



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 759 OF 2017

(Formerly Kisii ELC case 169 of 2013)

JARED AJINA OKWACH.....1ST PLAINTIFF

BERNARD JUMA OTIENO.....2ND PLAINTIFF

VERSUS

VICTORIA ACHIENG YONGO.....1ST DEFENDANT

GEORGE OTIENO YONGO.....2ND DEFENDANT

JUDGMENT

A. Introduction

1. At the heart of the instant dispute are land reference numbers **Suna East/Wasweta 1/15644** measuring approximately 0.26 hectares and **Suna East/ Wasweta 1/15650** measuring approximately 0.50 hectares in area (hereinafter referred to as the 1st and 2nd suit parcels of land respectively). They are registered in the name of the 1st defendant, Victoria Achieng Yongo (DW1) and the 2nd defendant, George Otieno Yongo. The said parcels of land were created out of the original parcel of land ,LR No. Suna East/Wasweta 1/6849 which also culminated to nine (9) other parcels of land located within Migori County in Kenya.

2. The plaintiff Jared Ajuna Okwach (PW1) and Benard Juma Otieno are represented by M/s Oguttu, Ochwangi, Ochwal and Company Advocates formerly M/s Oguttu Mboya and Company Advocates.

3. The 1st defendant appears in person. The 2nd defendant, George Otieno Yongo is represented by learned counsel, Mr. Bosire instructed by the firm of Moronge and Company Advocates.

4. Initially, this suit was partially heard before Samson Okongo J, at Kisii Environment and Land Court where PW1 and DW1 testified on 13th November 2014 and 27th November 2014, respectively. On 16th September 2015, the court (John Mutungi J) directed that the matter proceeds from where it had reached. On 13th September 2017, the suit was transferred to this court for further hearing and determination and on 20th September,2017 this court restated the directions given on 16th September 2015.

B. The Plaintiff's Case

5. By an authority to plead, act and or swear affidavit on behalf of co-plaintiff dated 6th April, 2013, the 2nd plaintiff mandated PW1 to proceed accordingly. The plaintiffs stated, that in February 2010 or thereabout, the defendants sold the 1st suit parcel of land to PW1 and the 2nd suit parcel of land to the 2nd plaintiff. That the defendants sought and obtained consent of the area Land Control Board and duly executed the transfer instruments with regard to the transfer and registration of their respective parcels of land. However, in spite of the plaintiffs' spirited efforts to the defendants to surrender the original title deeds to facilitate the transfer and registration of the 1st and 2nd suit parcels of land, the latter have failed to avail the original title deeds.

6. Thus, the plaintiffs initiated the instant suit by way of a plaint dated 6th April, 2014 and filed in court on 11th April, 2013 seeking the following reliefs;-

- i. Declaration that the sale agreement between the plaintiffs and defendants, over and in respect of the suit land, that is LR NO. Suna East/Wasweta 1/15644 and 15650,was lawful , binding and effective.

ii. An order of specific performance, directing the defendants to surrender and/ or avail the original title documents over and in respect of the suit land, that is LR NO. Suna East/Wasweta 1/15644 and 15650 to the Land Registry, Migori to facilitate cancellation, transfer, registration and issuance of new title documents in favour of the plaintiffs herein.

iii. Permanent injunction restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants from entering upon, re-entering trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with the suit lands that is LR NO. Suna East/Wasweta 1/15644 and 15650 and/or any portion thereof.

iv. Costs of this suit be borne by the defendants.

v. Such further and/or other relief as the Honourable court may deem fit and expedient so to grant.

7. It was the testimony of PW1 that he bought the 2nd suit parcel of land while the 2nd plaintiff bought the 1st suit parcel of land from the defendants. That they obtained the requisite consent and that the relevant instruments of transfer were duly executed. That the defendants refused to surrender the original title deed for registration of the suit parcels of land in their respective names. He relied on PExhibits 1 to 14 which include copies of a mutation form, a certificate of official search and a transfer form in respect of the 1st suit parcel of land as well as a certificate of official search, consent of the land control board and a transfer form regarding the 2nd suit parcel of land.

