



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

LAND CASE NO.76 OF 2015

ASMAN CHUMBA OMARI.....PLAINTIFF

VERSUS

JOHN OUMA GUMBA.....DEFENDANT

JUDGEMENT

1. **Asman Chumba Omari**, through the plaint dated 16th March 2015 filed this suit against **John Ouma Gumba**, the Defendant and seeks for the following orders;

“ **a)** Declaration that the subdivision of land parcel No.Kisumu/Kogony/1394 into land parcels Nos. Kisumu/Kogony/7046, 7047,7048, 7049 and 7050 and their subsequent transfers were fraudulent, null and void ab initio hence illegal.

b) An order that the subdivisions of land parcels No.Kisumu/Kogony/1394 into parcels Nos. Kisumu/Kogony/7046, 7047,7048, 7049 and 7050 and the subsequent transfers and registration of the same into the names of the Defendant and Vitalis Onyango Anjao Akech be cancelled and the map in respect of the same be rectified by reinstating land parcel No. Kisumu/Kogony/1394 in the name of the defendant thereafter the same be transferred into the name of the plaintiff.

c) That an order calling upon the defendant and the said Vitalis Onyango Anjao Akech to surrender back to the District Land Registrar, Kisumu title deeds in respect to land parcel No.Kisumu/Kogony/ 7046, 7047,7048, 7049 and 7050 and the same be cancelled.

d) An order for permanent injunction restraining the Defendant either by himself or through his agents, employees, wife, children, relatives or any other person deriving authority from him from claiming, entering using, cultivating, occupying, alienating, transferring or disposing off the same to 3rd parties or in any other way or manner interfering with the Plaintiff's subject land.

e) Costs of the suit.

f) Any other or further remedy that this honorable court may deem fit and just to grant.”

The Plaintiff avers that he bought land parcel **Kisumu/Kogony/1394** vide the agreement dated 17th December 2010 for Ksh.250,000/= from the Defendant. That the Defendant executed all the relevant transfer documents in his favour but on presenting the same for registration found a third party had lodged a caution. That in February 2015, he conducted a search on the parcel and found out that the Defendant

had fraudulently subdivided it on 11th September 2014 into parcels 7046 to 7050 and transferred them to his names and that of **Vitalis Onyango Anjao Akech**. That he then filed this suit.

2. The Defendant was duly served with suit papers as per the affidavit of service sworn by **Julius Otieno Raminya** on 20th March 2015 and on failing to enter appearance or file defence, the Plaintiff applied for interlocutory judgment vide letter dated 20th April 2015. That the Deputy Registrar directed the matter be fixed for formal proof which took place on 22nd September 2015 with the Plaintiff testifying as PW1. He produced a copy of the sale agreement, application for consent, letter of consent, transfer form and pay in slip for stamp duty as exhibit 1 to 5 respectively. PW1 testified that when he presented the documents for registration at the lands office, he found that the Defendant had subdivided the land into parcel **7046 to 7050** as shown in the copy of the mutation form he produced as exhibit 6. The Plaintiff stated that the Defendant had given him the original title deed for the land which he in turn presented to the Land Registrar who has not returned it to him. He produced a copy of the title deed which he had obtained from his surveyor as exhibit 7. The witness also produced copies of certificates of official searches for parcels **Kisumu/Kogony/7046** to 7050 as exhibit 8. He conceded that parcel 7049 was registered in the names of **Vitalis Onyango Anjao Akech** who he agreed he had not enjoined as a defendant.

3. The counsel for the Plaintiff then filed written submissions dated 4th February 2016.

4. The issues for determination are as follows:

- a. Whether the Plaintiff and Defendant had entered into a valid sale agreement over sale of land parcel **Kisumu/Kogony/1394**.
- b. Whether the Plaintiff had performed all his obligations under the sale agreement.
- c. Whether the Plaintiff had taken possession of the land.
- d. Whether the sale agreement had received the relevant statutory consents.
- e. Whether the subdivisions of **Kisumu/Kogony/1394** and the transfer of the parcels arising therefrom was done through fraud.
- f. Which of the orders/prayers sought should be granted.,
- g. Who pays the costs.

