appearance and/or file any defence. The plaintiff fixed the suit for formal proof hearing on 21st March 2016. A hearing notice was taken out and served on the defendants on 4th March 2016 as per the affidavit of service sworn by one David Okumu Ojill on 19th March 2016. The matter was listed before me on 21st March 2016 for formal proof hearing and being satisfied that the defendants had been duly served and filed no defence and had not attended court though served with a hearing notice, I permitted the plaintiff to proceed with the hearing ex parte. The plaintiff testified as PW1 and called no other witness.
4. It was the plaintiff's evidence that he on 21st September 2011 and 22nd September 2011 entered separate agreements with the 1st and 2nd defendants respectively for the purchase of portions of land out of land parcel Central Kasipul/Kachieng/512. The subject parcel of land was registered in the name of Noah Owino the deceased father of the 1st and 2nd defendants and in respect whereof the defendants were to obtain grant of letters of administration following which the defendants were to cause to be excised the portions contracted to be sold to the plaintiff and transferred to him. The 1st defendant was to sell to the plaintiff a portion of 1 acre for Kshs. 280,000/= while the 2nd defendant was to sell to the plaintiff a portion of ¼ acre for kshs. 50,000/=. The plaintiff produced the sale agreements numbered 1 and 2 in the plaintiff's bundle of documents as exhibits. The plaintiff paid to the 1st defendant a total of kshs. 220,000/= made up thus; kshs. 190,000/= paid upon signing the sale agreement and kshs. 30,000/= paid on 29th October 2011 as per the acknowledgement signed by the parties. The plaintiff was to pay the balance of kshs. 60,000/= upon processing of the transfer in his favour.
5. The plaintiff further paid to the 2nd plaintiff the full consideration of kshs. 50,000/= for the purchase of ¼ acre portion as follows:-
 - i. Kshs. 30,000/= on execution of the sale agreement and
 - ii. Kshs. 20,000/= on 28th June 2013 as per the acknowledgment of the same date. The acknowledgements dated 29th October 2011 and 28th June 2013 numbered 3 and 4 respectively in the plaintiff's bundle of documents were tendered as exhibits in evidence.

The plaintiff further testified that he expended various sums in furtherance of the agreements on account of professional fees and disbursements paid to the law firm of Bana & Company Advocates aggregating kshs. 16,500/= as per copies of official receipts issued by the said firm in acknowledgment of the payments. Receipts numbered as item (5) in the plaintiff's bundle of documents were tendered in evidence.

6. The plaintiff further testified that the defendants declined and/or refused to honour their part of the agreement and averred that they were in consequence in breach of the agreements. The plaintiff testified that the defendants even after obtaining the grant of letters of administration to their late father's estate refused to give effect to the agreements for sale. The confirmed grant of letters of administration included in the bundle of documents as item (7) shows the suit parcel of land was distributed thus:
 - i. George Odhiambo Owino 0.96Ha
 - ii. Joshua Otieno Owino 0.50Ha
 - iii. Gordon Otieno Ouma 0.40Ha
 - iv. Joshua Otieno Owino 0.34Ha
7. The plaintiff states that efforts to get the defendants to implement the agreements have failed leaving the plaintiff with no other option but to approach the court for assistance either for the defendants to be ordered to specifically perform their part of the contract and/or to make a refund of all monies paid by the plaintiff towards performance of the contracts.

8. I have reviewed the evidence adduced by the plaintiff and the documents tendered in evidence by the plaintiff. There is no doubt the plaintiff entered into two separate agreements with the defendants to purchase portions of land parcel **Central Kasipul/Kachieng/512** then registered in the name of Noah Owino Ogal (their deceased father). On 21st and 22nd September 2011 when the agreements of sale were entered into no letters of administration to the estate of Noah Owino Ogal had been issued to any of the defendants. Land parcel **Central Kasipul/Kachieng/512** formed part of the estate of the late Noah Owino Ogal (deceased). The defendants did not at the time they entered into the agreements with the plaintiff have capacity to deal with the assets of the deceased estate and could not therefore enter into a valid contract respecting the sale of any assets of the deceased estate. It did not matter that the defendants were purportedly selling what they said would be their entitlements. Unless the plaintiff was acknowledged and accepted as one of the beneficiaries to the deceased estate his claim cannot be enforced against the suit land. The defendants simply did not have any locus standi to deal with the property of their deceased father before grant of letters of administration were issued and distribution of the estate effected.
9. There is another reason why the agreements are not enforceable and that is that the transactions constituted controlled transactions as defined under section 6 (1) of the Land Control Act, Cap 302 of the Laws of Kenya. The consent of the land control board of that area ought to have been obtained within 6 months of entering into the agreement. This was not done and the transactions therefore became void for all purposes pursuant to the proviso to section 6 (1) of the Land Control Act.
10. Section 7 of the Land Control Act, allows monies that have been paid pursuant to a controlled transaction that has become void to be recovered as a civil debt by the person who paid it from the person who was paid. In the present case the plaintiff paid various monies outlined earlier in this judgment pursuant to a transaction that has become void. The defendants were acting together and the plaintiff is entitled to recover the said amounts from the defendants jointly and severally. It is my finding that the plaintiff paid the following sums towards the abortive transactions:-

- i. Kshs. 220,000/= to the 1st defendant
- ii. Kshs. 50,000/= to the 2nd defendant
- iii. Kshs. 16,500/= being professional fees and disbursements.

No damages would be awardable for a contract that has become void by operation of the law and I decline to award any.

11. Consequently, I enter judgment in favour of the plaintiff against the defendants jointly and severally for:-

- i. **Kshs. 286,500/= together with interest at court rates from the date of filing the suit until payment is made in full.**
- ii. **Costs of the suit with interest at court rates.**

Judgment dated, signed and delivered at Kisii this 6th day of May, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st and 2nd defendants

J. M. MUTUNGI

JUDGE