



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.861 OF 2015

[FORMERLY HIGH COURT CIVIL SUIT NO.7 OF 2012]

PETER OCHOLA OMOLO.....PLAINTIFF

VERSUS

EVANS KIDERO.....DEFENDANT

J U D G M E N T

1. Peter Ochola Omolo, the plaintiff, commenced this suit against Dr. Evans Odhiambo Kidero, the defendant, through the plaint dated 19th January 2012 seeking for the following prayers;

- a) That the subdivision of the suit land and subsequently registration of the defendant thereto as the registered proprietor be nullified.
- b) That mutation of the suit land be ordered for and the Plaintiff be given back his portion.
- c) That in any event the Executive officer of this Honourable court be ordered and authorized to sign and execute the necessary an relevant document pertaining to the suit land in favour of the Plaintiff for another transactions process and subsequent transfer of his portion into his name.
- d) General damages
- e) Costs of this suit and interest thereof.
- f) Any other further relief this Honourable court deems just and fit to grant”

2. The Plaintiff among others avers that in the year 2005, he bought a portion of land parcel **Kisumu/Korando ‘A’/2845** from one Peter Angira Jojuok. That he paid the full purchase price and a sale agreement was made. That he was involved in a road traffic accident in 2010 and was hospitalized for 12 months. That after recovering from his injuries he found the portion of the land he had bought from PW2 had been fenced off and developed without his knowledge. That on making enquiries, he found out that Peter Angira Jojuok, PW2, had sold the remaining portion of the land to Kimwa Murithi Mbui, who later sold it to the Defendant, who in total disregard of the due process, illegally acquired the whole

parcel, including the portion the Plaintiff had an interest on. That despite repeated demands to the Defendant to rectify the situation and give him his portion, the Defendant has refused and or neglected and hence the suit.

3. The Defendant denied the Plaintiff’s claim through his statement of defence dated the 13th February 2012. The Defendant among others avers that he is a stranger to the contract between the Plaintiff and Peter Angira Jojuok and therefore the Plaintiff has no claim against him. That in 2008, the Defendant bought 12 (twelve) parcels of land from Miriti Mbui Muthara and one Antony Lewis Kigathi Miriti for Ksh.12,000,000/=. That the parcels were vacant and appropriate consents were obtained. That the Plaintiff had lodged a dispute with Kisumu East Land Disputes Tribunal case No.40 of 2010, whose decision was adopted by the court in Kisumu C.M. Land case No.72 of 2011. That the Plaintiff’s claim should be dismissed with costs.

4. That hearing of oral evidence commenced on the 7th October 2015 and was completed on the 9th February 2017. Mr. Adiso and Onyango Advocates appeared for the Plaintiff and Defendant respectively.

5. The Plaintiff testified as PW1, and called Peter Angira Jojuok whom testified as PW2. Their testimony is that on the 1st December 2005, PW2 sold a portion of land measuring 144 by 72 metres from Land parcel **Kisumu/Korando/4457**, registered in the name of his late grandfather, namely Okeyo Nyakwaga, to PW1 for Ksh.45,000/=. That PW1 took possession of his portion and planted trees on it. That following an accident in 2010, PW1 was admitted in hospital for about 12 months and after being discharged he found the trees on the portion had been cut, and others uprooted. That the portion had also been fenced off together with the rest of the land. That on contacting PW2, he learnt that the rest of parcel Kisumu/Korando/4457 had been sold to one Kimwa Murithi Mbui by PW2. That the said Kimwa Murithi Mbui had then acquired other portions of the land sold to other people by the late registered proprietor before selling it to the Defendant. It is the Plaintiff's case that he reported to the Provincial administration

before taking the matter to the Tribunal who recommended that he files this suit.

6. That the Defendant testified as DW1. He told the court that in 2008, he met one Miriti Mbui who sold to him 13 (thirteen) parcels

of land which included the suit property. That they made the sale agreement and the vendor signed the transfer form. That his advocate then processed the titles into his name after conducting searches at the land registry and confirming that the titles were free of any restrictions or encumbrances. That the Plaintiff later filed Tribunal case No.72 of 2011 over land parcel **Kisumu/Korando/4457**. That the Tribunal recommended that the claim be filed in in this court. That the Defendant did not know of the Plaintiff's claim when he bought the land and his case should be dismissed with costs.

7. That at the close of oral evidence taking on the 9th February 2017, the parties counsel agreed to file and exchange written submissions. The counsel for the Plaintiff filed theirs on the 20th

April 2017 while that for the Defendant's counsel dated the 17th May 2017 was filed on the 18th May 2017.

8. The following are the issues for the court's determination;

- a) Whether the Defendant's title to land parcel **Kisumu/Korando/4457** was procedurally and regularly obtained.
- b) Whether the portion of 144 by 72 metres of land claimed by the plaintiff is part of Kisumu/Korando/4457.
- c) What orders to issue.
- d) Who pays the costs.

