



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 262 OF 2013 (FAST TRACK)

JAMES NYANGWESO NYAGOL.....PLAINTIFF

VERSUS

LILIAN ANYANGO OKELLO (Sued as the legal

representative of CHILLION RAKWACH, deceased,

pursuant to the court order of 31st May 2016).....DEFENDANT/COUNTER-CLAIMANT

JUDGEMENT

1. James Nyangweso Nyagol, the Plaintiff, commenced this suit against Chillion Rakwach, the Defendant, through the plaint dated 25th September 2013 seeking for permanent injunction restraining the Defendant by himself or agents from trespassing, encroaching or interfering with his use of Kisumu/Nyalunya/2366, declaration that he is the bona fide title holder of the said land and that the Defendant has no rights over it. He also prays for general damages for trespass and mesne profits, costs and interest. The Plaintiff avers that he is the equitable and registered proprietor of Kisumu/Nyalunya/2366, suit land, and that the Defendant had without authority placed a caution against the title and encroached onto the said land depriving him of access and use of the said land, hence suffering loss and damages.

2. The Defendant opposed the Plaintiff's claim through the statement of defence and counterclaim dated 29th October 2013. The Defendant avers that he is not a trespasser onto the suit land as the Plaintiff had sold to him a part of it. That he filed a caution after the Plaintiff failed to subdivide the portion he had bought from him and on which he has been staying for four (4) years. That the Plaintiff should be ordered to subdivide and transfer to him a rectangular plot measuring 60 feet by 200 feet from Kisumu/Nyalunya/2366 which he sold to him. That vide notice of motion dated 8th March 2106, Lilian Anyango Okello, applied to be enjoined as Defendant in her capacity as the legal representative of the original Defendant who had passed on the 13th August 2015. The application was granted on the 31st May 2016 and an amended statement of Defence and counterclaim dated 31st October 2016 was filed.

3. That when the hearing of the main suit came up on the 18th October 2017, the Plaintiff did not attend and upon being moved by counsel for the Defendant, the Plaintiff's suit commenced vide the plaint dated 25th September 2013 was dismissed with costs for non- attendance. The court then allowed the Defendant to prosecute their counterclaim. That in support of the counterclaim, Lilian Anyango Okello, the widow to the Defendant, and Pastor Samwel Onyango Nyaoke testified as DW1 and DW2 respectively. The Learned Counsel on record for the Defendant then filed the written submissions dated the 17th March 2018.

4. The issues for determination by the Court are as follows;

a) Whether the Defendant had discharged his obligation under the sale agreement, and if so, whether he is entitled to the order of specific performance against the Plaintiff.

b) Who pays the costs of the counterclaim.

5. The court has carefully considered the pleadings filed, oral and documentary evidence by DW1 and DW2, the written submission by counsel for the Defendant and come to the following conclusions;

a) That from the copy of Certificate of Official Search issued on the 15th August 2013 in respect of Kisumu/Nyalunya/2366, which is in the Plaintiff's list of documents filed with the plaint dated the 25th September 2013, the suit land was first registered on the 10th May 1991 in the name of James Nyangweso, the Plaintiff, whose suit was dismissed on the 18th October 2017 for non- attendance.

b) That upon the Plaintiff's suit being dismissed on the 18th October 2017 for non-attendance, the court allowed the Defendant to prosecute her counterclaim. That the counterclaim is for an order to be issued for the Plaintiff to carve out a rectangular portion of land measuring 60 by 200 feet from Kisumu/Nyalunya/2366 which he sold to the Defendant in 2008 and transfer it to him. That the court has perused the record and noted that the Plaintiff did not file a reply to the defence and defence to the counterclaim. That further, the Plaintiff did not attend court for the hearing of the Defendant's counterclaim. That therefore, the Defendant's counterclaim is unopposed.

c) That the Defendant's legal representative vide the Limited Grant of Letters of Administration Ad Litem issued on the 28th January 2016, in Kisumu H. C. Succession Cause No. 1287 of 2015, and one other witness testified as DW1 and DW2 in support of the counterclaim. That their testimony has not been challenged or rebutted. That the court has further taken note of the undated letter by the Plaintiff and addressed to the District Land Registrar Kisumu referenced "Removal of Caution vide L. R. No.Kisumu/Nyalunya/2366", that is annexed to his affidavit sworn on 14th May 2014 in support of his notice of motion of the same date for an order to remove the caution. That the Plaintiff definitely acknowledges the Defendant's claim over the suit land in the second paragraph which states, ***"Be hereby informed that the undersigned is the vendor of portion of the said parcel of land to the cautioner and wishes to proceed with further formalities as regards subdivision and transfer in favour of Chillion Rakwach."***

d) That the court has also taken judicial notice of the proceedings and order of the 5th June 2014 and 22nd September 2014 that clearly signals that the Plaintiff had acknowledged the Defendant's claim. That further an order for them to go to the Land Control Board for consent to subdivide the portion had been issued. That the testimony of DW1 that indeed the application for consent was made and that the letter was collected by the Plaintiff who however declined to continue with the remaining processes cannot be further from the truth.

e) That from the foregoing, and noting that the Defendant has been in occupation of the 60 by 200 feet portion of Kisumu/Nyalunya/2366, the court finds that the Defendant, having fully paid the purchase price, is entitled to an order of specific performance. That as the Defendant passed on the 13th August 2015, and as Lilian Anyango Okello, the legal representative is yet to obtain a full grant, the portion of the land is to be registered in the name of the Defendant, Chillion Rakwach, deceased.

f) That though costs would under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** be awarded to the successful litigant, the court has after perusing the Defendant's original and amended statement of Defence and counterclaim noted they do not contain a prayer for costs for the counterclaim. That as a party in a suit is bound by his/her/its pleadings, no costs for the counterclaim will be granted.

6. That flowing from the foregoing, the court finds that the Defendant has proved their claim against the Plaintiff in the counterclaim and enters judgment for her in the following terms;

a) That an order of Specific Performance be and is hereby issued directing the Plaintiff to subdivide a rectangular portion of land measuring 60 feet by 200 feet from Kisumu/Nyalunya/2366 and transfer it to the Defendant, namely Chillion Rakwach (deceased), upon obtaining the requisite statutory consents.

b) No order on costs of the counterclaim is granted.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER 2018

In the presence of:

Plaintiff Absent

Defendant Present

Counsel Mr. Okero for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE