



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 108 OF 2016

TAIDORA TATA ERNEST.....PLAINTIFF

= VERSUS =

AFRICANUS OKADA OMADEDE.....DEFENDANT

J U D G E M E N T

1. The Plaintiff herein – **TAIDORA TATA ERNEST** – filed this suit here on 7/9/2016 vide a plaint of even date. The suit is against the Defendant – **AFRICANUS OKADA OMADEDE** – and relates to land parcel No. SOUTH TESO/APOKOR/758, (hereafter “the land”) a portion of which she allegedly leased to the Defendant at a consideration of 27,000/=. The size of the leased portion was said to be 25 x 100ft and that portion was to be part of a larger portion said to be one acre which the Plaintiff later on agreed to sell to the Defendant at a price of Kshs.110,000/=.

2. As part of the purchase price, the Defendant paid 40,000/= leaving a balance of 70,000/=. He is said never to have cleared the balance to date. The Defendant is also said to have placed a restriction on the title of the land claiming purchaser’s interest. The restriction was allegedly placed fraudulently, with particulars of fraud stated to be taking advantage of the Plaintiff’s illiteracy by duping her to sign a sale agreement instead of a lease agreement regarding the portion leased to him. It was also stated that there were false entries into that agreement purporting to show full payment of the purchase price while the actual money paid amounted to only Kshs.40,000/=.

3. The Plaintiff wants the sale agreement to be found breached by the Defendant and to be declared null and void as no consent was obtained from the Land Control Board within the required time or at all. She wants also an order of eviction against the Defendant and/or those claiming through him. The order of restriction on the title is also sought to be removed and finally, it is also prayed that the costs of the suit be paid by the Defendant.

4. The Defendant responded to the suit by a defence filed on 26/10/2016. That defence was alter amended to include a counter-claim. The amended defence and counter claim was filed on 13/2/2018. The defence is a denial of the Plaintiff’s claim while the counter-claim pleads, *inter alia*, that the Defendant purchased 2.25acres from the land and went into possession and occupation. He pleaded that he has been on the land for over 8 years and has developed it. The current market price, developments included, is put at 750,000/=. The Defendant is praying for specific performance on the part of the Plaintiff so that the land purchased is transferred to him or in lieu thereof, compensation at the stated market price be paid. Costs of the counter-claim are also asked for.

5. The court started hearing the matter on 10/7/2018. The plaintiff testified as PW1 and called no other or further evidence. She said she first leased the defendant a portion for 20,000/= and was paid the money. Then the Defendant offered to buy an acre and she agreed. The price was put at 110,000/=. There was no written agreement for the lease but a written agreement was made for the sale agreed upon. Of the 110,000/= agreed as purchase price, the Defendant paid 40,000/=. A balance of 70,000/= remained and is unpaid to date. She denied ever going to Land Control Board. And she entered into only one sale agreement; not more than that. The Plaintiff also said that no surveyor has ever come to the land. She denied that the Defendant has developed the land.

6. The Plaintiff was cross-examined by Jumba, the Defendant’s counsel. Shown the land Control Board consent, she said it was false. Asked whether the Defendant has settled on the land, she said yes and accepted she allowed him to settle and construct there. During cross-examination also, she said she was willing to pay the Defendant the value of the land so that he can vacate and leave the land to her. She however changed this position abit during re-examination by her counsel by taking the position that she can only pay the 40,000/= paid by the Defendant.

7. The Defendant testified as DW1 on 7/11/2018. He adopted his statement as evidence. The statement is dated 7/3/2017. It is a short statement wherein he says he purchased the land on two different occasions, obtained consent from Land Control Board for one and he is yet

to obtain such for the other. The surveyor is said to have come to the site and demarcated the land on the ground. The Defendant also stated he is in occupation of the land. In his testimony in court, the Defendant generally espoused the same position. In particular, he said he first bought one acre. He and the Plaintiff went to Land Control Board and obtained a consent. Then the Plaintiff promised she would sell him more land. He fully paid for all the land which in the aggregate measures 2¼ acres.

8. The Defendant was cross-examined by the J. V. Juma, the Plaintiff's counsel. He denied harbouring unlawful desires to take the Plaintiff's land. He denied ever leasing land from the Plaintiff and asserted that he bought several portions on different occasions. The surveyor then came and put the portions together.

9. Hearing over, both sides filed written submissions. The Plaintiff's submissions were filed 20/11/2018. The Plaintiff reiterated that she first leased a portion of land to the Defendant and only later decided to sell a portion to him. The price of the portion of the land to be sold was 110,000/= of which only 40,000/= was ever paid. According to the Defendant, the sale transaction is now null and void for lack of consent of Land Control Board. The Defendant was also said to have failed to pay fully for the land and was faulted for not calling witness to back-up some of his averments. To the plaintiff, the Defendant abused the Plaintiff's generosity when she agreed to accommodate him on the land after his wife's relationship with his parents soured. As regards the Defendants' counter-claim, the court was told that the valuation report availed focusses on 2.25 acres instead of one acre. It was also submitted that the alleged development on the land consists of mud-houses and some crops which can be harvested. The court was asked to give judgment as per the plaint and dismiss the counter-claim.

