



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 278 OF 2013

KURA NGALA ABUYA PLAINTIFF

VERSUS

1. JENIFA AKUMU OBUNGA

2. GEORGE OBUNGA..... DEFENDANTS

JUDGMENT

1. The plaintiff brought this suit against the defendant on 21st June, 2013 seeking the following reliefs;
 - a. **An order for the eviction of the defendants from a portion measuring 6½ acres of all that parcel of land known as LR No. Kanyamwa/Kikwamo/429 (hereinafter referred to as “the suit property”).**
 - b. **Costs of the suit.**
 - c. **Any other relief that this court may deem fit to grant.**

In his plaint dated 21st June, 2013, the plaintiff averred that the defendants are the trustees and/or beneficiaries of the estate of one, Dalmas Obunga Obunga, deceased (hereinafter referred to as “**the deceased**”). The plaintiff averred that, at all material times, the deceased was and still is the registered proprietor of the suit property. The plaintiff averred that by an agreement in writing between the plaintiff and the defendants, the defendants in their capacities aforesaid sold to the plaintiff a portion of the suit property measuring 6 ½ acres. The plaintiff averred that following the said agreement, the plaintiff took possession of the said portion of the suit property in the year 2008, fenced the same with sisal plants and started cultivating it. The plaintiff averred that in the month of April, 2013, the defendants unlawfully invaded and trespassed on the said portion of the suit property and started to plant maize on the portion thereof which the plaintiff had prepared for his own use.

2. The defendants entered appearance through the firm of Moriasi Osoro & Co. Advocates on 3rd July, 2013 but failed to file a statement of defence to the plaintiff’s claim herein. On application by the plaintiff, interlocutory judgment in default of defence was entered for the plaintiff against the defendants on 27th November, 2013. This suit was thereafter set down for formal proof on 31st March, 2014. The defendant’s advocates aforesaid were served with a hearing notice but they failed to attend court for the hearing. After satisfying myself that service was duly effected upon the defendants’ advocates, I allowed the plaintiff to proceed with the hearing the absence of the defendants and their advocates notwithstanding. The plaintiff gave evidence and called no witness.
3. In his testimony, the plaintiff told the court that he purchased two portions measuring a total of 6

- ½ acres of the suit property from the defendants. He purchased the first portion measuring 4 acres in the year 2008 at a consideration of Ksh. 21,000/= while the second portion measuring 2 ½ acres was purchased in the year 2009 at a consideration of Ksh.25,000/=. The plaintiff testified further that after the said portions of the suit property were sold to him, he caused the same to be fenced with sisal plants after which he commenced cultivation thereon. The plaintiff told the court that he occupied and used the said portions of the suit property from the time the same was sold to him until April, 2013 when the defendants invaded the said portions of the suit property and chased him away therefrom.
4. The plaintiff testified that by the time he was chased away from the said portions of the suit property, the defendants who had promised him a title for the same had not fulfilled their promise. The plaintiff produced in evidence a copy of an agreement for sale dated 11th November, 2008 between the plaintiff and the defendants with respect to a portion of the suit property measuring 4 acres and a copy of another agreement for sale dated 7th January, 2009 between the plaintiff and the 1st defendant with respect a portion of the suit property measuring 2½ acres. On examination by the court, the plaintiff stated that the suit property is registered in the name of Dalmas Obunga Obunga (deceased) and that the defendants sold the aforesaid portions of the suit property to him after the death of the deceased. The plaintiff told the court further that no consent of the land control board was sought and obtained in relation to the sale to him by the defendants of the aforesaid portions of the suit property. After the close of the plaintiff's case, the plaintiff's advocate made closing submissions in writing.
 5. I have considered the plaint filed herein, the evidence tendered by the plaintiff and the written closing submissions by the plaintiff's advocate. The plaintiff's claim against the defendant is based on the two agreements for sale of land that the plaintiff had entered into with the defendants on 11th November, 2008 and 7th January, 2009 through which the defendants sold to the plaintiff a portion of the suit property measuring a total of 6 ½ acres. From the evidence tendered by the plaintiff, it is clear that the suit property was and still is registered in the name of a deceased person. The plaintiff has referred to the defendants in the plaint as "trustees and/or beneficiaries" of the estate of Dalmas Obunga Obunga, deceased. The plaintiff did not tender in evidence any proof that the defendants were appointed by the deceased to be his trustees in relation to the suit property or that the defendants have been appointed by the court as the deceased legal representatives.
 6. There being no evidence that the defendants are either the duly appointed trustees of the deceased or his court appointed legal representatives, the validity of the agreements for sale that the defendants had entered into with the plaintiff over the portions of the suit property is in doubt. The defendants did not have power in law to sell property of the deceased before obtaining grant of letters of administration in respect of the estate of the deceased. In the absence of a grant of letters of administration, what the defendants and the plaintiff engaged in amounted to intermeddling in the estate of a deceased person contrary to section 45 of the Succession Act, Cap. 160, Laws of Kenya. The plaintiff also led evidence to the effect that the suit property is agricultural land. Even if the defendants had the capacity to sell the suit property to the plaintiff, such sale was subject to consent of the land control board. The plaintiff admitted in his evidence that no such consent was obtained. Under section 6 of the Land Control Act, Cap.302 Laws of Kenya, a controlled transaction becomes null and void for all intents and purposes if no consent of the land control board is obtained in relation thereto within 6 months. Where a controlled transaction has become void as aforesaid, any act in furtherance thereof such as continued occupation of land that was the subject of the transaction is barred under section 22 of the Land Control Act, Cap. 302, Laws of Kenya.
 7. Due to the foregoing, I am not satisfied that the plaintiff has proved his case against the defendants to the required standard. The plaintiff has failed to prove that the defendants had the legal capacity to sell the disputed portion of the suit property to him and that the transaction was proper, lawful and enforceable in law. This court cannot lend its hand in aid of an illegal transaction. The agreements of sale that were entered into between the plaintiff and the defendants for the disputed portion of the suit property offend the provisions of section 45 of the Law of Succession Act and section 6 of the Land Control Act aforesaid. The same cannot therefore be enforced by this court. An order of eviction sought by the plaintiff in this suit cannot therefore be granted.
 8. The upshot of the foregoing is that the plaintiff's claim herein has no merit. The same is

accordingly dismissed with no order as to costs.

Delivered, signed and dated at KISII this 5th of December, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE