



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 44 OF 2016

IGNATIUS OKEMER ITEBA.....PLAINTIFF

= VERSUS =

GOLFRIDA IKABUKU ETYANG.....1ST DEFENDANT

JUMA KALASINGA SHABAN.....2ND DEFENDANT

J U D G E M E N T

1. The Plaintiff herein – **IGNATIUS OKEMER ITEBA** – filed this suit here on 10/5/2016 vide a plaint dated 14/5/2016. He sued the two Defendants – **GOLFRIDA IKABUKUN ETYANG** and **JUMA KALASINGA SHABAN** – whom he accuses of interfering with his rights and interests over a portion of land in parcel No. S.TESO/APOKOR/1023. That parcel is registered in the name of ETOTOTO OBWINI, who is first Defendant’s father-in-law.

2. According to Plaintiff’s pleadings, he bought half an acre from the 1st Defendant for Kshs.49,000/= on the understanding that he would be included as a beneficiary or purchaser in the succession process as the land was still registered in the 1st Defendant’s deceased father in law. The Plaintiff pleaded that he went into use and possession of the portion after purchase but the 2nd Defendant came to the scene in 2015, trespassed onto the portion, and took possession. This caused a dispute which ultimately ended up at Amukura Deputy Commissioner’s office. The 2nd Defendant was ordered to pay the Plaintiff Kshs.75,000 as a refund. This money was never paid and the arrangement to pay was later cancelled.

3. The 1st Defendant was said to have kept on promising to transfer the portion to the Plaintiff after succession proceedings but that has not happened despite repeated requests by the Plaintiff. The Plaintiff pleaded further that the actions of 2nd Defendant have caused him financial and economic loss. And this is so because the 2nd Defendant not only took possession but also destroyed the Plaintiff’s crops.

4. The Plaintiff is asking for the following orders:

(a) An order to compel the 1st Defendant to include the Plaintiff in the succession process as a purchaser.

(b) An order of permanent injunction against the 2nd Defendant, his agents, assignees, and/or any person working or claiming under him from entering into, tilling, and/or constructing any structure on the said half acre portion of land.

(c) Costs of this suit.

(d) Interests of (sic) at court rates.

(e) Any other relief this honourable court deems fit to grant.

5. The 2nd Defendant filed his defence on 17/6/2018. He denied the Plaintiff’s claim and pleaded that it is the Plaintiff who has refused to collect the Kshs.75,000 refund ordered to be paid to him. The 1st Defendant filed her defence on 6/7/2016. Like the 2nd Defendant, she denied the Plaintiff’s claim. In particular, she denied that the Plaintiff ever bought land from her or that he went into use or occupation of any such portion or that she is indebted to the Plaintiff. She further pleaded that the suit should be dismissed with costs.

6. The court started hearing the matter on 5/2/2018. The Plaintiff testified as PW1 and said, *inter alia*, that he sued the two Defendants because he purchased land from 1st Defendant and paid the full price. He started using the land and planted crops but the 2nd Defendant

came at night one time and ploughed the land. The second Defendant allegedly uprooted the Plaintiff's crops in the process. The Plaintiff reported the matter first to the area village elder, then to the area assistant chief, then further up to the chief, before ending up at the D.O' Office.

7. It was then decided that the Plaintiff get Kshs.75,000 as refund of purchase money and though this was allegedly being forced on the Plaintiff, the money was never paid. The Plaintiff then decided to sue, hence this suit. According to the Plaintiff, when the sale agreement was entered into, he paid Kshs.47,000/=. That happened way back on 14/1/2011. He later on paid the balance of Kshs.2,000 though that was never recorded anywhere. The Plaintiff said he felt comfortable paying the balance that way as he still related well with the Plaintiff at that time. At one point, the surveyor even came and marked the boundary. The Plaintiff said he wants his land back. He said that there was an understanding that he would be included in the succession process as the land belonged to a deceased person.

8. The Plaintiff called one PETER OKEMER as his as his witness. This witness gave evidence as PW2 and said, *interalia*, that he witnessed the sale. The land was being sold for 49,000, he said, and Kshs.47,000 was paid leaving a balance of 2,000/=. He got to know that there was a disagreement later and the matter went to the area D.O. A refund of Kshs75,000 was ordered to be paid to the Plaintiff and the 1st Defendant admitted there having received the remaining balance of Kshs.2,000 from Plaintiff.

9. In the course of hearing, the Plaintiff produced the following exhibits:

- (a) Sale agreement (PEX No.1).
- (b) A copy of search showing the land belonged to ETOTOTO OBWINI (PEX No.2).
- (c) A copy of a letter from area village elder referring the matter to the assistant-chief (PEX No.3).
- (d) A letter from area chief referring the Plaintiff to the area agricultural office for assessment of crop-damage (PEX No.4).
- (e) Summons received by Plaintiff to go to area D.O's office (PEX No.5).
- (f) Letter from area D.O to 2nd Defendant to refund the Plaintiff Kshs.75,000 (PEX No.6).
- (g) Another letter from D.O authorising the Plaintiff to go back to the land as the 2nd Defendant had not paid the refund (PEX No.7).

10. The 1st Defendant testified as DW1 on 9/4/2018. According to her, she did not sell land to the Plaintiff; her daughter did it. She said she gave a portion to her daughter to cultivate. The daughter sold the portion to the Plaintiff. Later on, the same daughter sold the same portion to 2nd Defendant and this happened when the Plaintiff demanded a refund of the money he had paid as purchase price. This witness referred to the refund ordered to be paid to Plaintiff at the area D.O's office and said that it is the Plaintiff who refused to collect the refund. She said further that the Plaintiff destroyed crops on the land.

11. The 2nd Defendant gave evidence as DW2 on the same date. He said that the 1st Defendant's daughter, one Anna Amae, went to him and explained she had a dispute with the Plaintiff over a piece of land she had sold to him. According to this witness, the 1st Defendant's daughter went to demand payment of the balance of the purchase price but the Plaintiff declined to pay and asked her to sell the land to someone else and refund his money. This witness decided to buy the land.

12. He asked that they go to transact at the offices of the area local administration. He was not only buying that portion (which was half acre) but a whole acre. He bought the land for 180,000/= and paid the money to Anna Amae, the 1st Defendant's daughter. Thereafter, the 2nd Defendant gave the land to one Martine Okiro to cultivate. Okire planted maize but the Plaintiff later on came and cut it, prompting the Plaintiff to cause his arrest.

13. The defence side availed the following exhibits:

- (a) Letter dated 22/8/2016 showing that the refund was ready for collection but the Plaintiff had refused to collect it. The letter is from the area local administrative office (DEX No.1).
- (b) Another letter dated 21/8/2015 to Plaintiff intimating that the refund of Kshs.75,000 would be deposited 25/8/2015 (DEX No.2).
- (c) Copy of search showing that the land belonged to ETOTOTO EDWIN (DEX No.3).
- (d) Police order to arrest Plaintiff for destroying crops (DEX No.4).
- (e) Crop damage assessment report dated 13/6/2016 (DEX No.5).

14. Cross-examination was done by each side to the other side during hearing. There is not much that one can gather from that cross-examination as each side sought to maintain the position espoused in evidence-in-chief.

15. After hearing, both sides filed written submissions. The Plaintiff's submissions were filed on 25/4/2018. The submissions are a nine-step narrative highlighting the events as they unfolded until this case was filed. These are events already referred to in pleadings and

evidence and repeating them here is un-necessary.

16. The Defendants' submissions were filed on 15/5/2018. According to the Defendants, the Plaintiff bought land from 1st Defendant's daughter and paid a sum of 47,000/= leaving a balance of 2,000/= which remains unpaid. The 1st Defendant's daughter decided to ask for the balance but the Plaintiff could not pay and advised that the land be sold to someone else with a view to refunding him the money already paid. That was done and the 2nd Defendant became the new buyer. The Plaintiff was to get the agreed refund from the area D.O's office but he never collected it. The refund reverted back to 1st Defendant's daughter.