8. In their submissions dated 28th August 2018, learned counsel for the plaintiffs referred to the orders sought in the plaint, analysed the evidence of PW1 and DW1 and urged this court to enter Judgment in terms of the orders sought in the plaint. Counsel relied on authorities namely **Thrift Homes Ltd –vs- Kays Investment Limited (2015) eKLR** which quoted the **Halsbury's Law of England (4th Edition) at paragraphed 487 volume 44** on specific performance of all terms of the contract undertaken to be performed whether expressly or by implication.

9. Counsel further relied on the Court of Appeal decision in **National Bank of Kenya Limited –vs- Pipe Plastic Samkolit (K) Ltd and another**, Nairobi Civil Appeal No. 95 of 1995 to the effect that a court of law can not rewrite a contract between the parties. Counsel also cited **Vivo Energy Kenya Limited –vs- Maloba Petrol Station Limited and 3 others (2015) eKLR** where the Court of Appeal applied the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd and 2 others (2003) KLR 125** at page 138 that a party must establish a prima facie case which is more than an arguable case for one to be granted an injunctive order.

C. The Defendants' case

10. By her statement of defence dated 26th November 2013 and filed in court on even date, DW1 wholly admits the entire claim by the plaintiffs. That she is ready and willing to co-operate with the plaintiffs and also to abide by the order of the court. She stated that it is the 2nd defendant who has been an obstacle towards the transfer and registration of the 1st and 2nd suit parcels of land in favour of the plaintiffs by demanding further payments beyond what was agreed upon and duly paid.

11. In her testimony, DW1 stated that she sold the suit parcels of land to the plaintiffs. That she has no objection to the orders sought in the plaint. That it is the 2nd defendant who has refused to give titles to the plaintiffs. On 27th February 2019, she 1st defendant closed her case.

12. The first defendant was served with the plaintiff's submissions in open court. She was given 14 days to file and serve her submissions and that the 2nd defendant be served accordingly.

13. The 2nd defendant in his 21- paragraphed statement of defence dated 9th May 2013, vehemently denied the plaintiffs' claim and termed the same incompetent and unproved. That in the event that the plaintiff dealt with DW1 in their transactions over the suit parcels of land, they did not involve him as a co-proprietor hence he can not be held responsible for the actions of DW1 and for the plaintiffs' failure to act prudently in their transactions. That the plaintiffs are attempting to acquire proprietary rights over the 1st and 2nd suit parcels of land by way of falsehood and fraud.

14. The 2nd defendant failed to adduce any evidence or at all. He also never offered any submissions herein.

D. Issues for determination

15. I have duly considered the respective pleadings of the parties, the testimonies of PW1 and DW1 as well as the plaintiffs' submissions including all the authorities cited therein. It is trite law that issues for determination in a suit generally flow from either the pleadings or as framed by the parties; see **Great Lakes Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720**.

16. Having considered the foregoing and in view of the plaintiffs' statement of agreed issues dated 10th May, 2013 and filed in court of 13th May, 2013, the issues for determination are compressed as hereunder:-

a) Whether the defendants entered into valid and enforceable land sale agreements with the plaintiffs in respect of the 1st and 2nd suit parcels of land.

b) Whether the defendants failed to supply the requisite documents pursuant to the agreements to facilitate the transfer of the 1st and 2nd suit parcels of land to the plaintiffs.

c) Whether the plaintiffs are entitled to the orders sought in the plaint.

E. Analysis and disposition

17. As regards the first issue, PW1 stated that he bought the 1st suit parcel of the suit land while the 2nd plaintiff bought the 2nd suit parcel of land from the defendants. PExhibits 1 to 9 do fortify his testimony thereof.

18. **Sections 3 (3) of the Law of Contract Act Revised Edition 2012 (2002)** gives triple requirements of a contract for the disposition of an interest in land. I note the said requirements and were met as discerned in PExhibits 1,4, 8 and 9 herein.

