



**Ongombe v Abuto & another (Environment & Land Case 341 of 2014)
[2016] KEELC 1312 (KLR) (2 November 2016) (Judgment)**

Fanuel Ongombe v Shem Oieno Abuto & another [2016] eKLR

Neutral citation: [2016] KEELC 1312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 341 OF 2014
SM KIBUNJA, J
NOVEMBER 2, 2016**

BETWEEN

FANUEL ONGOMBE PLAINTIFF

AND

SHEM OIENO ABUTO 1ST DEFENDANT

AIDS ORPHANS CENTRE KENYA 2ND DEFENDANT

JUDGMENT

1. Fanuel Ongombe, the Plaintiff, vide plaint dated 15th December 2014, commenced this suit against Shem Otieno Abuto and Aids Orphans Centre Kenya, the 1st and 2nd Defendants respectively seeking for a declaration that the Defendants registration with land parcel Kisumu/Wiwadhi A 11/960 is as trustees for the Plaintiff, an order for the Defendants to transfer the said land to him and costs. The Plaintiff avers that he agreed to sell the said land to the 2nd Defendant through the 1st Defendant. That the purchase price was to be paid after the registration of the 2nd Defendant as the proprietor of the said land. That he transferred the land as agreed but the Defendant have not paid him the full purchase price. The Plaintiff avers that the Defendants obtained registration of the said land through misrepresentations, unlawful and illegal acts without paying the full consideration as agreed. The Plaintiff sets out the particulars of fraud under paragraph 6 of the Plaint as follows:
 - a. Causing the transfer of Kisumu/Wiwadhi A11/960 from the Plaintiff's name to his.
 - b. Concealing his true identity from the officials at the Land office that the land was meant to the exclusive ownership of the 2nd Defendant.
 - c. Colluding with officials from the land office to procure the transfer herein in his names instead of the names of 2nd Defendant wholly.



- d. Colluding to disinherit the Plaintiff herein.
 - e. Failing to pay the agreed valuable consideration for the land.”
2. The service of summons on the Defendants was effected through advertisement in the Daily Nation newspaper of Wednesday 24th June 2015 as confirmed by the affidavit of service sworn on 9th September 2015 by Ben Nyanga Aduol. The Defendant did not enter appearance or file defence and by letter dated 9th September 2015, the Plaintiff requested for judgment. That on 14th September 2015, the Deputy Registrar issued directions that the matter proceed to formal proof which took place on 17th May 2016 with the Plaintiff testifying as PW1. He testified that the 1st Defendant was his pastor and that he agreed to sell to him the said land at Kshs.550,000 to put up a school for Aids Orphans. He testified that the 1st Defendant had told him that he was an official with Aids orphans Centre Kenya, the 2nd Defendant.
- The Plaintiff further testified that the 1st Defendant and himself went to Miruka and Company Advocates and recorded a land sale agreement after which he was paid Kshs,100,000/=. That he gave the 1st Defendant the title deed to conduct a search and he was to sign the transfer documents after final payment which was to come from some sponsors from out of the country. Later he went to the 2nd Defendants office in Nairobi to look for 1st Defendant and learnt that he had disappeared and that the 2nd Defendant was also looking for him. He prayed for the land to be returned to him. During cross examination the Plaintiff said he never applied for nor obtained land Control board consent to transfer the land to the Defendants. He also stated that he did not sign transfer documents in favour of the Defendants and that the appeal that had been filed to the Minister over the land was decided in his favour. He further stated that he never reported to the police or the land registrar that his land had been transferred to the Defendants through fraud.
3. The counsel for the Plaintiff filed written submissions at the close of the Plaintiff’s case dated 31st May 2016.
4. The issues for determination are as follows:
- a. Who the registered proprietor of land parcel Kisumu/Wiwadhi A 11/960 is.
 - b. If the Defendants are the registered proprietors, whether they are so registered as trustees for the Plaintiff, and if so whether they should transfer the land to the Plaintiff.
 - c. Whether the Defendants are in breach of the sale agreement over the said land.
 - d. Which prayers to issue
 - e. Who pays the costs.
5. The court has carefully considered the pleadings filed by the Plaintiff, the oral and documentary evidence adduced by PW1, submission by counsel and come to the following conclusions:
- a. That according to the copy of the register and certificate of official search produced as exhibits by the Plaintiff, land parcel Kisumu/Wiwadhi A 11/960 is a subdivision from Plot number 593 and was first registered on 27th December 2000 in the names of Fanuel Ongombe, whom the court takes to be the Plaintiff herein.
 - b. That the said copy of the register and certificate of official search further shows that the land was registered in the names of Shem Otieno Abuto for AIDS Orphans Centre Kenya and title deed issued on 15th august 2003. That the said Shem Otieno Abuto and AIDS Orphans Centre Kenya are taken as the defendants herein.



