



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 188 OF 2015

MARTHA ONUNGA (Suing as the personal Representatives of the Estate of the late

JOHNSON ONUNGA GENGA (Deceased).....**PLAINTIFF**

VERSUS

ERICK OKOTH CHORE.....**DEFENDANT**

JUDGMENT

By a plaint dated 20th July 2015 and amended on 14th May 2018, the plaintiff herein sued the defendant seeking for the following orders:

- a. A declaration that the late **JOHNSON ONUNGA GENGA** was a bona fide purchaser for value of the whole of land parcel No. **KISUMU/KOMBURA/388** and that the defendant holds the title deed to the said parcel No. **KISUMU/KOMBURA/388** in trust for the plaintiff and the other beneficiaries of the estate of the late **JOHNSON ONUNGA GENGA** who are therefore entitled to exclusive possession thereof.
- b. An order that the said land parcel No. **KISUMU/KOMBURA/388** be transferred to the plaintiff for and on behalf of the estate of the late **JOHNSON ONUNGA GENGA**.
- c. A permanent order or injunction restraining the defendant by himself or his family or servants, or agents or proxies from entering, occupying, remaining on, cultivating, developing or in any other way using or interfering with the plaintiff's access into, peaceful possession, user and enjoyment of the said land parcel No. **KISUMU/KOMBURA/388** or any portion thereof.
- d. Costs of this suit and interest thereon at court rates.

This matter came up for hearing when the plaintiff gave evidence and adopted her statement as her evidence in chief before the court. The defendant was served with summons to enter appearance together with a plaint, entered appearance but failed to file a defence within the stipulated period. The matter therefore proceeded by way of formal proof and the defendant was served with a hearing notice but never showed up.

It was the plaintiff's case that she is one of the widows of the late Johnson Onunga Genga who had three wives. She stated that she obtained letters of administration and the co wives gave her consent to prosecute this case.

It was further the plaintiff's evidence that the late Joshua Chore the father of the defendant who was the registered owner of the suit land sold to the late **JOHNSON ONUNGA GENGA** land parcel No. Kisumu/Kombura/ 388 vide an agreement dated 25th January 1986 which she produced as an exhibit.

The plaintiff also stated that the deceased executed transfer forms in respect of the suit land and her late husband took possession, planted trees and deposited building materials on the suit land.

PW1 testified that the late husband fell ill as per the documents produced and died before the transaction was complete. That the defendant and his brothers later demanded for additional Kshs. 100, 000/ and when the sum was presented to them at an Advocates' office they declined to take it. It was further the plaintiff's testimony that the defendant has denied her access and that when she carried out a search at the Lands office she realized that the defendant had illegally transferred the suit land in his name on 17th October 2012 without obtaining letters of administration.

She therefore urged the court to grant orders as prayed in the plaint plus costs of the suit.

Analysis and determination

This matter proceeded by way of formal proof whereby the plaintiff gave evidence to prove her case. The issues for determination are as to whether the plaintiff is entitled to the reliefs sought and whether she has proved her case against the defendant.

The plaintiff gave evidence and produced a sale agreement that the late husband entered into for the purchase of the suit land with the defendant's father. She also produced duly executed transfer forms which were signed by the defendant's father but the plaintiff's late husband died before the transaction was completed due to illness. The plaintiff produced copies of medical reports in respect of her husband's ailments.

The plaintiff also proved her legal capacity to bring this suit by producing letters of administration and letter of consent giving her authority by the other two widows of her late husband to plead and prosecute the case on their behalf. It is further evident that the plaintiff's husband paid the full purchase price as per the agreement and the defendant and his brothers had no business demanding for additional payment as purchase price.

It is also on record that the plaintiff's husband took possession, planted trees and deposited building materials on the suit land. I find that there was a valid sale agreement between the purchaser and the vendor and the money was paid in full therefore making the late Johnson Onunga Genga a bonafide purchaser for value.

The issue as to whether the transaction was subject to a Land Control Board, the agreement stipulated that the vendor was to ensure that all the necessary documents including obtaining a land Control Board consent to enable a transfer of the suit land. The vendor signed the transfer forms as required but there is no evidence of a Land Control Board consent. The plaintiff pleaded that the defendant was holding the suit land in trust for her and as such the court should find in her favour.

The issue of lack of a Land Control Board consent in transactions involving agricultural land has been litigated in our courts with decisions confirming that such absence renders the transactions null and void but with the recent decision of Willy **Kimutai Kitilit V Michael Kibet Civil Appeal No. 51 of 2015 (Eldoret)** has changed the landscape where the Court of Appeal held as follows:

“However, whether the Court will apply the equitable doctrines of constructive trust and estoppel to a contract rendered void by lack of consent of the Land Control Board will depend on the particular circumstances of the case. The Court further held as follows:

There is a stronger reason for applying the doctrines of constructive trust and estoppel to the Land Control Act. By Article 10 (2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis added) which binds the courts in interpreting any law (article 10 (1) (b)). Further by article 159 (2) (e) the Courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, section 7 of the Transitional and Consequential Provisions in the sixth Schedule to the Constitution, the Land Control Act should be construed with alterations, adaptations and exceptions necessary to bring it in conformity with the Constitution.... Since the Constitution has elevated equity as a principle of justice to a Constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.”

This decision has breathed a sigh of relief to most litigants who would otherwise lose their land due to the operation of the law. I find that the plaintiff has proved that the defendant held the suit land in trust for her and the beneficiaries. Once parties have sold land they sold not renege on the agreement which they entered into willingly without coercion.

The plaintiff further produced an official search indicating that the parcel of land was registered in the name of the late John Okoth Chore and that the defendant irregularly transferred the suit land in his name without letters of administration.

Having considered the evidence of the plaintiff and the supporting documents which were uncontroverted, I find that the plaintiff is entitled to the orders sought and make the following orders.

- a. A declaration is hereby issued that the late **JOHNSON ONUNGA GENGA** was a bona fide purchaser for value of the whole of land parcel No. **KISUMU/KOMBURA/388** that the defendant holds the title deed for the said parcel No. **KISUMU/KOMBURA/388** in trust for the plaintiff and the other beneficiaries of the estate of the late **JOHNSON ONUNGA GENGA** who are therefore entitled to exclusive possession thereof.
- b. An order is hereby issued that parcel No. **KISUMU/KOMBURA/388** be transferred to the plaintiff for and on behalf of the estate of the late **JOHNSON ONUNGA GENGA**.
- c. A permanent order or injunction is hereby issued restraining the defendant by himself or his family or servants, or agents or proxies from entering, occupying, remaining on, cultivating, developing or in any other way using or interfering with the plaintiff's access into, peaceful possession, user and enjoyment of the said land parcel No. **KISUMU/KOMBURA/388** or any portion thereof.
- d. The defendant to pay costs of the suit.

DATED and DELIVERED at KISUMU this 25TH DAY of JANUARY, 2019.

M.A ODENY

JUDGE

Delivered in the presence of:-