5. The court has considered the evidence adduced by the Plaintiff the written submissions by his counsel and come to the following findings;

- a. That from the documentary evidence availed by the Plaintiff, he has established that he had entered into a valid sale agreement with the Defendant over land parcel Kisumu/Kogony/1394 under which payment of Kshs.250,000/= as purchase price was acknowledged. That the sale agreement satisfies the requirement of **Section 3(3) of the Law of Contracts Act chapter 23 of Laws of Kenya**.
- b. That the sale agreement between the Plaintiff and Defendant received the consent of the Land Control Board as required under **Section 6(1) of the Land Control Act Chapter 302 of Laws of Kenya**.
- c. That the Plaintiff has availed copies of the transfer documents for the said land duly signed by both the Defendant and himself and witnessed by Sheila Yeke Advocate on 17th December 2010 and the court find that the property in the said land in law passed upon the execution of the transfer document and that all the remained was for the Plaintiff to present the transfer document for registration with the Land Registrar.

d. That it is not clear from the pleadings on what date the Plaintiff presented the transfer documents for registration as no copy of the presentation form was availed. That however, the court has noted some handwritten notes at the top right of the transfer form which the court takes to have been made by the Land Registrar's offices on the fees payable as follows:

Registration (Reg) – 500/=, stamp duty (S.d) 2000/=, and title deed (T.d) – 500/=. That the Plaintiff has exhibited only a receipt for payment of Ksh.2,000/= as stamp duty on 18th January 2011, and the court takes it that the other fees have not been paid.

e. That in the absence of evidence of presentation of the transfer documents to the Land Registrar by the Plaintiff, and considering that the Land Registrar, Land Surveyor and **Vitalis Onyango Anjao Akech** who was registered with one of the parcels after subdivision, are not enjoined as parties in this suit, the court cannot attribute fraud on their part or cancel the mutation, maps and titles of the subdivisions without giving them a hearing.

f. That the Plaintiff had been given possession of the land upon execution of the sale agreement on the 17th December 2010. That though the Plaintiff indicated that he found a third party had filed a caution against the title, he has not explained why he did not move the Land Registrar and the court to have the caution lifted in accordance with **Section 73** of the Land Registration Act No.3 of 2012. That he has also not explained why he did not promptly seek the Defendant's assistance or sue him for specific performance. That the Defendant has not defended this suit and in the absence of a demand notice having been served on the Defendant before the filing of the suit, the Plaintiff should bear the costs of this suit.

g. That from the foregoing the Plaintiff has proved that he is entitled to an order of specific performance against the Defendant in terms of their sale agreement dated 17th December 2010. That the land as described in the sale agreement has since been mutated into five parcels, four of which are still in the names of the Defendant and the fifth one in the names of a third party. The four titles of the subdivisions in the names of the Defendant should be transferred to the Plaintiff.

6. That flowing from above the court finds that the Plaintiff has established on a balance of probabilities that he is entitled to land parcel **Kisumu/Kogony/1394** or the parcels subdivided from it that are still in the names of the Defendants. The court therefore enters judgment for the Plaintiff against the Defendant as follow:

a. That an order of specific performance is hereby issued and the Defendant directed to transfer all the parcels in his names that were subdivided after the date of their sale agreement on 17 December 2010 from **Kisumu/Kogony/1394** being the land parcels **Kisumu/Kogony/7046, 7047, 7048 and 7050** within the next 30 days.

b. That in the event that the Defendant declines to execute any of documents necessary to transfer the four parcels of land to the Plaintiff, the Deputy Registrar of this Court is hereby empowered to execute all such relevant documents to give effect to order (a) above.

c. That the Plaintiff do meet his own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2016

11/10/2016

S.M. Kibunja J.

Oyugi court assistant

Parties absent

Counsel absent

Court: Judgment dated and delivered in open court in the absence of all the parties/Counsel. The Deputy Registrar to communicate to the parties.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2016