9. The court has carefully considered the pleadings, oral and documentary evidence tendered by and for the parties, the written submissions by both counsel and come to the following determinations;

- a. a) That from the certified true copy of the green card for land parcel Kisumu/Korando/4457, it is clear the land is subdivision from Plot 2845, and was first registered on the 28th May 1996 in the joint names of Okeyo Teti and George R. Midika under entry No.1. That under entry No.2 of 29th September 2008, the land was registered in the name of Evans Odhiambo Kidero, the Defendant, through a transfer and title deed issued.

b) That the sale agreement between PW2, as the vendor, and PW1, as the purchaser, dated 1st December 2005 and produced as exhibit 1 confirms the Plaintiff's claim that he bought a portion of 144m x 72m x 144m x 72m from Kisumu/Korando/4457. That from the finding in (a) above, the land was not registered in the name of PW2 at the time of the said sale agreement.

c) That the evidence given by PW2 that he sold a portion of Kisumu/Korando/4457, which remained after the portion he sold to PW1 to one Murithi Kimwa, has not been disputed or controverted by the Defendant. That indeed, the evidence of the Defendant that he bought Kisumu/Korando/4457 from Miriti Mbui Muthara and another goes on confirm that position. That further, the evidence of PW2 that the said Murithi bought other portions that had been sold by his late grandfather, namely Okeyo Nyakwaga, before selling the whole parcel to the Defendant received confirmation from the Defendant's testimony that Kisumu/Korando/4457 was among the twelve (12) parcels sold to him.

d) That while in the sale agreement produced by the Defendant as exhibit, the vendors namely, Miriti Mbui Muthara and Antony Levis Kigathi Miriti are described as "the registered owners of all the freehold interests comprised in all the land parcels,

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.

7.
8.
9.
10.
11. Kisumu/Korando/4457 measuring approximately 2.07 Ha.
12.”

the copy of the green card referred to in (a) above do not contain their names as registered proprietors of the suit land at any time.

5. That in view of the fact that the two named vendors, who allegedly sold and transferred the land parcel Kisumu/Korando/4457 to the Defendant, were not the registered proprietors of the said land, then they had no capacity to transfer the land to the Defendant. That by the Plaintiff filing this suit against the Defendant, he in essence challenges the Defendant’s title to the land on basis that it was transferred to his name unprocedurally and irregularly without first excising his 144 by 72 meters portion that he had bought from PW2.

6. That while PW2 also did not have capacity to enter into the sale agreement with the Plaintiff over a portion of Kisumu/Korando/4457, which he claimed belonged to his late grandfather, before obtaining a confirmed grant, he has not denied that he sold the said portion to the Plaintiff, before selling the rest of the land to the said Murithi Miriti who then sold it to the Defendant. That it equally follows that the said vendors, namely Miriti Mbui Muthara and Antony Levis Kigathi Miriti, had no capacity to sell and transfer Kisumu/Korando/4457 to the Defendant, as they were not the registered proprietors. That ones the Plaintiff questioned the Defendant’s title to the land, the Defendant had the obligation to prove that he got so registered legally and procedurally. That was the position taken by the Court of Appeal in the case of **Munyu Maina –V- Hiram Gathina Maina** [2013] eKLR where it held as follows;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which would not be noted in the register.”

That though the Defendant stated that he left his advocate to complete the transactions, and that he did not attend the land control board for consent to transfer, the court notes that no copies of the consent and transfer form were availed to this court to enable the court ascertain that the statutory formalities preceding the transfer were complied with, and that the transfer form was signed by the registered proprietors of the suit land.

7. That as the transfer of the title to the land parcel Kisumu/Korando/4457 to the name of the Defendant was not done by Okeyo Teti and George R. Midika, who were the registered proprietors before the Defendant, then the court finds that the Defendant’s acquisition of the title was not procedurally, regularly and legally done. That the Defendant’s title to the suit land is impugned under **Section 26 of the Land Registration Act No.6 of 2012.**

8. That in view of the testimony by PW2 that his grandfather, who reportedly owned the land from which he (PW2) sold portions of to Plaintiff and Murithi Miriti had died by the time of the transactions, the court cannot order that the Plaintiff get the 144 by 72 metres portion of the suit land transferred to his name in this proceedings. That will be left to PW2 or those entitled to file for the grant of letters of administration in respect of the estate of PW2’s late grandfather in a Succession Court.

10. That flowing from the foregoing, the court finds that the Plaintiff has partially proved his claim against the Defendant on a balance of probabilities. That the court therefore enters judgment for the Plaintiff against the Defendant as follows;

- a) That a declaration is hereby issued that the Defendant acquired registration as proprietor of land parcel Kisumu/Korando/4457 unprocedurally, irregularly and illegally.
- b) That the Land Registrar is hereby ordered to on receipt of a copy of this order, cancel and or revoke the title held by the Defendant over land parcel Kisumu/Korando/4457 by deleting entry numbers 3 and 4, and reverting ownership of the said land to the names of Okeyo Teti and George R. Midika as in entry number 1 and 2.
- c) That the Plaintiff and Defendant may thereafter pursue their claims against those who sold to them the suit land or portions thereof in accordance with the law.
- d) That each party bears his own costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF MARCH 2018

In presence of;

Plaintiff Absent

Defendant Absent

Counsel M/S Khapoya for Adiso for Plaintiff

Mr. Onyango for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/3/2018

14/3/2018

S.M. Kibunja Judge

Joane court assistant

Parties absent

M/s Khapoya for Adiso for Plaintiff

Mr. Onyango for the Defendant

Court: the judgment dated and delivered in open court in the presence
of M/S Khapoya for adios for the Plaintiff and Mr. Onyango for the
Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/3/2018