



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
ENVIRONMENT AND LAND COURT
ELC CASE NO. 192 OF 2017
(Formerly Kisii ELC case no.103 of 2016)

TITUS KAHUNYORO MOKOH.....PLAINTIFF

VERSUS

RISPER AKEYO OGINGA.....DEFENDANT

JUDGMENT

1. By a plaint dated 13th April, 2016 and filed in court on 19th April 2016, the plaintiff namely **TITUS KAHUNYORO MOKOH** sued the defendant, **RISPER AKEYO OGINGA**. He has sought the following reliefs:-

- a) Declaration that the plaintiff is the lawful, bona-fide and registered owner of LR NO. KAMAGAMBO/KABUORO/1251 (hereinafter referred to as the suit property).
- b) An order of eviction against the defendants, her agents and/or servants from the suit property.
- c) Permanent injunction restraining the defendants by either by herself, agents, servants and/or anyone claiming under the defendant from re-entering upon, trespassing onto, laying a claim to, leasing, building onto, interfering with and/or in any other manner, whatsoever dealing the suit property and/or any portions thereof, in any manner prejudicial and/or adverse to the rights and interest of the plaintiff.
- d) General damages for trespass.
- e) Costs of this suit be borne by the defendants
- f) Such further and/or other relief as the honorable court may deem fit and expedient so to grant.

2. The plaintiff is represented by M/s Oguttu, Ochwangi, Ochwal & Co. Advocates. The defendant is

represented by Naomi Mwangi advocate after the court sorted out the issue of the defendant's legal representation on 21/11/2016. The court (J M Mutungi, J) ordered thus:

“The firm of Sagwe allowed to withdraw from representing the defendant in this matter.....The firm of Naomi Mwangi Advocate is now deemed to be the firm on record for the defendant.”

3. Briefly the plaintiff's claim is that on 6th September 1996, he entered, into a land sale agreement with the late Oyugi Oremo (the defendant's deceased husband) whereby the plaintiff covenanted to sell the suit property at Kshs. 135,000/= .The defendant's deceased husband paid to the plaintiff Kshs.70,000/= leaving a balance of Kshs. 65,000/= pending processing of the requisite land control board consent, transfer and registration of the suit property in favour defendant's deceased husband. Subsequently the deceased failed to perform his bit of the sale agreement and it constrained the plaintiff to lodge Rongo Land Disputes Tribunal Misc. Application No. 28 of 2006 for the recovery of the suit property.

4. The Land Disputes Tribunal directed the defendant's deceased husband to pay the balance sum of Kshs. 65,000/= to the plaintiff and in default the suit property to revert to the plaintiff. The award was adopted by the court as Rongo SRM's Court Misc application No. 28 of 2006 on 18th January, 2011. In spite of the court order, the defendant trespassed into the suit property provoking the plaintiff to file the instant suit.

5. The defendant filed her statement of defence and a counter claim dated 3rd June 2016 on 6th June 2016 she denied the plaintiff's claim. She stated that she has been in occupation and/or possession of the suit property since 1996 with the express and/or implied permission of the plaintiff. She sought dismissal of the suit with costs.

6. In her counter claim, the defendant admitted that her deceased husband entered into the sale of land agreement and paid Kshs. 70,000/= leaving a balance of Kshs. 65,000/= pending signing of transfer forms in favour of the defendants deceased husband as well as obtain the requisite land control board consent, She claimed that the plaintiff went missing and failed and or neglected to perform his contractual obligations as per the agreement dated 9th September, 1996 (PExhibit 2).

7. The defendant counter claimed that in the year 2006, the plaintiff lodged a claim vide Rongo Land Disputes Tribunal cause No. 28 of 2006 against her deceased husband for the recovery of the suit property. That the tribunal directed her deceased husband to pay the balance of the purchase price of the Kshs. 65,000/= or surrender the suit property to the plaintiff. Thereafter the plaintiff went underground and spirited effort by the defendant's deceased husband to trace him were unsuccessful.

8. The defendant also counter claimed that she teamed up with her deceased husband and erected structures on the suit property hence she is bound to suffer irreparable harm in case the court grants the orders sought in the plaint The defendant has sought the following orders;-

i. An order dismissing the suit.

ii. An order for specific performance compelling the plaintiff to receive the balance of the purchaser price of kshs. 65,000/= only from the defendant and in exchange thereof to hand over to the defendant all documents as are or would be necessary to transfer the suit property into the plaintiff's name.

iii. A permanent injunction against the plaintiff, his agents, servants and representatives from trespassing on the suit property.

iv. That the plaintiff be ordered to pay the costs of this proceeding.

v. The defendant be granted such order or further relief as may be deemed fit by this honourable court.