19. On her examination in chief, DW1 stated that;-

“I also know the 2nd defendant. He is my son. It is true that I sold land to the plaintiffs. I also took them to the Land Control Board for the necessary consent together with the other people who had bought land from me. I have no dispute with the plaintiffs. I have no objection to the reliefs sought by the plaintiffs.” (Emphasis added)

20. During cross-examination by Mr. Bosire for the 2nd defendant, DW1 testified as follows:-

“Jack Bunde translated for us the agreement for sale that we had entered into with the plaintiffs. I received the purchase price long time ago.” (Emphasis supplied)

21. I take into account the meaning of the terms “**disposition,” “transfer” and “mark” under section 3 (6) of the law of Contract (supra)**. PExhibits 1 to 14 speak to the said terms and render support to the plaintiffs’ claim in respect of the sale of 1st and 2nd suit parcels of land. I find the sale valid and enforceable in the circumstances.

22. On the second issue, at paragraphed 8 of her statement of defence, the 1st defendant (DW1) stated that:-

“The 1st defendant further avers that it is the 2nd defendant, who has been an obstacle towards the transfer and registration of LR NO. Suna East/Wasweta 1/ 15644 and 15650, respectively, in favour of the plaintiffs by demanding further payments beyond what was agreed upon and duly paid.”

23. PW1 also stated that the defendants have refused to transfer the 1st and 2nd suit parcels of land to the plaintiffs. That the defendants have withheld the relevant title deed to finalise the transfer and registration of the 1st and 2nd suit parcels of land in the name of the plaintiffs.

24. DW1 admitted having received from the plaintiffs, the purchase price for the sale of the 1st and 2nd suit parcels of land. During cross-examination by Mr. Ochwangi learned counsel for the plaintiffs, DW1 stated thus;-

“ I sold land to the plaintiffs. I have no objection to the plaintiffs being given title deeds for their parcels of land. It is the 2nd defendant who has refused to give them title deeds. The 2nd defendant was aware of the sale.” (Emphasis laid)

25. On further cross-examination, by the said counsel, DW1 emphatically stated in part;-

“I don’t know why the 2nd defendant has refused give the plaintiffs their title deeds. I am the 2nd defendants biological mother. I took the plaintiff to the Land Control Board voluntarily. We had no objectionthe agreement for sale that we entered into is valid.....” (emphasis added)

26. By PExhibits 4,5,6, and 7, the defendants obtained Land Control Board Consent for the sale of the 1st and 2nd suit parcels of land to the plaintiffs. Assume there was no such consent, the agreement of sale between the defendants and the plaintiff remains valid and enforceable by virtue of constructive trust and equitable estoppel in favour of the plaintiffs who had paid full purchase price and took possession of the land as recognized by the Court of Appeal in the case of **William Kipsoi Sigei –vs- Kipkoech Arusei and another (2019) eKLR** and the principles of **Equity under Article 10 of the Constitution of Kenya,2010**.

27. Moreover, in the case of **Macharia Mwangi Maina and 87 others –vs- Davidson Mwangi Kagiri (2014) eKLR**, the Court of Appeal held thus;-

“It is our considered view that the respondent created an implied or constructive trust in favour those persons who had paid the purchase price.....”

28. It is evident that the 2nd defendant has refused to avail all the requisite documents including the title document to facilitate the transfer of the 1st and 2nd suit parcels of land following the sale and consent of the area land control board. There is no reason for his failure to so do in the obtaining scenario.

29. The plaintiffs’ case stand unchallenged. The same is further affirmed by the evidence of DW1. The 2nd defendants’ statement of defence is noted. However, I find the statement unsubstantiated thus it fails.

30. In conclusion, it is the finding of this court that the plaintiffs and the defendants entered into a valid and enforceable agreement for the sale of the 1st and 2nd suit parcels of land. Thus the plaintiffs are entitled to the reliefs sought in their plaint as they have proved their case against the defendants jointly and severally on a balance of probabilities.

31. A fortiori, I enter judgment for the plaintiffs against the defendants jointly and severally in terms of orders (i),(ii) and (iii) sought in the plaint dated 6th April, 2013 and filed in court on the 11th April, 2013.

32. By dint of the proviso to **section 27 of the Civil Procedure Act (Cap 21)** and since this suit was ignited by the acts of the 2nd defendant, the costs of the suit shall be borne by the 2nd defendant.

DELIVERED, SIGNED and DATED in open court at **MIGORI** this **29th day of OCTOBER 2019**.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. Oguttu Mboya learned counsel for the plaintiffs.

The 1st defendant in person.

Tom Maurice – Court Assistant