



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 783 OF 2017

SAMWEL OTIENO OMORO.....PLAINTIFF

VERSUS

TOM MBOYA OCHURA.....DEFENDANT

JUDGMENT

A. Brief introduction of the case:

1. At the heart of the present dispute is a portion of land measuring 20 feet by 60 feet of Land Reference number West Kasipul/Kodera Karabach/1 (the suit land herein). The same is situate in Homa-Bay County within the Republic of Kenya.
2. The plaintiff, Samwel Otieno Omoro is represented by learned counsel, Mr. G.S. Okoth of G.S. Okoth and Company Advocates.
3. The defendant Tom Mboya Ochura is represented by learned counsel, Mr. J.O. Bana of M/s Bana and Company Advocates.

B. The gist of the plaintiff's case

4. The plaintiff has sued the defendant by way of an originating summons (O.S) dated 4th July 2017 and filed in court on 2nd August 2017 pursuant to **section 76 (2) of the Land Registration Act, 2016 (2012) as read with section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya) and Order 37 Rule 8 of the Civil Procedure Rules,2010**. He claims to be the legal administrator and beneficiary of the estate of Benson Juma Mwangi alias Omoi Mwangi (deceased 1) and for determination of questions 1 to 6 set out on the face of the originating summons which I need not to reproduce herein.
5. The originating summons is accompanied by a seven (7) paragraphed affidavit sworn on even date by the plaintiff and copies of annexed documents namely a grant of letters of administration dated 27th January, 2016 and marked as SOO1A and SOO-1-B (PExhibits 1A and 1B respectively) and a land sale agreement allegedly made in 1983 between deceased 1 and deceased 2, Micheal Ochura who was the father of the defendant (PExhibit 2). The plaintiff deponed, inter alia, that further to PExhibits 1A and 1B, he is the sole beneficiary of the estate of deceased 1. That a restriction was lodged against the title of the suit land by the defendant claiming beneficial interest over the same. That the defendant referred to PExhibit 2 which became void in 198 by virtue of section 6 of the Land Control Act (Cap 302) since the suit land was registered on the 10th May 1979. Thus, it generated the present suit.

C. The gist of the defendant's case

6. In a replying affidavit sworn on 12th March 2019, and filed in court on 14th March 2019, the defendant opposed the originating (deceased 2) purchased 60 feet by 20 feet portion of the suit land in 1982 at Kshs. 4,500/= from the original registered proprietor (deceased 1).
7. The defendant further stated that he has possessed and occupied the said portion of land since 1982 hence acquired the same by adverse possession. He termed the restriction against the title to the suit land lawful and merited.

D. Court's Directions and hearing of the suit:

8. On 6th March, 2018 the court gave directions appropriately. That the originating summons, the replying affidavit was filed and served pursuant to leave of this court granted on the same date.
9. This suit was heard by way of affidavit and evidence and written submissions further to consent made on 14th March 2019 between

counsel for the respective parties. So, the plaintiff relied on the originating summons, and the accompanying affidavit while the defendant's evidence rested on the his replying affidavit herein.

10. By written submissions dated 2nd December 2019, and filed on 3rd December 2019 learned counsel for the plaintiff urged the court to order lifting of the restriction on title to the suit land and that the defendant has not adduced evidence in support of his replying affidavit and interest, among other orders. Counsel relied on **Order 37 Rule 8 of the Civil Procedure Rules, 2010, section 76 and 109 of the Land Registration Act, 2012**, in support of the submissions.

11. On the other hand, in his submission dated 26th November 2019 and filed on 27th November 2019, learned counsel for the defendant made reference to the pleadings herein, termed the suit misconceived and without merit and urged this court to dismiss it with costs to the defendant. He submitted that the defendant has on his own right acquired the right to title to the suit land by way of adverse possession, a substantive and overriding interest now both in equity and law in favour of the defendant. Counsel relied on the case of **Willy Kimuntai Kilitit –vs- Micheal Kibet (2018) eKLR** regarding constructive trust and equitable estoppel to buttress his submission.

E. Issues for determination:

12. I have duly considered the entire originating summons, the rival affidavits and submissions including all the authorities cited therein. I subscribed to the Court of Appeal decision in **Galaxy Paints Company Ltd –vs- Falcon Grounds Limited (2000) 2 EA 385** where it was stated that :-

“It is trite law andclear, that issues for determination in a suit generally flow from the pleadings or issues arising from the pleadings or such issue on the parties have framed for the court’s determination.”

13. On that score, I take into account issues 1 to 6 set out in the originating summons. Having noted the said issues, the pleadings and the submissions. I am of the considered view that the issues for determination boil down to whether the defendant has any legal or equitable right to restrict dealings in the plaintiff's title to the suit land and the final orders merited in this suit.

F. Analysis and determination:

14. The plaintiff initiated this suit under the notable legal provisions cited in the originating summons. He stated that the defendant is not entitled to restrict dealings in his title to the suit land since PE Exhibit 2 is not enforceable. That PE Exhibit 6 became void in 1983 in accordance with **section 6 of the Land Control Act (supra)**.

15. Admittedly, the transactions including sale, transfer partition and subdivision affecting agricultural land which are controlled. They are specified under the said **section 6 (1)** which provides that a transaction of that nature is void for all purposes.

16. In the case of **Kariuki –vs- Kariuki (1983) KLR 227**, it was held that :-

“ No general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. The only remedy open to a party to a transaction which has become void under the Act is that he can recover any money or consideration paid in the course of the transaction under section 7 of the Act.”

17. In **Mwangi and another –vs- Mwangi (1986) KLR 328**, and decision which I endorse, it was recognized that the registration of a title to land is a creation of the law and one must look into the consideration that surrounds the registration in order to determine whether it was envisaged that a trust should be created. That the creation of a trust over agricultural land situate in a land control area does not constitute “any other disposal or dealings with the land” within the meaning of **section 6 (1) (supra)** for which the consent of the local Land Control Board may be required.

18. The Black's Law Dictionary 10th Edition at page 1740 defines the term “Trust” as:-

“The right, enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title.”

19. Equity which include trust is one of the national values and principles of governance recognized under **Article 10 (2) (b) of the Constitution of Kenya, 2010**. Trusts including customary trusts are some of the interests expressly provided for under sections 25 (b) and 28 (h) of the Land Registration Act, a statute aligned to **Article 10 (2) (b) (supra)**.

20. It is trite law that lack of consent of the relevant Land Control Board does not preclude the court from giving effect to the equitable principles including constructive trust and equitable estoppel; see **William Kipsoi Sigei –vs- Kipkoech Arusei and another (2019) eKLR** and also **Willy Kilitit case (supra)**.

21. Additionally, land control consent is not required for rights acquired by adverse possession under **section 7 of the Limitation of Actions Act (Cap 22)**; see **Mwangi case (supra)**. I bear in mind that adverse possession is an overriding interest under section 28 (h) of the Land Registration Act, 2016 (2012).

22. The triple ingredients of the doctrine of adverse possession are as revealed in the Court of Appeal decision in **Wilson Kazungu Katana and 101 others –vs- Salim Abdalla Bakshwein and another (2015) eKLR** to which I subscribed accordingly. The doctrine is an overriding interest as stated at paragraph 19 hereinabove. The defendant's replying affidavit points to the satisfaction of the said ingredients.

23. In a nutshell, it is not in dispute herein that:-

a. The suit land is registered in the name of the plaintiff and that the defendant caused a restriction to be made against the title of the plaintiff to the suit land on 6th January 2017 as shown in a copy of certificate of search dated 11th January 2017 annexed to the plaintiff's affidavit accompany the originating summons pursuant to sections 76 (supra).

b. The defendant is claiming the right to title to the suit land.

c. Paragraph 4 of the plaintiff's affidavit and the defendant's replying affidavit at paragraphs 2, 3, 4 and 5 discern constructive trust equitable estoppel and adverse possession which are overriding interests over the suit land.

24. In view of the foregoing analysis and borrowing from the cited authorities, it is the finding of this court that the defendant has demonstrated that he has the foretated overriding interests over the suit land. His equitable claim therein is merited in the circumstances. Further, he is at liberty to enforce the overriding interests against the plaintiff. To that end, since the defendant is entitled to restrict the dealings in the title of the plaintiff in respect of the suit the plaintiff's case has not been proved a balance of probabilities.

25. Wherefore, the plaintiff's suit mounted by way of an originating summons dated 4th July, 2017 and filed on 2nd August 2017 is hereby dismissed with costs to the defendant.

DATED, SIGNED and DELIVERED at MIGORI this 18th day of DECEMBER 2019.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Kerario Marwa holding brief for G.S. Okoth learned counsel for plaintiff.

Mr. Agure Odera learned counsel holding brief for Mr. J.Bana learned counsel for the defendant

Court Assistant – Tom Maurice