9. In his defence to the counter claim, the plaintiff stated that the sale agreement has since lapsed and/or rendered void on account of, inter alia;-

- i. Non payments of the balance of the purchase price, either the Contractual timeline or at all.
- ii. Lapse of the statutory **6 months** period vide the provision of **Section 6 of the Land Control Act, Chapter 302, Laws of Kenya.**
- iii. Limitation of **Actions Act, Chapter 22, laws of Kenya**

10. The plaintiff stated that he has been a resident of Kenya and his place of abode was within the knowledge of the defendant and her deceased husband. He reserved his right to raise a preliminary objection on points of law, inter alia, that the issue raised in the counter claim are resjudicata and that the defendant/counter claimer has no locus standi to mount and or originate the counterclaim.

11. The plaintiff reiterated the contents of his plaint in his reply to defence to counter claim dated 9th June 2016. He termed the defendant a trespasser on the suit property.

12. The testimony of the plaintiff (PW1) was that the defendant's deceased husband paid him ksh. 70,000/= out of a consideration of Kshs. 135, 000/= for the sale of the suit property. He referred to and produced in evidence, the following documents:-

- a) A certificate of Official Search dated 6/4/2016 in respect of the suit property (PEXhibit 1)
- b) Sale of land agreement dated 6/9/1996 between PW1 and the defendant's deceased husband (PEXhibit 2).
- c) Proceedings and Judgment in the Rongo Land Disputes Tribunal vide Misc Application No. 28 of 2006 (PEXhibit 3)
- d) A decree in Rongo SRM's Court Misc Application No. 28 of 2006 (PEXhibit 4).
- e) A demand letter dated 15/3/2015 – Pexhibit 5.
- f) A copy of green card /record of the suit property showing initial owner as Isaac Okelo Orwa and transferred and registered in the name of PW1 (PEXhibit 6).

13. On her part, the defendant (DW 1) testified in support of her counter claim, inter alia, that PW1 went back to his home and refused to transfer the suit property to her deceased husband. That later PW1 resurfaced and lodged a complaint before Rongo Land Disputes Tribunal which determined the dispute in favour of her deceased husband and relied on PEXhibits 2,3, and 4.

14. The plaintiff's learned counsel filed submissions dated 13th February 2018 which entails the case background, evidence adduced by PW1 and DW1 as well as analysis of the evidence adduced in court. The conclusion of the submissions is that the plaintiff has established his case and that he is entitled to reliefs sought in the plaint. Counsel relied on the following authorities.:-

- a) **Aikaman –v- Muchoki Civil Appeal No. 9 of 1982 , Court of Appeal.**
- b) **Mrao Ltd -vs- American Bank of Kenya Ltd and 2 others (2003)eKLR**
- c) **George Orango Orango –v- George Liewa Jalalo Civil Appeal No. 62 of 2009 Court of Appeal at Kisumu.**

15. In her submissions dated 26th February, 2018, the defendant's counsel gave an introduction,

background of the case and identified the following four (4) issues for determination :-

- I. Whether the defendant's late husband and the defendant acquired any defined rights in the suit land parcel under the agreement.**
- II. Whether the defendant's late husband had performed his obligation as stipulated in the said agreement.**
- III. Whether then the defendant's continued occupation and use of the suit land parcel amounts to trespass.**
- IV. Whether this honourable court had jurisdiction to extend the statutory period to allow the plaintiff obtain the relevant consents in order to meet the ends of justice.**

16. Learned counsel relied on the authorities as hereunder in support of her submission;-

- a) Section 3 (3) of the Law of Contract Act
- b) Mwangi & Anor –v- Mwangi (1986) KLR 328
- c) Public Trustee –v- Wanduru (1984) KLR 314
- d) Clerk & Lindsell on Torts, Sweet & Maxwell 18th Edition at 923.
- e) Joseph Mathenge Kamutu –v- Joseph Wainaina Karanja & Anor Nyeri ELCC No. 102 of 2014.
- f) Section 1A, 1B & 3A of the Civil Procedure Act Cap 21 Laws of Kenya.
- g) Section 79 (2) of the Land Control Act Cap 302.
- h) Gatere Njamunyu –v- Joseck Njue Nairobi civil Appeal No. 20 of 1992 court of Appeal.

