



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 483 OF 2017**

**(Formerly Kisii Elc Case No. 467 of 2013)**

**MAURICE TIMOTHY OYWER ABUSO ..... APPLICANT**

**VERSUS**

**TOBIAS OSIRO NJOGA ..... DEFENDANT**

**JUDGMENT**

1. By a plaint (Fast track) dated 22<sup>nd</sup> November 2013, the plaintiff namely **MAURICE TIMOTHY OYWER ABUSO** has sued the Defendant, **TOBIAS OSIRO NJOGA** for:-

- a) **Specific performance**
- b) **Costs**
- c) **Interest**

2. The Plaintiff is represented by J.Bana Advocate. The Defendant is not represented herein and he appeared not thus hearing proceeded exparte.

3. The Defendant was duly served on 13<sup>th</sup> January 2014 by the plaintiffs' counsel. It is demonstrated by an affidavit of service sworn on 15<sup>th</sup> January 2014 by Tom Maurice Otieno, a licensed Court Process Server. The Defendant neither entered appearance nor filed a defence in this suit.

4. On 30/3/2017, this suit was transferred from Kisii Environment and Land court to this court for hearing and determination. I heard the testimony of the Plaintiff (PW1) on 14/11/2017. He sought to rely on his statement dated 22/11/2013.

5. Briefly the Plaintiff's claim is that at all material times to this suit, the Defendant was the registered owner of land Title No. EAST/KARACHUONYO /KOBUYA/939 measuring approximately 0.27 Ha situated in Kendu Bay area (Herein referred to as the suit property) The Defendant sold 0.13 Ha of the suit land to the plaintiff (PW1) at kshs. 60,000/= as per Exhibit 2. The Defendant sought and obtained consent to subdivide and transfer the suit property as shown on application dated 21/10/2010 by PW1 for consent to the Land Control Board (PExhibit 3a) A consent dated 25/10/2010 by the Land Control Board (PExhibit 3b).

However the Defendant has refused and or declined to effect the subdivision and or execute transfer of the portion of the suit land to PW1 rendering the instant suit necessary.

6. The Plaintiff (PW1) claimed that he filed a list of documents dated 22/11/2013. He further relied on the following documents as evidence.

a) A certificate of official Search dated 8/10/2013 (P-Exhibit 1)

b) Sale of land agreement dated 13/1/2009( P Exhibit 2.)

c) P –Exhibit 3a

d) P-Exhibit 3b

7. It was further claimed by PW1 that he has occupied the portion of the suit property. He has a School on the property and that he has no title deed to the property to enable him register the school.

8. I have carefully studied the entire plaint and the testimony of PW1. Guided by the decision in **Great Lakes Transport Co. Ltd –vs- KRA (2009) KLR 720**, the points that arise therefrom for determination are:-

a) Is the Defendant the registered proprietor of the suit property?

b) Was there a land sale agreement between the Defendant and PW1 in respect of 0.13 Ha of the suit property?.

c) Has the Defendant failed and or refused to transfer 0.13 Ha of the suit property to PW1 ?.

d) The relief(s) available to PW1.

9. In the case of **PIL Kenya Ltd –vs- Oppong (2009) KLR 442**, it was noted that it is the duty of a trial court to evaluate and analyse all the evidence in a case before it. Therefore, I proceed with the evaluation and analysis herein.

10. Moreover, in **Great Lakes Case (supra)** it was observed that it is the duty of the court to only rely on evidence before it. Indeed the evidence before the court is that of PW1 and as per the plaint.

11. P-Exhibits 1 and 3b reveal that the Defendant is the registered proprietor of the suit property. **Section 24(a) of the Land Registration Act No. 3 of 2012** vests absolute ownership of the suit property on the defendant with rights under **Section 25** thereof. By P Exhibit 1, there is an indication that the defendant has a certificate of title to the suit property thus conclusive evidence of proprietorship on his part as envisaged under **Section 26 of the Land Registration Act, 2012**.

12. PW1 has demonstrated by way of PExhibit 2 that there was a land sale agreement between him and the Defendant. The land is the suit property. The agreement is pleaded at paragraph 4 of the plaint by PW1.

13. The evidence of PW1 was that he paid Kshs. 60,000/= as consideration to the defendant for the suit property by PExhibit 2. He also stated so at paragraph 4 of the plaint. However, at para 6 of the plaint, PW1 stated that the defendant has refused and or declined to effect the said sub division and or execute a transfer of the sold portion of the suit property.

14. PW1 is entitled to the reliefs sought. He testified in part;-

**“I pray to this court for specific performance and costs of this suit against the defendant.”**

15. In a nut shell, PW1 has shown that he brought the suit property from the defendant who has failed to sub divide and or execute transfer form in respect of the property. PW1 is entitled to the reliefs sought in the plaint. The claim is unchallenged. He has proved his claim against the defendant on a balance of

probability.

16. I accordingly enter Judgment for the plaintiff (PW1) against the defendant in terms of orders (a) and (b) sought in the plaint dated 22<sup>nd</sup> November 2013.

17. Orders accordingly.

**DELIVERED, SIGNED and DATED in open court at MIGORI this 31<sup>st</sup> day of January 2018.**

**G. M. A. ONGONDO**

**JUDGE**

**In the presence of:**

Ms. Mireri counsel holding brief for Bana for Plaintiff

Court Assistant - Lori

**G. M. A. ONGONDO**

**JUDGE**