



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

ELC CASE NO. 131 OF 2013

JULIUS OKOTH MAGINAPLAINTIFF

VERSUS

SAMWEL OWOKO ALIAS OOKO.....DEFENDANT

J U D G E M E N T

1. The plaintiff Julius Okoth Magina sued the defendant Samwel Owoko alias Ooko vide a plaint filed on 26th November 2013. The plaintiff claims that he is the registered owner of plot No. Bukhayo/Ebusibwabo/3788 as at 21/7/2013 which the defendant has encroached on. He prays that judgment be entered in his favour as follows:

(a) For an order directing the defendant whether by himself, his agents, servants and or employees and or anybody claiming through him to remove illegal structures erected on L.R. No. BUKHAYO/EBUSIBWABO/3788 forthwith and to surrender vacant possession of LR. NO. BUKHAYO/EBUSIBWABO/3788 to the plaintiff forthwith and in default an order of demolition and eviction do issue against the defendant, his agents, servants, employees and or anybody that may be claiming title through him.

(b) For an order of permanent injunction restraining the defendant whether by himself, his agents, servants and or employees and or anybody claiming through him from entering staying and or using LR. No. BUKHAYO/EBUSIBWABO/3788 order from interfering with the plaintiff use of the said parcel of land.

(c) Cost of the suit.

(d) Any other relief this honourable may deem fit to grant.

2. The suit was defended via a statement of defence filed on 19th December 2013. The defendant pleaded that he entered the land pursuant to a valid agreement with Wilson Angalwa Makokha. Further that his occupation has been open, uninterrupted and undisturbed for a period of 8 years until his daughter Caroline Atieno Angalwa died on 23rd April 2012. He urged the court not to grant the orders sought as he has nowhere to stay. He also prayed that Wilson Makokha be summoned to come and state what happened for he is the cause of everything.

3. At the close of pleadings, the plaintiff called three witnesses while the defendant called two witnesses. The plaintiff testified on 27th may 2019 when he told court that some time on 17th October 2006 he entered into an agreement to sell his land to Mr. Wilson Angalwa Makokha. The portion sold was measuring 100 by 100ft comprised in title No. BUKHAYO/EBUSIBWABO/3788 for a sum of Kshs.80,000. That by 10/2/2007, Mr. Angalwa had paid the entire purchase price.

4. The plaintiff continued that on 22/9/2012 Mr. Angalwa decided to sell the plot and since he had not processed the title to Mr. Angalwa's name, he decided to buy back the suit portion. They agreed at a price of Kshs.120,000 which was paid in full on 22/9/2012. The plaintiff stated that he later subdivided the land into several plots and sold and transferred to various people. That the plot he has retained in his name is No. 5184 and 5186. That the defendant is living on part of plot 5184. It is the plaintiff's case that the defendant was brought on the suit land by Wilson Angalwa and having refunded the money paid to him, the defendant should now leave his land. He urged the Court to grant him the orders sought in the plaint.

5. Wilson Angalwa Makokha testified as **PW2**. He adopted his witness statement filed on 26th November 2013. In the statement, PW2 said that he gave his parent-in-law (the defendant) temporary shelter on the suit plot after they were attacked and chased away from their ancestral land in Butula. That due to his (PW2) financial problems, he asked the plaintiff to buy back the plot. **PW2** said his parent-in-law cannot in any way claim land from the plaintiff. PW2 stated further that the defendant was fully compensated for his inconveniences by the National Irrigation Board who paid him a sum of Kshs.350,000 which money was due to PW2 but he let the defendant to have it to enable him buy

land elsewhere.

6. **PW3** Aloys Benard Barasa stated that he is the one who prepared the agreements between the plaintiff and Wilson Angalwa. That he was introduced to the defendant by Wilson when the surveyors when to mark out the plot sold to Wilson. **PW3** confirmed he was a witness to the refund agreement. **PW3** admitted that at the time of refund, the defendant was living on the suit land. He denied going to collect the sum of Kshs.20,000 from the defendant's house. This marked the close of the plaintiff's case.

