



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 207 OF 2017

HARRISON OTIENO OLAL.....PLAINTIFF

VERSUS

STEPHEN OMOLO OPASI.....DEFENDANT

JUDGMENT

1. By a plaint dated 13th January 2016 and filed on 7th September 2016, the plaintiff namely **HARRISON OTIENO OLAL** through M/s Agure Odero and Company Advocates has sued the defendant **STEPHEN OMOLO OPASI** seeking the following reliefs:-

i. Specific performance to effect immediate transfer of LR KANYAMKAGO/KAWERE 1/3966 measuring 0.4 ha in the names of the plaintiffs, failure to do so, court to mandate Court Executive officer to effect/execute transfer documents from the names of the defendant to plaintiff's name.

ii. An order of permanent injunction to restrain the defendant his servant/assigns, employees or prospective purchasers from interfering with peaceful stay of the plaintiff vis parcel LR NO. Kanyamkago/Kawere 1/3966 measuring 0.4 hectares and from felling or, cutting trees thereof.

iii. Costs

iv. Any other interest this court may deem fit to grant.

2. The gist of the plaintiff's case as per the plaint is that on or about 1st July, 2002, the plaintiff purchased a portion of land measuring 0.4 hectares of LR NO.Kanyamkago/Kawere 1/884 which has culminated into the suit land, LR NO. Kanyamkago/Kawere 1/3966 measuring 1.7 hactares. He paid a sum of **Ksh. 34,000/=** being consideration thereof. Consequently, the plaintiff has developed the portion of the land and lives thereon.

3. The plaintiff claims that in or about the year 2013, the defendant sold the same portion of land to other prospective buyers disregarding the interest of plaintiff. As a result, the defendant, his agents, servants and or prospective purchasers have trespassed into the portion of land as they have cultivated and built thereon thus precipitating the instant suit.

4. The defendant through Mainga and Company Advocates filed his statement of defence dated 26th April, 2017 on even date whereby he denied the plaintiff's claim. The defendant stated that if the plaintiff insists on his claim which is already denied, then the sale of the portion of land was frustrated and or breached by the plaintiff. He pleaded particulars of breach on the part of the plaintiff.

5. The defendant termed the plaintiff's suit poorly pleaded, ambiguous, unclear and or otherwise defective, thus sought further and better particulars of the cause of action. That the plaintiff is not entitled to the reliefs sought in the plaint and sought dismissal of the suit with costs.

6. In his reply to defence dated 18th October, the plaintiff reiterated the contents of his plaint. He denied the particulars of breach as alleged by the defendant. That the suit is competent as there is a valid cause of action.

7. The defendant's counsel was duly served through registered post on 13th November 2018 for hearing of the suit. The defendant and his counsel did not attend court for hearing as scheduled and or at all. Consequently and at the hearing, the plaintiff (PW1) relied on his statement dated and filed on 7th September 2016 as well as his list of documents dated 12th January 2016 (PExhibits 1 to 4) which include sale agreement (PExhibit 2) and photographs of the portion of land (PExhibit -3).

8. Learned counsel for the plaintiff filed submission dated 5th March, 2019. He made reference to the orders sought in the plaint, the particulars of breach set out in the plaint and PExhibits 1 to 4 in favour of the plaintiff's case.

9. I have carefully examined the parties' respective pleadings, evidence of PW1 and the plaintiff's submissions in this suit. This court is alive to the Court of Appeal decision in the case of **Galaxy Paints Limited –v- Falcon Grounds Limited (200) 2EA 385** that issues for determination is a suit generally flow from either the pleadings or such issue as the parties have framed for the court's determination. The parties have not framed any such issues herein. In that regard, it is the onerous duty of this court to determine whether the plaintiff and the defendant entered into a contract for the sale of 0.4 hectares of the suit land and whether the defendant breached the contract to entitle the plaintiff to the orders sought in the plaint.

10. The plaintiff (PW1) relied on his statement dated and filed on 7th September 2016 wherein he stated that ;-

“ I bought land, LR No. Kanyamkago/Kawere 1/884 now number LR No. Kanyamkago/Kawere 1/3966 from Stephen Omolo Opsi and made an agreement on 1st day of July, 2002 witnessed by both of us and other witnesses before the sub-chief of Arambe location at a consideration of Kshs. 34,000/= paid in 3 installments.” (*Emphasis added*)

11. It is discerned from PExhibit 4 that the defendant owned the suit land as at 14th September 2015. PExhibit 2 shows that PW1 bought the portion of land measuring 0.4 hectares of the suit land from the defendant. PExhibit 3 reveals that PW1 settled on the portion of land.

12. It was the testimony of PW1 as per his statement that in or about the year 2013, the defendant sold the same portion of the suit land to other prospective buyers. It provoked a dispute between them as shown on PExhibit 1 in support of the contents of the plaint.

13. The plaintiff relied on the doctrine of specific performance for breach of contract. He pleaded particulars of breach thereof at paragraph 7 of the plaint.

14. According to **Black's Law Dictionary 10th Edition** the term “specific performance” means:-

“ A court ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are in appropriate or in a adequate.....It is an equitable remedy that lies within the court's discretion.”

15. The plaintiff has based his claim on PExhibit 2 which is an agreement in writing; see **Sumaria and another –v- Allied Industries Limited (2007) 2 KLR 1**.

16. It emerges that the plaintiff's claim stand unchallenged. The defendant's statement of defence, is unsubstantive hence fails; see **Linus Ng'ang'a Kiongo and 3 others –vs - Town Council of Kikuyu (2012) eKLR**.

17. It is the finding of this court that since the plaintiff's case is uncontroverted, the reliefs of permanent injunction and specific performance are available to the plaintiff as provided for under **Section 13 (7) (a) and (e) of the Environment and Land Court Act,2015 (2012)**. The plaintiff is entitled to the said reliefs as he has proved his case against the defendant on a balance of probabilities.

18. The upshot of the foregoing is that judgment be and is hereby entered for the plaintiff against the defendant in terms of orders (a), (b) and (c) sought in his plaint dated 13th January 2016.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of JUNE 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Kiseru holding brief for Mr. Agure Odera learned counsel for plaintiff.

Tom Maurice – Court Assistant.