REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 41 OF 2015

HERMAN EKESA PAPAI ..... PLAINTIFF

VERSUS

DAVID OGARE Alias OGARE ORONE ..... 1ST DEFENDANT

LENNY INYANJE ..... 2ND DEFENDANT

J U D G E M E N T

1. This suit was initially filed in court on 24/4/2015 vide a plaint dated 20/4/2015. That plaint was later amended, re-dated 10/5/2017, and re-filed on 11/5/2017. The disputants are **HERMAN EKESA PAPAI**, as Plaintiff, **DAVID OGARE alias OGARE ORONE,** as 1st Defendant, and **LENNY INYANJE,** as 2nd Defendant. The two Defendants are father and son respectively. The 1st Defendant is the registered owner of land parcel No. SOUTH/TESO/AMUKURA/173. As the 1st Defendant's son, the second Defendant was entitled to a portion of the land. The second Defendant decided to sell his portion of the land in order to go and settle elsewhere.

2. The Plaintiff became the person to buy the land. As the 2nd Defendant was not yet the registered owner, the 1st Defendant was brought on board in the sale transaction. A written sale agreement was entered into between the Plaintiff and 2nd Defendant, with 1st Defendant appearing as a witness. The size of the land was stated to be three (3) acres. According to the Plaintiff, the 1st Defendant showed him the boundary of the portion on the ground. And things proceeded at first on the assumption that the 2nd Defendant's portion on the ground was 3 acres. Infact, the Plaintiff paid the entire price of the 3 acres.

3. The Surveyor was then called to the land and upon conclusion of the survey exercise, it turned out that the portion earmarked for sale on the ground was 3¼ acres. Then the Plaintiff and the 2nd Defendant, allegedly with the blessings of 1st Defendant, and with the consent of 1st Defendant's other family members, agreed that the Plaintiff buys even the ¼ acre. An agreement to that effect was entered into, with some of 1st Defendant's family members becoming signatories to it.

4. The Plaintiff paid for the ¼ acre also and thereafter, the process to transfer the purchased portion to him commenced. The co-operation of the 1st Defendant was crucial and the 1st Defendant is said to have co-operated up to some point. Then co-operation ceased and it became clear that the 1st Defendant had resiled from his earlier position. This turn of events is what prompted the filing of this suit.

5. When the suit was filed, the 1st Defendant filed his defence on 20/8/2015. He acknowledged that there was sale agreement of 3 acres between the Plaintiff and second Defendant. He denied knowledge of sale of the extra ¼ acre to the Plaintiff and pleaded that he was never part of it. According to the 1st Defendant, the Plaintiff intends to defraud him of his land.

6. On his part, the 2nd Defendant admitted the whole of the Plaintiff's claim. That admission led to the entry of judgement on admission against the 2nd Defendant on 19/4/2016. NOT surprisingly therefore, when the matter came for hearing, the second Defendant's evidence was in support of the Plaintiff's claim. Strictly speaking, this suit is therefore between the Plaintiff and the 1st Defendant.

7. The Plaintiff gave his evidence as PW1. He started testifying on 12/4/2017. He gave part of his evidence on that day. He testified again on 25/9/2017. His evidence was pretty much in line with what his pleadings and his written statement contained.

8. As pointed out earlier, the 2nd Defendant admitted the Plaintiff's claim. He then went further thereafter and testified on the side of the Plaintiff as PW2. It was his testimony that as a son of 1st Defendant, he had been allocated his portion, which was thought to be 3 acres but turned out to be 3¼ acres when the survey was conducted. As he had transacted with the Plaintiff for only 3 acres and was minded to sell his whole portion, he entered into another agreement with the Plaintiff for sale of the ¼ acre. According to this witness, the 1st Defendant was

aware of this second agreement also.

9. Both PW1 and PW2 were cross-examined by Luchivya for 1st Defendant. They maintained their positions that the 1st Defendant was all along aware of what was going on. When asked about the 1st Defendant's knowledge of the transactions, these two witnesses said:

> **PW1 "It is the 2nd Defendant who was selling the land with full knowledge**
>
> **and agreement of the 1st Defendant".**
>
> **PW2 "My father had given authority to sell".**

10. The first Defendant testified as DW1 on 6/2/2018. According to him, the sale transaction was between the Plaintiff and 2nd Defendant. He was not part of it and the case should be dismissed because the land being sold was his. During cross-examination however, he acknowledged signing the first agreement and he said he did so as the father of the 2nd Defendant. He acknowledged too that other members of his family and even the area village elder signed the agreement. And when it came to the second agreement, he acknowledged too that some of his family members signed it. Also admitted by 1st Defendant is that the portion he was giving to 2nd Defendant was 3¼ acres.