10. The Defendant's submissions were filed on 14/1/2019. The Defendant gave a summation of the Plaintiff's case. He then submitted that the Defendant purchased the land and was allowed to go into possession. It was further submitted that the Plaintiff cannot therefore be allowed to seek eviction without compensation.

11. The Plaintiff availed two exhibits: PEX No.1, which is a copy of search showing she owns the land and the Defendant has placed a restriction on the title, and PEX No.2, which is a sale agreement showing she was selling once acre to the Defendant. The Defendant on the other hand availed various exhibits as follows:

1. DEX No.1 - Mutation forms showing a process started to subdivide the land.
2. DEX No.2 - Application to Land Control Board for consent.
3. DEX No.3 - A ruling showing a previous attempt by the Plaintiff to remove the restriction placed on the land.
4. DEX No.4 - One consent obtained from Land Control Board.
5. DEX No.5 - Another consent obtained from Land Control Board.
6. DEX No.6 - An agreement of sale dated 13/11/2010.
7. DEX No.7 - Yet another agreement dated 9/7/2012.
8. DEX No. 8a - Valuation report for the land purchased by the Defendant.
9. DEX No. 8b - Receipt for 45,000 for payment for valuation report.

12. I have considered the pleadings, evidence, and rival submissions. From the exhibits availed by both sides, it is clear that there were witnesses when they were transacting. In this case however, none of them deemed it necessary to call any witness. Land transactions are largely a matter of documentation and no court of law easily disregards the language or communication spoken to it through such documentation. The Plaintiff in this matter would have the court believe that the Defendant took advantage of her illiteracy to take her land. But the agreement shown by her – see PEX No.2 – shows she had witnesses doing the transaction. This is the same agreement availed by the Defendant as DEX No. 7. It appears to me that she had ERNEST PANYAKO, TABITHA ODIMA, OBALI PATRICIA and FRANCIS OILE as her witnesses. The same agreement shows payment of 40,000/=, 65,000/= and 5,000/=.

13. The Plaintiff is the one who brought the Defendant to court. She was duty-bound to prove her case well. Her bare word against that of the Defendant was not enough. In law, the one who asserts must prove. In law too, the position of a person who denies is as follows: *FACTUM NEGANTIS NULLA PROBATIO*, meaning that no proof is incumbent on a person who denies a fact. In this matter therefore, the Plaintiff should have endeavoured to articulate and demonstrate her case better than she did. She cannot hide behind her alleged illiteracy to say she was duped. She had witnesses. Where are they?

14. In my view, the court should place more reliance on the documents availed. The communication in them shows constructive engagements between the parties to ensure that the Defendant became the registered owner of the portion he was buying. And the documents do not talk of one acre. They show 2¼ acres. Some of them – like the application to Land Control Board (DEX No.2) and the consent obtained (DEX No.4 and DEX No.5) – show the Plaintiff as Applicant. To me, the documents availed speak loudly as to what was going on between the parties. What is contained in them talk of happenings that took place before any court case was ever contemplated. It appears clear to me that over time, the Plaintiff had change of heart and she decided to renege on what she had already agreed to do.

15. When the Plaintiff's evidence is weighed against that of the Defendant, the Defendant's comes across as the more credible witness. He

had various documents to back up what he stated. It is clear that he already lives on the land with his family. And it is the plaintiff who put him into possession and occupation.

16. When all is considered, I find it appropriate to make a finding that the Plaintiff has not proved her case on a balance of probabilities. And I hereby make that finding. On the other hand, it is clear to me that the Defendant has a genuine claim against the Plaintiff. He purchased land from her and she is now back-tracking on what was agreed upon. The Defendant does not mind leaving the land provided he is well compensated. He took the trouble to conduct a valuation and the value of his portion including the developments thereon was put at 750,000/=. The Plaintiff comes across again as not well meaning on this issue. She is only willing to concede a mere 40,000/= paid to her about a decade ago. This is not acceptable. I make a finding that the Defendant's counter-claim is well proved on balance. Ultimately then, the Plaintiff's case is hereby dismissed with costs. The Defendant's counter-claim is hereby allowed in terms of prayers 1 and 2. The Plaintiff should compensate the Defendant to the tune of 750,000/= within 6 months after the delivery of this judgment failing which there should be a transfer thereafter of 2¼ acres of the land to the Defendant. And the restriction on the title can only be removed at the instance of the Defendant.

Dated, signed and delivered at Busia this 17th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendant: Present

Court Assistant: Nelson Odame