- c. That the two documents further confirms that on the 27th August 2003, a restriction against dealing with the suit land pending the hearing and determination of an appeal with the Minister was registered against the title. That even though the Plaintiff's testified that the appeal was decided in his favour, he did not avail documentary evidence to back his claim. That the copy of the certificate of official search bears the date of 18th March 2013 and carries the restriction at entry number 5 and if the appeal had been decided in favour of the Plaintiff as he alleged, then an appropriate entry to that effect would have been inserted in the register and would have been noted in the certificate of official search.
- d. That the main basis or foundation of the Plaintiff's claim against the defendants is that they are yet to pay the full purchase price for the land. That the Plaintiff testified that the purchase price was Kshs.550,000/= and that he was only paid kshs100,000/= on executing the transfer and that the balance of was to be paid after transfer. That though the Plaintiff evidence is that the sale agreement was made and executed before an advocate, he did not produce a copy to the court to confirm its contents. That the court has taken note of the Plaintiff response during cross examination that he has never lodged any complaint with the police or the Land Registrar even after establishing that the Defendants had transferred the land to their without involving him more than ten years ago, without him signing the transfer documents or applying for and obtaining the land control board consent. That this allegation by the Plaintiff appears strange and an afterthought in view of the contents of paragraphs 5 of the plaint where he had averred as follows:

“ 5. The Plaintiff contends that he willingly transferred the title to the defendants as agreed but the 1st Defendant on behalf of the 2nd Defendants AIDS Orhans Centre Kenya failed to complete their part of bargain to pay the full consideration for the sale further they have failed refused and neglected to take possession.”

- e. That the Plaintiff having clearly pleaded in paragraph 5 of the plaint as shown in (d) above that he had willingly transferred the land to the Defendants, cannot then claim that the Defendants had the land transferred to their names unlawfully, illegally and through fraudulent misrepresentations as he seems to claim in paragraph 6 of the same plaint. That in any case the Plaintiff has not offered any evidence to proof any acts of illegality, unlawfulness or fraudulent misrepresentation in the process of registering the Defendants with the land.
- f. That as earlier pointed out above, the Plaintiff's claim against the Defendants seem to be based on his contention that they have not paid him the balance of the purchase price. That the provisions of Section 3 (3) of the Law of Contract Act chapter 23 of Law Of Kenya states as follows:

“3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

- a. The contract upon which the suit is founded –
- i. is in writing;
 - ii. is signed by all the parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”



That the Plaintiff cannot therefore base a claim against the Defendants on a sale agreement whose copy he has not availed to the court as the court cannot be expected to presume its existence. That the court is not in a position to confirm the purchase price, the deposit paid and the balance outstanding without a copy of the sale agreement being availed.

- g. That the court has taken note of the contents of the affidavit of service sworn on 27th April 2015 by Araali Odhiambo Hanington to the effect that he had been instructed to serve the summons on Spurgeons Child Care Kenya in Kibera Estate Nairobi. The deponent at paragraph 2 deponed as follows:

“ 2. That on 12.3.2015, I proceeded as instructed above to the offices of Aids Orphans Centre Kenya which currently is known as Spurgeons Child Care Kenya and runs under the same roof with Spurgeons Academy Located within Olympic estate which is a sub-estate of Kibera”.

That the Plaintiff did not avail any evidence to confirm whether indeed the 2nd Defendant exists at a legal entity capable of being sued or had been replaced by Spugeons Child Care Kenya as alleged in the affidavit of service.

- h. That even though the Defendants did not enter appearance or defend this suit, the Plaintiff obligation to prove his case on a balance of probabilities remained his responsibility and the court finds that he has failed to discharge it.

6. That from the foregoing, the Plaintiff's suit against both Defendants is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 2ND DAY OF NOVEMBER 2016

In presence of;

Plaintiff Present

Defendant Absent

Counsel Mr Nyanga for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

2/ 11/2016

2/11/2016

S.M. Kibunja Judge

Oyugi court assistant

Plaintiff present

Mr Nyanga for the Plaintiff

Court: Judgment dated and delivered in open court in presence the Plaintiff and Mr. Nyanga advocate for the Plaintiff.



S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

2/11/2016

