



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 833 OF 2015

(FORMERLY HCCC NO. 45 OF 2010)

BONFACE OCHIENG SAOKE.....PLAINTIFF

VERSUS

JACK ODHIAMBO MIYAWA.....DEFENDANT

JUDGEMENT

1. Boniface Ochieng Saoke, the Plaintiff, commenced this proceedings through the plaint dated 11th February 2010 and filed on the 9th April 2010 against Jack Odhiambo Miyawa, the Defendant, seeking for a declaration that the Defendant obtained registration with Kisumu/Nyangoma/3462, the suit land, illegally and registration should be reverted to the late Joanes Tore Apuoyo; permanent injunction and costs. The Plaintiff avers that he is the administrator of the estate of Lucas Saoke Maseko who had bought the suit land from the late Joanes Tore Apuoyo between 4th May 1994 and 25th November 1994 for Kshs. 53,000/=, when the adjudication and registration process in the area was ongoing. That the Plaintiff's family assumed possession and ownership of the suit land upon finalization of the sale transaction. That however, the Defendant, with the sole aim of defrauding the Plaintiff's family, misrepresented himself, forged and submitted fake documents and obtained registration of the suit land in his name. The Plaintiff has set out the particulars of misrepresentation and fraud attributed to the defendant at paragraph 6 (a) to (d) of the plaint. That the Defendant has declined to surrender the suit land to the Plaintiff and has embarked on wanton wastage of the same and hence this suit.

2. The claim of the Plaintiff is opposed by the Defendant through the statement of defence dated the 29th July 2013, among others averring that he obtained registration of the Kisumu/Wangaya 1/3462 legally as the rightful beneficiary of the estate of Joanes Tore Apuoya, deceased, and that land is different from the suit land claimed by the Plaintiff. That the sale transaction upon which the Plaintiff basis his claim is null and void as it did not receive the consent from the Land Control Board. That the suit should be dismissed with costs.

3. The learned Counsel for the Plaintiff and Defendant filed their written submissions dated the 4th February 2019 and 13th May 2109 respectively.

4. The following are the issues for the Court's determinations;

- a) Whether the Plaintiff's late father bought land from the late Joanes Tore Apuoyo and if so what acreage.**
- b) Whether the Plaintiff's family took possession of the land bought from the late Joanes Tore Apuoyo.**
- c) Whether the land references Kisumu/Nyangoma/3462, Kano/Nyangoma/3462 and Kisumu/Wangaya 1/3462 refers to the same parcel of land.**
- d) Whether the Defendant obtained registration as proprietor of Kisumu/Wangaya 1/3462 regularly and legally.**
- e) Whether the Plaintiff is entitled to the declaratory and injunction orders sought.**
- f) Who pays the costs.**

5. The Court has considered the pleadings by both parties, documentary and oral evidence by Plaintiff who testified as PW1, Land Registrar (PW2), the Defendant who testified as DW1, written submissions by the parties learned Counsel and come to the following determinations;

- a) That from the documentary evidence availed to the court, especially the certified copy of the green card produced by PW2, the Land Registrar, the land parcel Kisumu/Wangaya 1/3462 was first registered on 23rd October 2003 in the name of Joanes Tore

Apuoyo and on the 6th October 2009 transmitted to Jack Odhiambo Miyawa, the Defendant. That the said green card further shows under Part C that the title was charged to A.F.C to secure a sum of Kshs. 260,000/= on the 31st May 2012.

b) That paragraph 3 of the plaint describes the land parcel the Plaintiff's late father bought from the late Joanes Tore Apuoyo as **"Kano/Nyangoma/3462 properly described as Kisumu/Wangaya 1/3462,"** while the sale agreements dated the 4th May and 25th November 1994 described the land at paragraphs 2 as **"parcel of land lying in Nyangoma locaton in Kisumu District known as N.E. Kano/Nyangoma/3462"**. That as confirmed by the Land Registrar (PW2) vide his letter dated 21st December 2009, and through his oral testimony in court, there was no registration Section in that area described as North East/Nyangoma and that area must be within Wangaya 1 Registration Section. That Nyangoma is the name of a village in Wangaya 1 Registration section. That having considered the above, the evidence tendered by both PW1 and DW1, the court holds and finds that the parcel of land subject matter of the two sale agreements dated the 4th May and 25th November 1994, is the same one that on completion of adjudication was registered as Kisumu/Wangaya 1/3462, the suit land.