7. The defendant opened his defence on 1/10/2019. He said he lives on a plot given to him by his son in law Mr. Wilson Angalwa Makokha. That the land was given as dowry payment in the year 2006. That they lived peacefully on the land until April 2012 when her daughter who was the wife to Wilson Makokha died. That after the death of his daughter, Wilson decided to collude with the plaintiff to remove him from the suit land. That he has nowhere else to go.

8. The defendant in cross-examination denied that he has land where he came from. He admitted that the plaintiff does not know him as he was brought by Wilson Angalwa to live on the suit land.

9. Florence Owoko testified as **DW2**. She is the wife of the defendant she said. That Wilson and Caroline decided to let them live on the suit land he bought from the plaintiff because they had nowhere to live. That they lived peacefully and they were given a copy of the sale agreement as evidence of the gift. **DW2** continued that after the death of her daughter, Angalwa decided to disturb them yet he buried Caroline as his wife. In cross-examination, **DW2** conceded it is Wilson Angalwa who gave them permission to stay on the suit land. That previously they lived in a rented house. This marked the close of the defendant's case.

10. Parties opted to rely on the evidence as presented. The questions framed by this court for determination are:

(a) Whether or not the suit portion was given to the defendant as a gift/dowry payment thus cannot be taken away.

(b) Whether or not orders of eviction can issue.

11. It is not in dispute that the plaintiff entered into a sale agreement for the disputed portion with one Wilson Angalwa Makokha. It is also not in dispute that the defendant is living on the sold portion. The dispute is whether he (defendant) is entitled to continue living on the portion after the refund of the purchase was made to his son-in-law (Wilson) on whose permission he gave to live on the disputed portion.

12. The defendant contends that his son-in-law gifted him the land as dowry payment hence he should not be made to leave as he has nowhere to go. That the defendant lived on the land peacefully from the year 2006 until 2012 when his daughter died. Although this statement/fact is not challenged, the question is whether the stay of the defendant on the land would estop Wilson Makokha from selling the land whether to the plaintiff as he did or to any 3rd party.

13. The evidence led that this plot was given as dowry required corroboration since this court takes judicial notice of the cultural practices of most ethnic tribes in Kenya that payment of dowry is not made in secret. Given that it is the defendant who was alleging this fact of gift/dowry as his defence, the burden was upon him to discharge. Merely stating that the land was given to him as dowry payment is not sufficient.

14. From the evidence it appears that he was staying on the land at the pleasure of Wilson Angalwa, therefore there was nothing which stopped Wilson from disposing of the land. All PW2 required to do was to give the defendant sufficient notice of such intention. Wilson added that he had built for the defendant structures in Butula where the defendant came from. That the defendant was compensated for these structures by National Irrigation Board with a payment of Kshs.350,000. Mr. Wilson further stated that the sum of Kshs.350,000 was sufficient to enable the defendant buy land elsewhere and build on. This makes the defendant's demand that he has nowhere to go if evicted to be unreasonable.

15. Further, the sale agreement for the suit land was between the plaintiff and the defendant's son-in-law which two parties later decided to rescind the agreement through the refund payment. Once Mr. Wilson received his money back, the suit land became the property of the plaintiff. The defendant in his evidence admitted he had no transaction with the plaintiff. Having been served with a notice to move out, he should have done so instead of defending this suit. The defendant has no claim against the plaintiff and so the argument that he has nowhere to go cannot be a justification for denying the plaintiff his right to property.

16. In light of the foregoing, I find no reason to deny the plaintiff the orders of eviction he is seeking. Accordingly I enter judgment in the plaintiff's favour as prayed in the plaint. The defendant is granted 120 days to surrender vacant possession of the portion of land BUKHAYO/EBUSIBWABO/5184(3788) he is occupying. In default, the plaintiff is granted liberty to evict him using lawful means. Costs of the suit is also awarded to the plaintiff.

Dated, signed and delivered at BUSIA this 7th day of November 2019.

A. OMOLLO

JUDGE