



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 72 OF 2015

PAUL DEBACKO GOGO.....PLAINTIFF

VERSUS

CONSULATE AUMA ODHIAMBO.....1ST DEFENDANT

CHARLES OBUYA OPANDE.....2ND DEFENDANT

NATIONAL HOUSING CORPORATION.....3RD DEFENDANT

JUDGEMENT

1. Paul Debacko Gogo, the Plaintiff, sued Consulate Auma Odhiambo, Charles Obuya Opande and National Housing Corporation, the 1st to 3rd Defendant respectively, through the plaint dated the 12th March 2015 and filed on the 17th March 2015 seeking for;

- a) An order of specific performance and transfer of Kisumu/Wawidhi "A" 11/806, the suit land, to him.**
- b) Permanent injunction against the Defendants and those claiming under them in respect of the suit land.**
- c) Costs and interests.**

The Plaintiff avers that on or about August 1996, the late John Odhiambo Opande approached him and asked that he pays for him the loan with the 3rd Defendant and he would have the suit land's title, which had secured the loan, transferred to him. That the Plaintiff agreed with the late Opande's request. That the late Opande wrote to the 3rd Defendant a letter dated 12th August 1996 directing that it transfers the land to the Plaintiff upon payment of the loan balance of Kshs. 66,664/=. That the Plaintiff paid the said amount and the 3rd Defendant forwarded to him the original title document, copy of the charge, certificate of official search, letter of consent and discharge of charge duly executed under their letter of 12th September 1996. That when he presented the documents to the Land Registrar, he learnt they were incapable of effecting the transfer to his name as the 3rd Defendant had not forwarded to him a transfer by chargee form duly, signed and that he would have to get the late Opande do the transfer. That before that could be done, the late Opande fell ill and died. That on or about 28th January 2015, the Plaintiff checked with the Lands Office and learnt the suit land had been transferred into the names of 1st and 2nd Defendants, as joint administrators and personal representatives of the estate of the late John Odhiambo Opande, and subsequently subdivided into Kisumu/Wawidhi "A" 11/1657 to 1659. That the said transactions were nul and void as the discharge of charge had not been registered on the suit land title and the subdivisions thereof did not reflect the existence of the charge. That when the Plaintiff raised the issue with the Land Registrar, the subdivisions were cancelled and the register rectified to read as before. That the Plaintiff then filed this suit.

2. The 3rd Defendant opposed the Plaintiff's claim through their statement of defence dated the 27th April 2015, among others averring that they acknowledge receiving the late Opande's letter dated 12th August 1996 authorizing it to transfer the suit land's title to the Plaintiff upon payment of the loan due of Kshs. 66,664/=. That the Plaintiff made the payment and they forwarded to him the documents as listed vide their letter dated the 12th September 1996. That the 3rd Defendant did not prepare the transfer by chargee document as it did not exercise its statutory power of sale. That the 3rd Defendant is wrongfully sued as it issued a discharge of charge to the Plaintiff on 12th September 1996 thus extinguishing its interest as a chargee of the suit land, and that the suit against it should be dismissed with costs.

3. The 1st and 2nd Defendants also opposed the Plaintiff's claim through their statement of defence dated the 16th February 2016 averring to the following among others; that the late Opande never offered to have the suit land transferred to the Plaintiff, but had authorized the 3rd Defendant to accept payment from the Plaintiff. That the Plaintiff should have followed the issue of the transfer of the suit land with the late Opande during the four (4) years he lived before he died in 2000. That the 2nd Defendant had sought the Land Registrar's assistance to

distribute the late Opande's estate as per the order of Kisumu High Court Succession Cause No. 812 of 2000 as the 3rd defendant had executed the discharge of charge. That the late Opande never sold the suit land to the Plaintiff and their transactions over the said land were not fraudulent. That they are ready to make a refund of the money the Plaintiff paid the 3rd Defendant, but should not be made to perform a non-existent contract. That they have never been administrators of the estate of the late Opande and hence cannot be sued over the suit land. That this suit is time barred and the court is without jurisdiction to entertain it. They prayed for the suit to be struck out and or dismissed with costs.

4. The Plaintiff testified as PW1 and told the court of the close relationship he had with the late John Odhiambo Opande, who was the Senior Chief, Nyando after they were introduced by Father Fredrick. That after the late Opande suffered a gunshot from some thugs, he (Plaintiff) used about Kshs. 100,000/= in his treatment. That in August 1996, he paid for the late Opande Kshs. 66,664/=, which was the outstanding loan with 3rd defendant, that was secured against the title to the suit land, on the understanding that the land would be transferred to him after the discharge of charge was executed by the 3rd Defendant. That however, the 3rd Defendant did not execute a transfer by chargee as expected. That the late Opande got sick and later died before he could effect the transfer to him. That the 1st Defendant, who was the widow to the late Opande, kept on promising that she would ensure the transfer to him but come the 2015, he learnt the 1st and 2nd Defendants had instead transmitted the land to their names and later subdivided it into three parcels. That the subdivisions and transfer were rescinded after he lodged his complaints with the Land Registrar, Chief and District Commissioner and pointing out that the said transactions had been done without registering the discharge of , which document was still with him.