c) That the portion sold through the sale agreement of 4th May 1994 was **"approximately 3 acres"**, while that sold vide the sale agreement dated the 25th November 1994 was **"approximately 1 acre"**, therefore making a total of approximately four (4) acres out of the parcel, that at registration measured 2.31 hectares, which is equal to 5.708 acres. That as four (4) acres cannot reasonably be described as 5.708 acres, the court finds and holds that of the Plaintiff if successful in his claim, would only be entitled to four (4) acres of the suit land and not the whole parcel as he seems to demand in this suit.

d) That the agreements dated the 4th May and 25th November 1994 were witnessed by among others Charles Miyawa Apuoyo and Wilson Otieno Miyawa who the Defendant in his oral testimony described as his **"step brother and father respectively"** and went on to state that **"They are alive. I have not shown them the sale agreements provided by the Plaintiff todote"**. That accordingly, the court finds that the sale agreements must be genuine because if they were not, the Defendant would have availed the two named witnesses, who are admittedly his brother and father, to come and dispute or confirm having signed them. That the Defendant's failure to call them can only be taken to mean the evidence they would give would be injurious to his case.

e) That though the Plaintiff had in his pleading indicated that his late father's family had taken possession of the suit land after completion of the sale transactions, the testimony he gave in court confirmed that it is the Defendant and his brother who are indeed using the suit land. That with that in mind, and considering the purchaser and vendor under the two sale agreements did not obtain the Land Control Board consent within six (6) months from the date of the last agreement as required under **Sections 4, 6 and 8 of the Land Control Act Chapter 302 of Laws of Kenya**, the two sale agreements are void and all the Plaintiff, as administrator of his late father's estate, could get is the refund of the purchase price paid, which under paragraphs 2 of the two agreements shows it totals Kshs. 53,000/=, possibly with interests at court's rates.

f) That the Defendant became the registered proprietor of the suit land on the 6th October 2009 allegedly through transmission. That while the Plaintiff testimony was that the late Joanes Tore Apuoyo (the vendor) died in 1995, which would mean he died before the suit land was registered, the Defendant position was that he died in 2003. That as no documentary evidence on the death of the said Joanes Tore Apuoyo has been availed to the court, it is not possible to conclusively make a finding on the date, month or year of his death. That what however the court finds is that the late Joanes Tore Apuoyo was not the one who transferred the suit land to the defendant in 2009, which was definitely years after his death. That the Plaintiff case is that the defendant obtained registration with the suit fraudulently and through misrepresentation as no confirmed grant in respect of the estate of the late Joanes Tore Apuoyo, had been obtained. That the Defendant agreed in his testimony in court that he **"did not file a succession Cause over Joanes estate before transferring the land to me as I was not told to do so."** That the fact that the transfer was not done by the late Joanes, and that no confirmed grant had been obtained explains why the Land Registrar (PW2) could not trace any documents to support the transfer of the suit land to the name of the Defendant. That the process through which the Defendant obtained registration of the suit land which belonged to a deceased person offends the provision of **Section 2 (1) and 45 (1) of the Law of Succession Act Chapter 160 of Laws of Kenya**. That the said transaction, not having been regularly, legally and procedurally done or obtained must be reversed, and the registration of the suit land returned to the late Joanes Tore Apuoyo, to be administered in accordance with the law through the Succession Court. That way the Plaintiff will have the opportunity to pursue his claim as the administrator of the estate of his late father's estate.

g) That as the Plaintiff and his family are not in possession of the suit land, and in view of the finding of the court that what he could be entitled to is refund of the money paid under the sale agreements and interests, the court further finds the prayer of permanent injunction should not issue at this stage.

h) That as the Plaintiff has succeeded in showing that the Defendant had obtained registration of the suit land without following the provisions of the Law of Succession Act, he is entitled to costs of the suit as under **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya**, costs follow the event.

6. That the court finds the Plaintiff has proved his case against the Defendant on a balance of probabilities and enters judgment for him and against the Defendant in the following terms;

a) **That a declaration is hereby issued that the Defendant obtained registration as proprietor of Kisumu/Wangaya 1/3462 illegally, irregularly and in contravention of the provisions of the Law of Succession Act Chapter 160 of Laws of Kenya.**

b) **That the Land Registrar is hereby ordered to upon presentation of a copy of this order, to rectify the register by cancelling the name of the Defendant as proprietor of the suit land through deleting entries numbers 2 and 3, and revert the proprietorship of the said land to the late Joanes Tore Apuoyo, in accordance with entry number 1 of 23rd October 2003. That thereafter those interested and entitled to administer the estate of the said deceased to do so in accordance with the provisions of the Law of Succession Act.**

c) That the Defendant do meet the Plaintiff's costs of the suit.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 5TH DAY OF SEPTEMBER 2019

In the presence of:

Plaintiff Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE