



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NUMBER 396 OF 2017

LUCAS OGOLA OYIMBA.....PLAINTIFF

VERSUS

CHARLES OCHIENG OGUTU.....1ST DEFENDANT

SITIVIN OUMA OTIENO.....2ND DEFENDANT

JUDGMENT

A. INTRODUCTION

1. The property in dispute in the instant suit is a portion of land measuring approximately two (2) acres of land title number Kanyamwa/Kojwang/Kachola-Kadwet/98 measuring approximately six decimal five two acres (6.52 Ha) in area (Hereinafter referred to as the suit land). The same is contained in Registry Map Sheet number 5. The suit land is located in Ndhiwa sub county within Homa Bay County.
2. The suit was originally lodged at Kisii Environment and Land Court. On 23rd March 2017, it was transferred to this court, upon its constitution, for hearing and determination.
3. The plaintiff, Lucas Ogola Oyimbo is represented by the firm of G.S Okoth and Co Advocates.
4. The 1st and 2nd defendants namely Charles Ochieng Ogutu and Sitivin Ouma Otiemo respectively appear in person herein.

B. THE GIST OF THE PLAINTIFF'S CASE

5. By a plaint dated 12th February 2015 and lodged in court on 7th April 2015, the plaintiff has sued the 1st and 2nd defendants jointly and severally for;
 - a. A declaration that the defendants as administrators of the estate of the deceased vendor, Maricus Olum Ngala, are obliged to fulfil the contractual obligations of the deceased vendor.
 - b. An order of specific performance to compel the defendants to transfer a portion measuring two (2) acres of Land Parcel No. Kanyamwa/Kojwang/Kachola-Kadwet/198 to the plaintiff and the register to be duly rectified accordingly.
 - c. Costs of this suit together with interest thereon at the rate of 14% p.a from the date of judgement until payment in full.
 - d. Such further or other alternative relief as this Honourable Court deems fit to grant.
6. It is the plaintiff's claim that on 29th January 1992, he bought one (1) acre being part of the suit land from Maricus Olum Ngala (Deceased) at an agreed purchase price of Ksh 2,500 as shown in sale of land agreement dated 29th January 1992 (PEXh2). That on 14th March 2006 while the deceased was ailing, the plaintiff further paid Ksh 20,000/= to James Ouma Olum a son of the deceased, for the purchase of an additional one (1) acre being part of the suit land as disclosed in a supplementary sale of land agreement dated 13th February 2006(PEXhibit 3).
7. The plaintiff further claims that upon the death of the deceased, the defendants failed to file a succession cause in respect of the estate of

the deceased. Therefore, the plaintiff issued a citation thereof in Homa Bay High Court Succession Cause No 13 of 2013 (PEXh4a) which prompted the defendants to file Homa Bay High Court Succession Cause No 33 of 2013 whereby they were issued with a grant of letters of administration accordingly. That the defendants failed to transfer the suit land to the plaintiff thus, precipitating the present suit.

8. On 19th April 2018, the plaintiff(PW1) testified in this suit and relied on a certificate of official search with regard to the suit land (PEXh1), PEXhibits 2, 3 and 4(a) referred to hereinabove, death certificate in respect of the deceased(PEXh6), among other documents. On 24th January 2019, he called his witnesses namely George Onyango Oyugi (PW2) and Jenifer Adhiambo(PW3) who relied on their respective statements dated 22nd November 2017, in support of the plaintiff's case.

9. In his submissions dated 10th December 2019 and filed in court on 20th January 2020, learned counsel for the plaintiff gave brief facts of the case, set out the pleadings, the evidence and referred to the applicable law namely Section 3 of the Law of Contract Act as well as Sections 79, 82 and 83 of the Law of Succession Act (Cap 160 Laws of Kenya). Counsel argued that the defendants are obliged to fulfil the contractual obligations of the deceased by executing the transfer of the suit land in favour of PW1.

C. THE GIST OF THE DEFENDANTS' CASE

10. In their statement of defence dated 13th May 2015 and filed in court on 14th May 2015, the 1st and 2nd defendants denied the plaintiff's claim. They termed PEXh3 a nullity since the parties who entered into it were not the registered owners of the suit land. That the deceased, who was the registered proprietor thereof was still alive at the time PEXh3 was made.