5. The 1st and 2nd Defendants testified as DW1 and DW2 respectively. Their defence is that the agreement between the late Opande and the Plaintiff was for the Plaintiff to pay the outstanding loan with the 3rd Defendant, who would in turn release the suit land's title to him to hold onto, until he was refunded the money. That the late Opande told them that he had refunded the Plaintiff the money before he died in 2000. That they are ready to refund the money to him again. That the late Opande's elder son, named Moses Joseph Odhiambo is the one who filed the Succession cause for the late Opande's estate. That the said Moses passed on the 6th January 2013, and in 2014 the 2nd Defendant enlisted the assistance of the Land Registrar Nyando, to have the suit land distributed as per the Succession Court's order. That the suit is statute time barred. During cross examination, DW1 informed the court that she did not know the amount of the loan the late Opande had obtained from the 3rd Defendant, or how much of it he had paid before the Plaintiff paid the last installment of Kshs. 66,664/=. That she was aware her late husband wrote to the 3rd defendant to release the title document of the suit land to the Plaintiff, upon receiving the Kshs. 66664/=. That she is the administrator of the late Opande's estate and is the one who subdivided and transferred the suit land in 2015 to the living beneficiaries. DW2 testified that though a portion of the suit land had been registered in his name after subdivision, the register was later changed and the land returned to the name of his late father.

6. The 3rd Defendant called Pamela Atieno Ambok, a legal assistant, who testified as DW3. She told the court that the 3rd Defendant had given the late John Odhiambo Opande a rural housing loan of Kshs. 60,000/= in 1992 that was secured against the suit land. That due to the erratic and sporadic repayments it accrued interests, and as of 12th August 1996, the total amount outstanding was Kshs. 66,664/=. That on the 12th August 1996, the late Opande wrote a letter to the 3rd Defendant authorizing it to transfer the title deed of the suit land to the Plaintiff, upon receipt of Kshs. 66,664/= from him to offset the loan. That the Plaintiff made the payment on 19th August 1996, and vide its letter dated 12th September 1996, the 3rd defendant transmitted the original title deed, copy of charge, certificate of official search, copy of letter of consent and executed discharge of charge to the Plaintiff. That the 3rd Defendant could not have executed a transfer by chargee in favour of the Plaintiff, as the statutory power of sale over the suit land, and its interest over it had been extinguished after receiving the payment from the Plaintiff. During cross-examination, DW3 confirmed that the late Opande had in his letter dated 12th August 1996 instructed the 3rd defendant to transfer the title to the late Plaintiff, but they did not inform him that they could not do so and instead forwarded the documents to the Plaintiff vide their letter dated the 12th September 1996.

7. The learned Counsel for the Plaintiff, 1st and 2nd Defendants, and the 3rd Defendant filed their written submissions dated the 15th July 2019, 20th May 2019 and 15th July 2019 respectively.

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

a) Whether there was a sale agreement between the Plaintiff and the late Opande over the suit land, capable of being enforced.

b) Whether the 3rd Defendant was under legal obligation to transfer the suit land to the Plaintiff upon receipt of the Kshs. 66,664/= to offset the loan owed by the late Opande.

c) Whether the Plaintiff has established his claim against any, or all of the Defendants.

d) Who pays the costs of the suit.

9. The Court has after carefully considering the parties pleadings, oral and documentary evidence by PW1, DW1 to DW3, the written submissions by the three Counsel come to the following conclusions;

a) That it is not disputed that the Plaintiff and the late Opande entered into some understanding in August 1996 under which the Plaintiff paid a total amount of Kshs. 66,664/= that the late Opande owed the 3rd Defendant. That the Plaintiff paid the said amount on the 19th August 1996 and the 3rd Defendant forwarded the original title documents, among others, to the Plaintiff through their letter dated the 12th September 1996. That while the Plaintiff holds that the late Opande's letter of 12th August 1996 obligated the 3rd Defendant to transfer the suit land to him upon paying the Kshs. 66,664/=:, the Defendants disputes that and hold that the agreement was for the 3rd defendant to transfer the title deed, and not the land to the Plaintiff. The court has carefully considered the learned

Counsel for the parties' submissions on the matter and is in agreement with the Defendants position that the late Opande had only authorized the 3rd Defendant to transfer the original Title deed to the Plaintiff after he paid the said sum to offset the loan. That contrary to the Plaintiff's contention, the letter dated the 12th August 1996 does not amount to a sale agreement between him and the late Opande. That the said letter does not in any manner of interpretation confer any authority upon the 3rd Defendant to transfer the interests and rights the late Opande had over the suit land to the Plaintiff upon payment of the Kshs. 66,664/=.

