



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND COURT

ELC CASE NO. 234 OF 2017

CEPHAS ODONGO SWETA.....PLAINTIFF

-versus-

KENNEDY WIMMSY.....1ST DEFENDANT

THOMAS ODUNGA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff namely **CEPHAS ODONGO SWETA** sued the defendants namely **KENNEDY WIMMSY** and **THOMAS ODUNGA** by a plaint dated 2nd March , 2017 and filed in court on 2nd March 2017. He has sought the following reliefs:-

i. An order compelling the 2nd defendant herein to effect and or execute transfer of LR. NO. KAMAGAMBO/KANYAWANGA/940 originally 331 measuring 0.2 ha to the plaintiff as the plaintiff enjoys purchasers right, failure by the defendants to execute instrument of transfer court do mandate court executive officer to execute instrument thereof on behalf of the plaintiff and a portion measuring 0.2 ha out of 1.07 ha be registered in the names of the plaintiff herein.

ii. An order for injunction restraining the defendants their agents, assigns legal representatives, employees, from alienating ,selling, interfering with plaintiff from cultivating his portion measuring 0.2 ha and or peaceful use thereof.

iii. Cost of the suit

iv. Any other relief this honourable court may deem fit to grant.

2. Learned counsel Mr. Agure Odero represents the plaintiff in this matter.

3. The defendants were duly served on 16th March 2017 as proved by an affidavit of service sworn on 17th March 2018 by Mr. David Odongo Onyango. They failed to enter appearance and file statement of defence within the prescribed period of time or at all. Hearing proceeded ex parte on 14th February 2018 whereby the plaintiff (PW1) adduced evidence in support of his claim.

4. The plaintiff's claim in brief is that on 18th May 1997, he bought 0.20 hectares of land reference No. Kamagambo/Kanyagwanga/331 from James Okumu Okeyo (deceased). Later the deceased died without having transferred it to PW1. Upon the death of the deceased, the defendant did succession of the estate of the deceased, processed title in respect of the suit property which later culminated to **LR. No. Kamagambo/Kanyawanga/940 (the suit property)** and registered it in the name of the 2nd defendant in total disregard to the interest of PW1 therein. On 11th November 2015, the defendants entered the suit property prompting PW1 to take the instant action.

5. Learned counsel for the plaintiff relied on the evidence on record. He filed no submissions herein.

6. The evidence of PW1 was that he bought the suit property from the deceased and cultivated it until 11/11/2015 when the defendants entered the property. He produced in evidence the following documents:-

a) Sale agreement dated 18/5/1997 (PEXh 1)

b) Chiefs letter dated 18/1/2016 (PEXhibit 2)

c) Green Card/ record in relation to the suit property (PEXhibit 3)

d) Certificate of official search dated 18/12/2015 (PEXhibit 4).

e) English translation of summons dated 13/6/2016 (PEXhibit 5)

f) Demand letter (PEXhibit 6)

g) Demand letter dated 16/12/2015 by 1st defendant's advocate (PEXhibit 7)

7. I have considered the plaint and the evidence of PW1 in this matter. I bear in mind the case of **Galaxy Paints Ltd – v- Falcon Grounds Ltd (2000) 2 EA 385**, on issues for determination by the court. In light of the contents of the plaint and the evidence did PW1 obtain proprietary interest in the suit property and he is entitled to the reliefs he has sought in this suit? The analysis of the evidence is as hereunder.

8. The plaintiff averred that he bought the suit property from the deceased in 1997 as shown on PEXhibit 1. The deceased died before execution of transfer of the property. Upon the death, the defendant did succession in respect of the estate of the deceased in total disregard to PW1. The defendants then secretly transferred the suit property to the 2nd defendant.

9. PW1 testified, inter alia, thus:

“The defendants cultivate 0.2 Ha which I bought legally..... the defendants entered the land on 11/11/2016 and I had been cultivating the land since 1998.”

10. The facts of the case demonstrate that there was common intention between the deceased who was the owner of the suit property and by extension, the defendants who are his (deceased) heirs, and PW1 in respect of the suit property. It was unfortunate that the deceased passed on without effecting transfer of the suit property in furtherance of their intention as expressed in PEXhibit1. Apparently PW1 tends to rely on the doctrine of constructive trust created on the suit property.

11. A constructive trust is a trust imposed by law whenever justice and good conscience require it as judicially recognized in **Hussey –v- Palmer (1972) 3 ALL ER 744**. An aggrieved party can obtain a restitution through equitable remedy of constructive trust.

12. In **Steadman -V- Steadman (1976) A.C 536,540**, Lord Reid termed constructive trust as an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. Therefore the agreement (PEXhibit 1) is enforceable in the circumstances.

13. In **Macharia Mwangi Maina & 87 Others – V- Davidson Mwangi Kagiri (2014) eKLR**, the Court of Appeal cited **Mwangi & Anor – V- Mwangi (1986)KLR 328** where it was held that the creation of a trust over a land control area does not constitute any **“other disposal or dealing”** with the land within the meaning of **Section 6(1) of the Land Control Act (Cap 302)** and therefore the consent of the local land control board is not required. The court applied the case of **Gatimu Kinguru –v- Muya Gathangi (1976) KLR 253**.

14. A thorough examination of various documents including PEXhibits 1 to 5, tends to show that PW1 paid purchase price to the deceased who was originally the owner of the suit property. Clearly the property is currently in the name of the 2nd defendant who is heir of the estate of the deceased. PW1 is in occupation and possession of the suit property. He has an overriding interest in terms of a constructive trust over the suit property as envisaged under **Section 28 (b) of the Land Registration Act, 2012**.

15. PW1 has sought reliefs including an order for injunction. In **Ngaruman Ltd – v- Jan Bonde Nielsen & 2 Others (2014) eKLR**, the court of Appeal held that there are three pillars of which rests the foundation of any order of injunction, interlocutory or permanent. I am conscious of the pillars and this court's mandate to grant a permanent injunctive remedy like in the present situation. see **Giella – V- Cassman Brown & Co. Ltd (1973) EA 358**.

16. In a nut shell, I find that the suit property exists and it is currently registered in the name of the 2nd defendant. PW1 has proved that he has a constructive trust over the property and he is entitled to the reliefs sought in the plaint. The defendants have intruded into the suit property of the plaintiff without justification hence they are trespassers thereon; see **Clerk and Lindsell on Torts**. In that scenario, a permanent injunction against the defendants is applicable and would serve the ends of justice.

17. The plaintiff's claim is not challenged and it has been proved against the defendants jointly and severally on a balance of probability.

18. Accordingly I enter Judgment for the plaintiff against the defendants jointly and severally for order No.1 sought in his plaint dated 2nd March 2017 and a permanent injunction with costs of the suit.

DELIVERED, DATED and SIGNED at MIGORI this 3RD day of MAY 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Tom Maurice - Court Assistant

In absence of plaintiff and his counsel,