17. I have considered the entire pleadings, evidence of PW1 and DW1 together with submissions including all the authorities relied upon by counsel for the respective parties. In **Great Lakes Transport Co. (U) Ltd-vs-Kenya Revenue Authority (2009) KLR 720**, it was held that issues for determination in a suit generally flow from the pleadings or as framed by the parties for the court's determination. I take into account the statement of agreed issues (the plaintiff's version) dated 9th June, 2016 and issues for determination as framed by the defendant's counsel in submissions. In that regard, the issues for determination, boil down to:

- a) The validity of the contract (PExhibit 2)**
- b) Is PW1 entitled to the reliefs sought in the plaint?**
- c) Is DW1 entitled to the reliefs sought in the counter claim?.**

18. At the onset, I must state that it is the duty of the court to set out, evaluate and analyse all the evidence before reaching at a finding. I bear in mind the pleadings and evidence of the witnesses in this suit.

19. In the present case, there is no dispute that PW1 and the deceased who was the husband of DW1 entered into a contract (PExh 2) whereby PW1 was paid Ksh 70,000/= being part of the consideration for sale of the suit property. It is also common baseline that DW1 is in possession of the suit property and that her husband passed on before the property could be transferred to him (deceased) by PW1. The balance sum of Ksh 65,000/= remain unpaid to PW1.

20. The terms of the purchase price in PExh 2,were, inter alia:

“Kenya shillings one hundred and fifty thousand only of which the purchaser was paid kshs. 70,000/= through Bankers cheque) upon signing of the agreement and the balance of 65,000/= plus sixty five thousand shall be paid after signing the transfer form and when the consent from the land control will have been obtained from Rongo Land Control board.” (Emphasis supplied).

21. Section 97(1) of the Law of evidence Act (cap 80 Laws of Kenya) provides that:

“When the term of a contract, or of grant, or of any other disposition of property, have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

22. Did the parties perform PExh 2. On one hand, PW1 claimed that the deceased husband of DW1 failed to perform his bit of the bargain which prompted PW1 to lodge a complaint under Rongo Land Disputes Tribunal Misc. Application No. 28 of 1996 for the recovery of the suit property.

23. On the other hand, DW1 claimed that PW1 went underground after execution of PExhibit 2 and efforts to trace him for the performance of PExh 2, were unsuccessful. DW1 sought an order of part performance but that is not pleaded in her pleadings; see **Sumaria and Another –vs—Allied Industries Ltd (2007) 2 KLR 1.**

24. The instant claim relates to the suit property which was registered under the repealed Registered Land Act (Cap 300). Therefore PExhibit 2 was subject to **Section 6(1) of the Land control Act(cap 302 Laws of Kenya)** which states:

a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

b) The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the development and use of land (planning) regulations, 1961 (L.N. 516/1961) for the time being apply;

c) The issue, sale transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area.

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. (Emphasis laid)

25. Moreover, Section 8(1) of the Land control Act(cap 302) reads:

“ An application for consent in respect of controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that he period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.” (Emphasis added)

26. In the case of **Mwangi and Another (supra)**, it was held, inter alia:

- a) Trust over agricultural land is not subject to section 6(1) (a) of the Land Control Act (Cap 302 Laws of Kenya) for which the consent of the local land control board may be required.
- b) Land control board consent is not required for rights acquired by adverse possession under section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya).
- c) By the way, land is extremely important aspect of lives of society.

27. As already noted, PExhibit 2 in respect of the suit property was subject to consent obtainable from the local land control board. There is nothing offered in evidence by DW1 to reveal that there was an overriding interest in terms of a trust over the property as envisaged under **Section 28 (b) of the Land Registration Act, 2012**. PW1 filed his complaint against DW1 within the prescribed period of time hence section 7 of the Limitations of Actions Act (cap 22) is inapplicable in the circumstances.

28. It is pretty clear that PExh 2 did not receive the consent as mandatorily required under section 6 (1) (a) of the Land Control Act Cap 302. It became void after six (6) months from the date it was entered into between PW1 and the deceased husband of DW1 as provided under Section 8 (1) of the Act.