11. The defendants also stated that the purported sale of the suit land to the plaintiff was not genuine as the plaintiff could not have waited for over ten (10) years to claim the suit land after the death of the deceased. That before the commencement of the citation, the plaintiff never notified the defendants jointly and some other beneficiaries of the purchase of the suit land from the deceased. They urged this court to dismiss the suit with costs.

12. On 10th December 2019, the 1st defendant (DW1) and the 2nd defendant (DW2) testified and relied on their respective statements dated and filed on 14th May 2015 and further statements filed in court on 11th June 2019 as part of their evidence. They also relied on their list of documents dated 14th May 2015 serialised as Nos. 1 to 4 namely agreement dated 13th February 2001(DEXh1), death certificates of the deceased (DEXhibit 2 and DEXhibit 3) and certificate of official search dated 14th May 2013(DEXhibit 4,) to enforce their case.

13. To further fortify their case, DW1 and DW2 also relied on the following documents;

- a. Land sale agreement dated 29th January 1992(DEXh5).
- b. Ruling dated 24/6/2014 in Homa Bay High Court Succession Cause No. 33 of 2013(DEXh6).
- c. A grant of letters of administration intestate dated 24th June 2014 in Homa Bay High Court Succession Cause No. 33 of 2013(DEXh7).
- d. A certificate of confirmation of grant dated 16th December 2014 in Homa Bay High Court Succession Cause No. 33 of 2013(DEXh8).

14. On 20th January 2020, the defendants filed their submissions dated 16th January 2020 where they referred to the reliefs sought in the plaint, stated the plaintiff's and defendants' cases in brief and analysed the evidence in their favour. They submitted that the plaintiff did not erect structures on the suit land. That the plaint is defective as they are not sued as legal representatives of the estate of the deceased and that the original land, LR No. Kanyamwa/Kojwang/Kachola- Kadwet/198 does not exist as the same has been subdivided into 16 pieces and registered in other people's names.

D. ISSUES FOR DETERMINATION

15. I have carefully examined the pleadings, evidence and submissions of the respective parties in the instant suit. The issues for determination in a suit generally flow from either the pleadings or as framed for the court's determination as held by the Court of Appeal in *Galaxy Paints Co. Ltd v Falcon Grounds Ltd (2000) 2EA 385 and* restated in *Great Lakes Transport Company (V) Ltd vs Kenya Revenue Authority (2009)KLR 720*.

16. In the foregone, I am of the considered view that the following issues fall for determination herein;

- a. Whether PW1 and the deceased entered into lawful contract(s) for the sale of the suit land as alleged herein.
- b. Based on the outcome in issue No.(a) above, are the defendants entitled to the reliefs sought in the plaint?

E. ANALYSIS AND DETERMINATION

17. As regards the first issue, I bear in mind the contents of paragraphs 3 and 4 of the plaint to the effect that the deceased sold the suit land to PW1. However, the proposition is disputed by DW1 and DW2 in their statements of defence.

18. In his evidence in chief, PW1 stated inter alia;

“...The deceased and myself agreed that I buy one (1) acre from him. We agreed for consideration of Ksh 25,000/= in respect of the one (1) acre. We signed land sale agreement dated 29.11.1992.”

19. PW1 further testified that he sent Ksh 20,000/= to his brother, George Onyango Oyugi, for purchase of an additional one (1) acre of the suit land. That the deceased used the amount for medication. That the said brother signed PEXh3.

20. During cross examination by DW1, it was the evidence of PW1 that:

“The deceased passed on in year 2006. He had sold one (1) acre of the suit land in 1992. He also sold one (1) acre to me in year 2006...”

21. In their respective statements, PW2 and PW3 indicate that PW1 bought the suit land from the deceased. That they were aware of PEXhibits 2 and 3.

22. It was the testimony of PW1 that he planted sisal plants on the land boundary. That he erected a posho mill and church house on the suit land. PW2 and PW3 affirmed that a posho mill and trees stand on the suit land.