11. Counsel for 1st Defendant re-examined him after cross-examination. During re-examination, the 1st Defendant vacillated. He is shown saying:

> **"Yes, this is PEX NO1. It is an agreement. I did not sign it. I did not agree that the 2nd Defendant sell 3 acres. I agreed that the 2nd Defendant sell 3 acres…".**

And in both cross-examination and re-examination the 1st Defendant said that the size of the portion he was giving to 2nd Defendant was 3¼ acres.

12. Hearing over, both sides filed written submissions. The Plaintiff's submissions were filed on 20/3/2018. The Plaintiff submitted, *interalia*, that the two agreements he availed showed well that he was buying 3¼ acres of land. He said that he has been occupying and utilizing this land. The court was urged to compel the Plaintiff to sign transfer forms as the 1st Defendant has proved his case against him.

13. The 1st Defendant's submissions were filed on 19/3/2018. It was submitted, *interalia*, that the Plaintiff has no enforceable contract with the 1st Defendant. According to the 1st Defendant, he was not party to the agreements between the Plaintiff and 2nd Defendant and he cannot therefore be compelled by law to transfer the land to the Plaintiff. And the 2nd Defendant, 1st Defendant continued, had no title to the land and he cannot therefore force the 1st Defendant to transfer that land to the Plaintiff.

14. The 1st Defendant also submitted that specific performance cannot be ordered against him since the transaction constituting the sale was a controlled one in law and therefore required the requisite Land Control Board consent which the Plaintiff did not obtain. The 1st Defendant alleged that failure to obtain the requisite Land Control Board consent within the prescribed period of six (6) months made the sale agreements void and therefore a nullity. It seems to be the 1st Defendant's position that the Plaintiff's remedy lies in an order for refund of the money paid as consideration.

15. While the 1st Defendant's desired result is the dismissal of the Plaintiff's case, the most pleasing outcome to the Plaintiff is the grant of the following prayers:

> **(a) (which is styled prayer a.A. in the amended plaint)**
>
> **An order of specific performance to compel the 1st Defendant to transfer to the Plaintiff 3¼ acres out of title No. SOUTH TESO/AMUKURA/173 and in the alternative the Deputy Registrar of this Honourable Court to sign all the relevant consents and transfer forms for transfer of 3¼ acres out of title No. SOUTH TESO/AMUKURA/173 on behalf of 1st Defendant.**
>
> **(b) Costs**
>
> **(c) Interest**
>
> **(d) Further or other relief to be issued by the Honourable Court.**

16. I have considered the pleadings, all evidence availed, and rival submissions. It emerged during hearing that the parties are not strangers to one another. The 1st and 2nd Defendant are father and son respectively while the Plaintiff is a relative to the two Defendants. From all the parties, it emerged that the size of land that the 1st Defendant was gifting to 2nd Defendant his son was thought to be three acres but turned out to be 3¼ acres during survey.

17. The transaction to purchase the land took place at first on the basis that it was 3 acres. The Plaintiff had infact paid for 3 acres. But when it turned out that it was 3¼ acres a second agreement was entered into for the Plaintiff to purchase the extra ¼ acre. The 1st Defendant did not sign the 2nd agreement but is said to have had full knowledge of it. Some of his children are said to be signatories.

18. The 2nd Defendant was selling his whole entitlement in order to relocate to another place. That entitlement was 3¼ acres according to him, 3¼ acres according to Plaintiff, and 3¼ acres according to 1st Defendant himself. The 2nd Defendant relocated after being paid all the money. It was left to the 1st Defendant to ensure that the Plaintiff got to own what was the 2nd Defendant's entitlement. Evidently, the process to actualize that ownership started, with the 1st Defendant participating up to a point. Then there was an apparent change of mind on the part of 1st Defendant and the process stalled. Eventually, the Plaintiff had to have recourse to court and that is why this suit was filed.

19. The 1st Defendant is opposed to the Plaintiff's demands because as the registered owner of the land, the agreements availed here are not between him and the Plaintiff. They are, according to him, not binding. In the course of hearing however, he admitted that his son, 2nd Defendant was selling 3 acres to the Plaintiff with his approval. It emerged that what he was opposed to was the ¼ acre that is an extra acquisition by the Plaintiff. In other words, the Plaintiff had given his acceptance for the sale transaction for 3 acres between the 2nd Defendant and the Plaintiff. The 3 acres was the presumed size of the land that the 1st Defendant had earmarked for the 2nd Defendant. And when the Plaintiff fully paid the agreed price for the presumed 3 acres, the 1st Defendant showed him the boundaries.

20. Then the Surveyor came and the very portion presumed to be 3 acres turned out to be 3¼ acres. The 2nd Defendant realized that there was an extra ¼ acre that he had not transacted to sell to the Plaintiff. He transacted to sell it and indeed sold it. A written agreement to that effect was entered into. The 1st Defendant pleads ignorance of this agreement. But the Plaintiff and second Defendant aver that he was aware of it. Infact according to the Plaintiff, the consideration agreed in this second agreement was given to 1st Defendant who in turn gave it to 2nd Defendant.

21. It was the 1st Defendant' argument in his submissions that this second agreement cancelled the 1st agreement or at least ran counter to it. I have looked at the 2nd agreement. It is a full agreement in its own right. It is clear in its substance, tenor, and intended effect. The 1st Defendant argument is therefore without basis; it is manufactured fiction. It is clear right from the outset that the 2nd Defendant desired to sell his entire portion to go and settle elsewhere. It is clear that that portion was 3 ¼ acres and was wrongly presumed at first to be 3 acres. The 1st Defendant himself was clear that it was that entire portion that he had earmarked for gifting to the 2nd Defendant as his son. It is that entire portion that the 2nd Defendant sold to the Plaintiff.

22. The 1st Defendant would have us believe that he was not privy to all what was going on. But the courts position on this must be informed by both the oral and documentary evidence availed. And all that evidence points to 1st Defendant's full awareness of what was happening. He signed the 1st agreement, is shown by credible evidence to have been aware of the 2nd agreement, and is shown to have initiated the process leading to transfer. What is more, when 1st Defendant turn to testify came, he turned out to be a shifty witness. The evidence he gave lacked consistency and was wishy-washy and unhelpful.

23. The Plaintiff was also faulted for not obtaining the Land Control Board consent within the required period. It seems to me rather surprising that the 1st Defendant can make this kind of allegation against the Plaintiff. The Plaintiff paid the full purchase price for the land. Naturally, the next thing he wanted to see was the commencement of the process leading to ownership. Evidence shows that the process was started but the 1st Defendant himself frustrated it. That is the process that would clearly involve going to Land Control Board. The Plaintiff could not go to that Board to urge it to give consent concerning land registered in the name of somebody else. The truth of the matter is that nothing good would come by going to the Board without the co-operation of the 1st Defendant. And when things stalled, it is that cooperation that lacked and only the 1st Defendant could have provided it.

24. The 1st Defendant now turns everything against the Plaintiff to make it appear that the Plaintiff bungled everything. How wrong he is! It is clear that it is him, not the Plaintiff, who stalled everything. The Plaintiff obviously desired that the process be started and finished the soonest possible so that he could become the registered owner of the land he had purchased. It is therefore not possible to agree with the 1st Defendant on this allegation.

25. When all is considered, this matter is a simple one. The 1st Defendant and the 2nd Defendant are father and son respectively. The 1st Defendant was intent on gifting a portion of land to the 2nd Defendant as his son from Land Parcel No. L.R. SOUTH TESO/AMUKURA/173. The 2nd Defendant made it clear that he wanted to sell that portion to raise money to buy a piece of land elsewhere. The 1st Defendant consented to this. The 2nd Defendant's portion was thought to be 3 acres. And this was the position even as he transacted to sell it to the Plaintiff. BUT the same portion turned out to be 3¼ acres and that made it necessary for the Plaintiff to purchase the extra ¼ acre.

26. In simple terms, the land meant for the 2nd Defendant by 1st Defendant was actually 3¼ acres. The land sold by the 2nd Defendant to Plaintiff with consent and approval of 1st Defendant was 3¼ acres. It is apparent that the 1st Defendant later had a change of mind and decided to frustrate the sale. Yet even as he did so, the 2nd Defendant, who is his son, had already received the whole purchase price and bought himself another piece of land in another place.

27. It is clear therefore that in the 1st Defendant's scheme of things, the looser would be the Plaintiff. The 1st Defendant would end up benefitting by owning a ¼ acre that the Plaintiff had already paid for. The 2nd Defendant would lose nothing. He has already received the full purchase price and bought himself the land he wanted.

28. This court would be failing if it allows the 1st Defendant's nefarious designs to succeed. The findings of the court, in light of the foregoing, is that the Plaintiff is entitled to become the registered owner of the very portion of land that the 1st Defendant had intended for the 2nd Defendant. And this position is taken after due consideration of all the oral and documentary evidence availed. The upshot is that the Plaintiff case is found to be well proved on a balance of probabilities. The court therefore grants prayers (a.A.), (b) and (c) in the amended

plaint.

Dated, signed and delivered at Busia this 17th day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: ……..……..……..……..

1st Defendant: ……..……..……

2nd Defendant: ……

Counsel of Plaintiff……..……..……..……..

Counsel of Defendants……..……..……..