29. Does DW1 have a remedy in regard to PExh 2 which has been declared a void contract? In **Kariuki – vs—Kariuki (1983) KLR 22**, it was held that no general or special damages are recoverable in respect of 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.

30. **Section 7 of the Land Control Act (Cap 302)** reads:

“if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

31. It has emerged from the evidence that PW1 and the deceased husband of DW1 entered into a contract in form of PExh 2 which was not completed or performed within the prescribed period of time hence it was rendered void. Soundly there was no meeting of mind between the parties to PExh 2; see **Muchira – vs—Gesima Power Mills Ltd (2004) EA 168**.

32. In **Nkalubo –v- Kibirige (1973) E.A 102, Spry V.P.**, commented on the general statement in the case of **Odd Jobs –vs—Mubia (1970) EA 476** that a trial court may frame issues, on a point that is not covered by the pleadings but arises from the facts stated or evidence adduced. In that regard, this court can decide on issues not pleaded in the suit but have arisen from the facts or evidence and as framed by the court for determination.

33. It is apparent from her counterclaim that DW1 has not sought recovery of consideration under Section 7 of the Land Control Act. However, she has sought a relief that :-

“ The defendant be granted such other or further relief as may be deemed fit by this honourable court.”

34. It is not disputed that DW1 is in possession of the suit property and that she was wife of her deceased husband who was a party to PExh 2. She has claimed overriding interest over the suit property under **section 28 (a) of the Land Registration Act, 2012**, which provides inter alia; Spousal rights over matrimonial property and trust including customary trusts;

35. Be that as it may, PExh 2 has been rendered void. Under Section 26(1) Land Registration Act, 2012, PW1 is the absolute and indefeasible owner of the suit property with rights conferred upon him under **sections 24 and 25 of the Act**.

I am of the considered view that DW1 is a trespasser on the suit property as she has intruded into the property of PW1 without permission; see Clerk and Lindsell on Torts (supra).

36. The totality of the evidence is that PW1 is entitled to an order to prohibit DW1 from unlawful occupation of the land namely the suit property. **Section 152A of the Land Act, 2016 (2012)** provides that :

” a person shall not unlawfully occupy private, community or public land.”

37. The eviction of DW1 from the suit property by PW1 shall be carried out in accordance with **Section 152B of the Land Act, 2016 (2012)** which provides as follows:

“An unlawful occupant of private, community or public land shall be evicted in accordance with the Act.” *(emphasis added)*

38. The evidence of PW1 was that in 1996, he sold the suit property to the deceased husband of DW1. He stated that he wants to occupy the property as the deceased husband of DW1 failed to honour PE Exhibit 2. He further stated that DW1 has no right to the suit property and he sought orders including general damages. DW1 counterclaimed otherwise.

39. General damages relief can be a token, modest or substantial depending on circumstances of each case. The remedy is within the discretion of the court based on the applicable principles and relevant factors in order to ascertain the real or approximate financial loss suffered by the claimant.

40. PW1 has demonstrated that he has suffered inconvenience due to the actions of DW 1. He is entitled to minimum amount of general damages for loss due to the trespass on the suit property, see Eric Adome & Anor -v- Pauline Kasumba Osebe & anor (2014) eKLR. Therefore, I would assess general damages at Kshs. 10,000/= for the plaintiff (PW1) against DW1 in the circumstances of the case.

41. In sum, I find that the plaintiff (PW1) is entitled to the reliefs sought in his plaint. He has proved his case against the Defendant (DW1) on a balance of probability.

42. I further find that DW1 is entitled to such other or further relief in the form of recovery of kshs. **70,000** being part of the consideration paid to PW1 as shown on PE Exh 2. This is informed by Section 7 of the land Control Act (Cap 302 Laws of Kenya, Kariuki case (supra) and such or further relief as sought her in counterclaim dated 3rd July, 2016.

43. A fortiori, I enter judgment as hereunder:-

(a) For the plaintiff against the defendant in terms of orders (a), (b), (c) and general damages of Kshs. 10,000/=

(b) For the defendant against the plaintiff for kshs. 70,000/= together with interest at court rates.

(c) Costs of suit and the counter claim be borne by the plaintiff and defendant respectively.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of APRIL 2018.

G. ONGONDO

JUDGE

In presence of :-

W Ochwal learned counsel for the plaintiff

Tom Maurice – Court Assistant.