23. It is trite law that possession of land in question can take different forms including tilling and tending the land; see *Kimani Ruchine vs Swift Rutherford Company Ltd and another (1976-80) KLR 1500* applied by the Court of Appeal in *Titus O. Nyachio vs Martin Okioma Nyauma and 3 others (2015)eKLR*, and *Elijah O.Opar vs Tobias Odhiambo Abach (2019)eKLR*.

24. In cross examination, PW3 stated that he was present when PEXh2 and 3 were made but did not sign them. Nonetheless, PW1 has not based his claim on verbal agreement but does allege an agreement in writing as observed in *Sumaria and another vs Allied Industries Ltd (2007)2KLR1*.

25. DW1 and DW2 relied on DEXhibits 1 to 8 and in cross examination, clearly, they admitted that the suit land belongs to the deceased. That they are the legal representatives of the estate of the deceased as revealed in DEXhibits 6, 7 and 8.

26. This court is not unaware of section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya and the Court of Appeal decision in *Tronistik Union International and another vs Jane Mbeyu and another (1993)eKLR*, on the meaning of legal representative and that the estate of the deceased person is vested in the legal representative respectively. This court also takes into account Sections 79, 82 and 83 of the Law of Succession Act Cap 160 Laws of Kenya regarding the powers and duties of personal representatives.

27. It is common ground that the suit land is registered in the name of the deceased as disclosed in PEXhibit 1, PEXhibit 2(DEXh5), PEXh3(DEXh1). It is further discernable from PEXhibits 2, 3, DEXh1 and 4 that the contracts complied with the mandatory requirements as stipulated at Section 3(3) of the Law of Contract Act Chapter 23 Revised Edition 2012(2002).

28. On that score, the said contracts are admissible under Section 97(1) of the Evidence Act Chapter 80 laws of Kenya in respect of written contracts and grants. Accordingly, the said statutory provision is borne in mind in the present suit.

29. The defendants asserted that PEXhibit 2 (DEXh5) and PEXh3(DEXh1) were void as envisaged under Sections 6 and 7 of the Land Control Act Cap 302 Laws of Kenya and possible remedies thereby; see also *Kariuki vs Kariuki (1983) KLR 227*.

30. Be that as it may, in cross examination by DW1, it was evidence of PW1 that:

“...I was away from home hence the deceased did not transfer the portions of land to me...”

31. Article 10(2)(b) of the Constitution of Kenya, 2010 provides that the national values and principles of governance include equity. In *Willy Kimutai Kitilit vs Michael Kibet (2018)eKLR*, the Court of Appeal held;

“...the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular, the doctrine of constructive trust...”

32. Similarly, the Court of Appeal differently constituted held that constructive trust and equitable estoppel applied in favour of a purchaser who paid full purchase price and took possession of a parcel of agricultural land but failed to obtain Land Control Board consent under Section 6(1) of the Land Control Act (supra). That such an agreement between the seller and purchaser was valid and enforceable; see *William Kipsoi Sigei vs Kipkoech Arusei and another (2019)eKLR*, and *Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri(2014)eKLR*.

33. On the second issue, the plaintiff has established that he entered into a valid and enforceable contract with the deceased with regard to the sale of the suit land. He has proved so against the defendants who are the legal representatives of the deceased on a balance of probabilities. Therefore, the plaintiff is entitled to the reliefs sought in his plaint herein.

34. In the result, judgment be and is hereby entered for the plaintiff (PW1) jointly and severally for:

a. A declaration that the defendants as administrators of the estate of the deceased vendor, Maricus Olum Ngala, are obliged to fulfil the contractual obligations of the deceased vendor.

b. An order of specific performance to compel the defendants to transfer a portion measuring two (2) acres of Land Parcel No. Kanyamwa/Kojwang/Kachola-Kadwet/198 to the plaintiff and the register to be duly rectified accordingly.

c. Costs of this suit together with interest thereon at the rate of 14% p.a from the date of judgement until payment in full.

35. It is ordered accordingly.

Delivered, Signed and Dated at Migori in open Court and through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge, this 17th day of SEPTEMBER, 2020.

G.M.A ONGONDO

JUDGE

In presence of :-

Both parties – Absent

Court

Assistant

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Tom

Maurice