



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC. CASE NO. 272 OF 2017

SYLPHANS ODHIAMBO OWITI.....PLAINTIFF

-versus-

CHARLES OKUMU OKUMU.....DEFENDANT

JUDGMENT

1. The plaintiff namely **SYLPHANS ODHIAMBO OWITI** who appears in person has sued the defendant, **CHARLES OKUMU OKUMU** by a plaint dated 13th March 2017 filed on the even date. He is seeking the following reliefs:-

a) Permanent injunction restraining the defendant, his family and /or anybody action upon the defendant's instructions from interfering from the activities being carried out by the plaintiff or his agents on the sold parcel of the said land parcel.

b) This honourable court to compel the defendant into signing transfer papers of the sold portion of this suit land parcel and or order the execution of the transfer papers by the Executive officer of Migori Law courts to enable the plaintiff have the full ownership of the sold portion of the suit land parcel.

c) Cost of this suit.

d) Cost of the special damages and general damages on the halted farming activities that resulted from the interference caused by the defendant since 2nd February 2017 on the sold portion of the suit land parcel.

e) Any other relief that this honourable court shall deem fit to grant in the circumstance of this suit.

2. Briefly, the plaintiff claims that on 4th August 2014 and 26th August 2015, he purchased a portion measuring approximately 0.4 hectares out of the suit land, **LR NO. KANYAMKAGO/KATIENO/2871** from the defendant at a consideration of Kshs. 90,000/= which he paid in full to the defendant. After the completion of the agreed consideration, the defendant put the plaintiff in occupation of the portion of the suit land pending its transfer. The plaintiff carried out farming activities thereon. However, in September 2016, all through to 2nd February 2017, the defendant stopped the plaintiff's workers from working on the said portion of the suit land and chased them away. He failed to transfer the land to the plaintiff hence provoking the instant suit.

3. The defendant was duly served on 15/3/2017 and 3rd November 2017 as per affidavits of service sworn on 29th March 2017 and 3rd December 2017 respectively. He failed to enter appearance, and file statement of defence and appear for hearing of the suit. In the circumstances, the matter proceeded to ex-parte hearing on 7th March 2018.

4. I note the request for judgment dated 5th April, 2017. The testimonies of the plaintiff (PW1), Alfred Okoth Aeja (PW2) and Peterson Otura Okombo (PW3) include first sale of land agreement dated 5/8/2014 (PEXhibit 1), 2nd sale of land the agreement dated 28th June 2015 (PEXhibit 2), certificate of official search dated 24th February 2017 (PEXhibit 3) and a receipt for Kshs. 50 for (PEXhibit 3), (PEXhibit 4) in relation to the suit land.

5. The plaintiff filed submission dated 5th October 2018 whereby he stated that the suit land is in the name of the defendant who failed to file defence hence the suit is not challenged. He submitted on the reliefs, sought and urged the court to grant them accordingly.

6. In the case of **Galaxy Paints Company Ltd –vs- Falcon Grounds Ltd (2002) 2EA 385**, the Court of Appeal held inter alia,

“it is trite law, and thethe issues for determination in a suit generally flow the pleadings and or such issues as the parties have framed for the court’s determination.”

7. The parties have not framed any issues for determination herein. Having looked at the plaint, the evidence of PW1, PW2 and PW3 as well as the plaintiff’s submissions. I find that the following issues emerge for determination:

- a) Who is the registered owner of the suit land?
- b) The validity of the transaction between the plaintiff and defendant
- c) Is the plaintiff entitled to the reliefs sought in the plaintiff?

8. PW1 testified that he bought 0.4 hectares out of the suit land which is registered in the name of the defendant. The same is revealed in PExhibits 1 to 3 and I am aware of the definition of the term “**Proprietor**” at Section 2 of the **Land Registration Act, 2012** as read with **Sections 24, 25, 26 and 30 of the same Act.**

9. PW2, a clan elder of the area, stated that the defendant sold his land to PW1 as shown on PExhibit 1. That PW1 ploughed the land but the defendant chased him away. A report was made to PW2 and thereafter this suit was filed.

10. According to PW3, the defendant chased him away from the suit land. That PW1 had given him (PW3) the land to cultivate.

11. It is noted that PExhibits 1 and 2 did not receive the consent of the land control board of the area. In **Njamunyu –v- Nyagah (1983) KLR 282**, it was held that Land Control Consent does not make an agreement for sale of land binding.

12. In **Kariuki –v- Kariuki (1983) KLR 226**, it was held that failure to obtain the land control board consent rendered the agreement for sale of land and the transaction between the parties void for all intents and purposes. That the only remedy for the purchaser is to recover the purchase price or consideration under **Section 7 of the Land Control Board Act (Cap 302 Laws of Kenya).**

13. Be that as it may, I am of the considered view that since the plaintiff paid the consideration to the defendant, a constructive trust was created in his favour. This is informed by the overriding objective of this court at **Section 3 of the Environment and Land Court Act, 2015 (2011)** and the need to render substantive justice to all parties to the suit.

14. In the case of **Macharia Mwangi Maina & 87 others –v- Davidson Mwangi Kagiri (2014) eKLR**, the Court of Appeal held, thus:-

“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the overriding objectives of this court and the need to dispense substantive and not technical justice”.

15. Special damages sought were not pleaded and proved; see **Ouma –v- Nairobi City Council (1976 to 1980) I KLR 375**. Therefore I decline to award the same.

16. Trespass to land is a tort actionable per se. The plaintiff has been out of the land due to the acts of the defendant. General damages for trespass are within the discretion of the court. I have considered the entire case and think that an amount of **Kshs. 15,000/=** general damages would be appropriate in the circumstances; see **Erick Adome & another –v- Pauline Kasumba Osebe and Another (2014) eKLR**.

17. In the instant suit, I find that PExhibit 1 and PExhibit 2 created a constructive trust in favour of PW1. Therefore, the plaintiff is entitled to almost all the orders sought in his plaint and he has proved his case against the defendant on a balance of probability.

18. Accordingly, I enter judgment for the plaintiff against the defendant in terms of orders (a) and (b) sought in the plaint.

19. General damages for trespass to the suit land are awarded in the sum of **Kshs.15,000/=** in favour of the plaintiff.

20. Costs of the suit shall be borne by the defendant.

DELIVERED, DATED and SIGNED at MIGORI this 21st day of November 2018.

G. ONGONDO

JUDGE

In presence of :-

Plaintiff – Present in person

Tom Maurice – Court Assistant