17. The Defendant's submitted that this court cannot order inclusion of the Plaintiff in the succession process; another court is better suited to do so if need be. According to the Defendants too, the Plaintiff did not transact with the 1st Defendant; he transacted with the 1st Defendant's daughter, with 1st Defendant being a mere witness. This being the position, a refund cannot be claimed from 1st Defendant as she is the wrong party. The 2nd Defendant was also said to have no contractual obligation with the Plaintiff as he never transacted with him and it is not even to him that he paid the purchase money.

18. I have considered the pleadings, evidence, rival submissions, and the documents availed by each side. The Defendants side didn't avail the sale agreement though it is common ground that there was sale of land to Plaintiff. The Plaintiff availed the agreement as his first exhibit (PEX No.1). The copy of agreement clearly shows that the 1st Defendant was the one selling the land. The Defendants would have us believe that the 1st Defendant was a witness but they are wrong. It is the 1st Defendant's daughter instead who is shown as a witness.

19. It is common ground too that the Plaintiff was to get 75,000/= as a refund. The defence takes the position that it took the refund where it was agreed. The Plaintiff on the other hand says the refund was never taken there as agreed. The Plaintiff availed PEX No.6 which is a letter dated 26/6/2015 reminding the parties to make the refund. Another exhibit (PEX No.7) shows that the agreement for refund was cancelled for non-payment by the other side.

20. The defence on the other hand availed DEX No.1, an exhibit which is a letter dated 22/8/2016 talking of a refund deposited on 25/8/2015. The Plaintiff is said to have refused to take the refund to be deposited on 25/8/2015. My impression is that it is the Plaintiff who is telling the truth in this matter. He availed PEX No.5, a letter summoning him to D.O's office. He was supposed to appear there on 30/4/2015 and its clear he appeared. That was the time a refund was suggested. PEX No.6 shows the refund was to be deposited on 30/6/2015. PEX No.6, a letter dated 7/7/2015 shows that the refund was not paid. In contrast, the defence exhibits (see DEX No.1 and DEX No.2) shows that the deposit of the refund may have taken place much later, infact outside the agreed time. Given all this, I am inclined to believe the Plaintiff.

21. Even then however, its clear that the Defendants are not willing to make the Plaintiff owner of the portion he had purchased. It is clear that they are more willing to refund the Plaintiff his money. And the law itself does not seem to favour the Plaintiff. He said he paid all the purchase price. If you look at Section 8(1) of the Land Control Act (cap 302), the Plaintiff was supposed to get consent of Land Control Board consent within 6 months of making the agreement. If no consent is obtained within that period, Section 7 of the same Act is clear that the transaction becomes null and void for want of consent and any money paid as consideration becomes recoverable as a civil debt. I need to point out that the Plaintiff convinced the court that he paid all the purchase price.

22. In my view, the best option is for the Plaintiff to get a refund. It is clear that much as the Defendants would like to use the technicality of the law to avoid payment to the Plaintiff, they were all acting together when the issue of refund was proposed in the first place. They cannot now turn around here in court to avoid obligations they had accepted earlier. The 1st Defendant has a duty to ensure that the Plaintiff get his refund. Payment of such refund would pave the way for 2nd Defendant to become owner without hindrance from the Plaintiff. That removes obstacles from 2nd Defendant's way.

23. The Plaintiff is therefore better off getting a refund rather than imposing himself on unwilling parties who have already transacted with someone else. I realise that the refund of 75,000/= was supposed to be paid way back in 2015. It is now 2019. It would be unfair to the Plaintiff to order that that same amount should be paid about 4 years down the line. In the interests of fairness and justice, I order that the Plaintiff be paid 85,000/= as the refund money. This relief is granted by this court under prayer (e) in the plaint and the Plaintiff's case only succeeds to this extent. For the avoidance of doubt, prayers (a), (b), (c) and (d) are not granted. And for prayer (c) in particular, I order that each side bear its own costs. The Plaintiff should be paid within 6 months from the delivery of this judgement and as long as he is not paid, his interest in the portion he had purchased still remains and the 2nd Defendant should not become the owner.

Dated, signed and delivered at Busia this 16th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Present

1st Defendant: Present

2nd Defendant: Present

Counsel for the Plaintiff: Absent

Counsel for the Defendants: Present

Court Assistant: Nelson Odame