b) That upon the 3rd Defendant releasing the original title of the suit land it held to the Plaintiff, together with the executed discharge of the charge, among others, their obligation under the charge and the letter dated the 12th August 1996, were extinguished as they could not transfer to the Plaintiff the proprietary interest over the suit land as they never held it. That accordingly, the court finds the Plaintiff has failed to prove the existence of any duty or responsibility that the 3rd defendant owed him, after their letter of the 13th September 1996, and his case against the 3rd defendant fails.

c) That the transmission of the suit land from the name of John Odhiambo Opande, deceased, and subsequent subdivision and transfer of the three parcels thereof, effected by the 1st and 2nd Defendants in 2015, without first discharging the charge registered in favour of the 3rd Defendant, was obviously illegal, irregular and un-procedurally done. That further, Moses Joseph Odhiambo, who was the sole administrator, had by then passed on having died in 2013, and no documentary evidence was availed by the 1st Defendant that she had legally been empowered by the Succession court to step into his shoes. That what the 2nd Defendant said that he sought and got assistance of the Land Registrar Nyando, to have the transmission, subdivision and transfer effected without fidelity to the provisions of the **Law of Succession Act, Chapter 160 of Laws of Kenya**, was unlawful and irregular.

d) That though the Plaintiff and 2nd Defendant told the court that the transmission, subdivision and transfers done on the suit land were later reversed, there are no documentary evidence availed to the court to confirm that position.

e) That by the time this suit was filed on the 17th March 2015, the documentary evidence availed in the form of certificates of official searches for Kisumu/Wawidhi A 11/1657 to 1659, dated the 28th January 2015, shows that they were registered on the 23rd January 2015 in the joint names of Consolate Auma Adhiambo and Charles Obuya Opande. That the two named persons are the 1st and 2nd Defendants respectively. That the Grant and certificate of confirmation issued in Kisumu High Court Succession Cause No. 812 of 2000 shows that the one appointed as administrator of the estate of the late John Odhiambo Opande was Moses Joseph Odhiambo, who reportedly passed on the 6th January 2013. That in any case, other than the 2nd Defendant who insisted in his testimony that he was not an administrator of the estate of the late Opande, the 1st Defendant admitted in her evidence that she was the administrator of the late Opande's estate and that was the capacity she transacted over the suit land in 2015. That the court finds that both the 1st and 2nd Defendants are properly sued as the joint registered proprietors of the three parcels subdivided from the suit land, and or administrators of the late Opande's estate.

f) That having found, that the late Opande's letter dated the 12th August 1996 does not amount to a sale agreement between him and the Plaintiff over the suit land, and in the absence of a consent from the Land Control Board obtained in accordance with **Section 6 and 8 of the Land Control Act, Chapter 302 of Laws of Kenya**, the court finds that the Plaintiff has failed to establish a valid sale of land contract that the 1st and 2nd Defendants could have failed to obey, for an order of specific performance to issue. That what the Plaintiff should expect from the 1st and 2nd Defendants is refund of the money he had paid on behalf of the late Opande to the 3rd Defendant and upon which he retains the documents forwarded to him through the letter dated the 12th September 1996.

g) That from the evidence adduced by the Plaintiff, he had been in constant touch with the 1st Defendant after the death of the late Opande, and she was making promises that the land would be transferred to him. That it is not until January 2015 that he discovered the suit land had been subdivided into three parcels and transferred. That he filed the suit soon thereafter and it would be unfair and unjust to let the 1st and 2nd Defendants raise the limitation defence, while in their statement of defence and oral evidence of DW1, they had expressed their preparedness to refund the money the Plaintiff paid the 3rd Defendant on behalf of the late Opande. That accordingly the 1st and 2nd Defendants' claim that the suit is statute time barred fails.

h) That the court finds that the 1st and 2nd Defendants have an obligation, as the living personal representatives of the late John Odhiambo Opande, deceased and the ones probably to inherit the suit land, to refund to the Plaintiff the Kshs. 66,664/= paid on behalf of the late Opande, with interests at court's rates from 19th August 1996 to the date it is paid in full.

i) That the Plaintiff's costs in the suit to be paid by the 1st and 2nd Defendants while the 3rd Defendant's costs should be paid by the Plaintiff.

10. That flowing from the foregoing, the court enters judgment for the Plaintiff and against the 1st and 2nd Defendants and orders as follows;

a) That the 1st and 2nd Defendants do refund Kshs. 66,664/= (Sixty Six Thousands, Six Hundred Sixty Four), being the amount the Plaintiff paid to the 3rd defendant to offset the loan owed by the late John Odhiambo Opande, on the 19th August 1996 with interest at court's rates from that date till payment in full.

b) That the Plaintiff's costs be paid by the 1st and 2nd Defendants.

c) That the Plaintiff's claim against the 3rd Defendant is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 5TH DAY OF SEPTEMBER 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE