



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.883 of 2015

ISAAC ISAIH OPANDE.....1ST PLAINTIFF

MICHAEL SIRANDA.....2ND PLAINTIFF

VERSUS

LUCAS OCHIENG OMOLLO.....1ST DEFENDANT

EDWIN OMONDI OMOLLO.....2ND DEFENDANT

JUDGMENT

1. **Isaac Isaih Opande and Michael Siranda**, the 1st and 2nd Plaintiff respectively, filed this suit against **Lucas Ochieng Omollo and Edwin Omondi Omollo**, the 1st and 2nd Defendant respectively, vide the plaint dated 23rd August 2011 seeking for transfer of 1.0 acres and 0.1446 hectares from land parcel **Kisumu/Wawidhi A 11/747** to the 1st and 2nd Plaintiff respectively, permanent injunction and costs. The Plaintiffs aver that by sale agreements dated 17th May 1989 and 5th June 1998, the late **Joseph Ondio Ondira** sold to the 1st and 2nd Plaintiff portions of land parcel Kisumu Wawidhi A 11/747 measuring 1.0 acres and 0.1446 hectares respectively. That the vendor died before he could transfer the land to the Plaintiffs and because the Defendants were minors, they had to wait for them to attain the age of majority to succeed the vendor. That the Defendants latter obtained the grant, transferred the land to their names and in 2010 fenced off the entire land without transferring the portions of the land bought by the Plaintiffs.

2. The Defendants did not enter appearance nor file any defence and the hearing proceeded through formal proof on the 6th February 2017. The 1st and 2nd Plaintiff testified as PW1 and PW2 respectively. The 1st Plaintiff case is that on 17th May 1989, he entered into a land sale agreement with the father of the Defendants in which he bought one acre at Ksh.7,000/=. The witnesses to the sale agreement are both deceased. The vendor died before they could obtain the Land Control Board consent to subdivide the land and transfer the one acre to him. The 1st Plaintiff conceded that the sale agreement did not specify the parcel of land from which he was buying one acre. The 2nd Plaintiff testified that by the sale agreement dated 5th June 1998, he bought half acre out of Kisumu/Wawidhi A 11/747 from Joseph Omollo. However the Defendants have since sold the land to another person called James Agenga. He added that Joseph Omollo died before they could obtain the Land control board consent to subdivide the land and transfer the half acre to him.

3. The learned counsel for the Plaintiffs filed written submissions dated 20th February 2017 and cited the rulings in Kitale Environment and Land Case No.31 of 2015 **James Muigai Thungu –V- County**

Government of Trans – Nzoia & 2 others and Mombasa H.C. C.C. No.8 o 2011, **Tritex Industries Lt & 3 Others –V- National Housing corporation & another** both dealing with the issue of temporary injunctions.

4. The following are the issue for the court’s determination;

- a) Whether the Plaintiffs are entitled to orders of specific performance under the sale agreements dated 17th May 1989 and 5th July 1998.
- b) Whether any of the orders sought should issue.
- c) Who pays the costs.

5. The court has after carefully considering the pleadings filed by the Plaintiffs and their oral testimonies, plus their counsel’s written submissions come to the following findings:

- a) That the Plaintiffs claim against the Defendants is based on the contracts for sale of land entered between them and one Joseph Omollo Ondura in 1989 and 1998. That the said Joseph Omollo Ondura is reportedly the father to the Defendants and has since died on a date that was not disclosed.
- b) That even though the Defendants did not enter appearance or file defence, the Plaintiffs still had the legal duty to prove their case to the standard require of a balance of probabilities so as to get a judgment in their favour.
- c) That from the Plaintiffs pleadings and evidence, the Defendants were minors when they entered into the sale agreement with their late father. That disclosure leads the court to conclude that the Defendants were not party to the two sale agreements and there is no evidence adduced by the Plaintiffs to show that the Defendants had ever acknowledged the two sale agreements.
- d) That under the provisions of **Section 6 and 8 of the Land Control Act Chapter 302 of Laws of Kenya**, the sale agreements between the Plaintiffs and the late **Joseph Omollo Ondura** become void at the expiry of six months for failure to obtain consent of Land Control Board. The Plaintiffs have disclosed that the vendor, Joseph Omollo Ondura died before obtaining the Land Control board consent to subdivide the Land and transfer the portions he was selling to the respective Plaintiffs. That under the provisions of **Section 7 of the said Act**, the only recourse the Plaintiffs could have had against the vendor or his estate was refund of the purchase price paid.
- e) That as the Plaintiffs claim against the Defendants is based on the sale agreements of 1989 and 1998 which are essentially contracts, **Section 4(1) of the Limitation of Actions Act Chapter 22 of Laws of Kenya** requires such a claim be filed before the expiry of six (6) years from the date of the sale agreement. That in respect of the sale agreement in favour of the 1st Plaintiff, the six (6) years lapsed on the 17th may 1995 while that in favour the 2nd Plaintiff become time barred after 5th June 2004. That this suit was filed on 29th August 2011 without obtaining extension of time and is therefore statute time barred for all intent and purposes.
- f) That the sale agreement dated 17th May 1989 under which the 1st Plaintiff basis his claim, do not indicate the parcel of land he was buying one acre from. That the sketch attached to the sale agreement do not make reference to any specific parcel of land. That accordingly, the sale agreement dated 17th May 1989 do not have any relationship with land parcel **Kisumu/Wawidhi A 11/747** from which the 1st Plaintiff now claim one acre.
- g) That the sale agreement dated 5th June 1989 under which the 2nd Plaintiff claim to have bought a portion of 0.1446 hectares describes the size of the portion he was buying as “**49M X 27M X 33M X32M**” which measurements are reflected on the attached sketch. Both the sale agreement and

sketch makes reference to parcel 747 from which the 2nd Plaintiff now claims the portion from.

h) That both Plaintiffs concedes that they have not used the portions of land they claim from the year 2010 when they Defendants took them and fenced the whole land after obtaining the grant of letters of administration. That 2nd plaintiff further disclosed that the land has been sold to one **James Agenga** who has reportedly taken possession and has not been enjoined as a party or interested party in this proceedings.

i) That for reasons that the Plaintiffs sale agreements of 17th May 1989 and 5th June 1998 did not receive the requisite consent from the Land Control board in accordance with **Section 6 and 8 of Land Control Act**, and that the suit is time barred having been filed outside the six years from their dates contrary to **Section 4(1) (a) of the Limitation of Actions Act**, the Plaintiffs case must fail even if not defended.

6. That flowing from the foregoing, the court finds that the Plaintiffs have failed to prove their case on a balance of probabilities and the same is dismissed. The file should be closed forthwith.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 4TH DAY OF OCTOBER 2017

In presence of;

Plaintiffs Present

Defendants Absent

Counsel Mr. Achura for the Plaintiffs

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

4/10/2017

4/10/2017

S.M. Kibunja Judge

Plaintiffs present

Mr. Achura for the Plaintiff

Order: The Judgment dated and delivered in open court in the presence of the Plaintiffs and their counsel Mr. Achura.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

4/10/2017