



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.9 OF 2014

STEPHEN ODHIAMBO OKUMBE.....PLAINTIFF

VERSUS

WYCLIFE YAMO YAMO1ST DEFENDANT

VICTOR OTWEYO OMORO.....2ND DEFENDANT

JAPHETH YAMO OMORO.....3RD DEFENDANT

RULING

1. By notice of motion dated 20th January 2014, **Stephen Odhiambo Okumbe**, the Plaintiff, prays for injunction orders restraining **Wycliffe Yamo Yamo, Victor Otweyo Omoro and Japheth Yamo Omoro**, the Defendants, from interfering with the Plaintiff's use of the portion purchased from Land parcel **Uholo/Sigomere/1937**. The application is based on the six grounds on the notice of motion and supported by the affidavit of the plaintiff sworn on the 20th January 2014 summarized as follows:

- a) That plaintiff entered into a land sale agreement for a portion of 0.045 hectares from **Uholo/Sigomere/1937** at Ksh.125,000/= with the Defendants on 25th September 2011.
- b) That the Plaintiff paid Ksh.121,000/= of the purchase price to the Defendants leaving Ksh.4000/= balance.
- c) That the land is registered in the names of 2nd and 3rd Defendants.
- d) That the Plaintiff has commenced development on the portion he bought and has paid Ksh.30,000/= to connect electricity.
- e) That the Defendants have purportedly cancelled the agreement and barred him and his workers from accessing the plot and hence this application.

2. The application is opposed by the Defendants through the replying affidavit sworn by Wycliffe Yamo Yamo on the 24th March 2014 in which he deponed to the following among others;

- a) That the agreement for sale was for a plot measuring 13.3m by 15 metres, which is equal to 0.02 hectares, and not 0.045 hectares as alleged by the Plaintiff.
- b) That the purchase price of Ksh.125,000/= was to be paid by end of October 2011 but by May

2012, the plaintiff had paid only Ksh.117,000/= leaving an outstanding balance of Ksh.8,000/=.

c)That they had agreed that after the Plaintiff paid for the portion of 0.02 hectares, he would embark on buying the remaining portion of the land to make a total of 0.045 hectares.

d)That contrary to the agreement, the Plaintiff took possession of the land and started the construction without making full payment of the purchase price.

e) That after the Plaintiff declined to buy the remaining portion, the Defendants had the plot resurveyed to create plots D, E and F and sold plot E and F to other persons.

f)That the development carried out by the Plaintiff had encroached onto plot F by 1.7 metres on one side. That the development by the Plaintiff extends to the boundary and its roof and windows open to the neighbouring plot.

g)That the Defendants are ready and willing to give the Plaintiff title to his 0.02 hectare plot after making the necessary payments, but in return the Plaintiff should stop encroaching onto the neighbouring plots. That it is for the reasons stated that the Defendants stopped any further development on the plot.

h) That alternatively the sale agreement is a nullity for it was not attested to.

3. The counsel for the Plaintiff filed written submission dated 30th June 2014 while counsel for the Defendants filed theirs dated 7th July 2014. The Plaintiff's counsel then filed their reply dated 29th September 2014 to the Defendants' submissions.

4. The following are the issues for the court's determination;

a) Whether the Plaintiff has established a prima facie case against the Defendants with probability of success.

b) Who should pay the costs.

5. The court has considered the grounds on the notice of motion, the affidavit evidence, the written rival submissions by counsel and come to the following findings;

a) That the Plaintiff's suit against the Defendants is for specific performance of the sale agreement dated 25th September 2011 while the Defendants' counter claimed against the Plaintiff for the 1.7 metres encroachment into the neighboring plots, general damages for trespass and in the alternative have the sale agreement dated 25th September 2011 declared void and unenforceable for failure to be attested.

b) That the copies of the sale agreement availed to the court by the Plaintiff and Defendants show that what the Plaintiff bought from the Defendants was a portion of 0.02 hectares, and not 0.45 hectares, for Ksh.125,000/=. That it was a term of the said agreement that **“the purchaser shall take immediate possession of the said portion of land upon payment of the purchase price in full settlement to the vendor and the vendor shall allow the purchaser full rights and liberty to enter the said portion and use or develop the same after settlement of the second installment due by 20th October 2011.”** That it is therefore not right for the Defendants to claim, as they appear to do, that the Plaintiff was not to take possession and start development before full payment.

c) That it was also a term of the said agreement that after payment of Ksh.42,000/= acknowledged under the agreement, the remaining balance of Ksh.83,000/= would be paid in installments of Ksh.20,000/= on 20th October 2011 and the balance would be paid in instalments before the six

months from the date of the agreement expired.

d) That contrary to the agreed payment schedule, the Plaintiff is yet to make the full payment. That according to the Plaintiff, he still owes the Defendants Ksh,4,000/= while according to the Defendants, the balance is Ksh.8,000/=. That the actual amount pending payment will have to be settled through evidence in the main suit.

e) That the parties to the sale agreement had agreed that the “**vendor shall execute a transfer in favour of the purchaser in respect of the said portion of land upon payment of the purchase price in full.**” That as both parties have agreed that the whole purchase price is yet to be paid, the vendor (Defendants) cannot be blamed or faulted for failure to have transferred the land to the Plaintiff. The transfer was to be done after full payment of purchase price.

f) That it was also a term of the agreement that “**sale of the said piece of land is subject to consent of the appropriate land control board.**” This was merely to restate the statutory requirements under **Section 6** of the Land Control Act **Chapter 301** of Laws of Kenya. That the parties herein have not exhibited the Land Control board consent obtained within six months from 25th September 2011, and if none was obtained, then the sale agreement is void and the Plaintiff’s probable recourse would be for refund of the purchase price paid.

g) That the sale agreement appear to have been witnessed by one Millicent Adhiambo Okumbe, who is said to be the mother to the Plaintiff.

h) That the main purpose for the Plaintiff to file the notice of motion was to get the Defendants stopped from interfering with the developments that he was carrying out on the portion of the plot that he had bought from the Defendants. That the reasons offered by the Defendants for their action to stop further development, being that the Plaintiff is yet to make full payments, and that his development has encroached onto the neighbouring portion, have not been disputed or rebutted by the Plaintiff. That the court finds that the reasons are sufficient to make the Defendants, who are still the registered proprietors of the land, to get concerned and it is only logical that the issues of trespass (encroachment), and legal ownership of the plot be settled before any further development are carried out by the Plaintiff.

i) That in view of the foregoing, the Plaintiff has failed to establish a prima facie case with a probability of success for injunction orders to be issued at this interlocutory stage. That whatever loss the Plaintiff may suffer is capable of being computed and compensated through an award damages. That the balance of convenience tilts to stopping the developments until the parties settles their differences or the suit is heard and determined.

6. That flowing from the foregoing, the court finds that the notice of motion dated 20th January 2014 has no merit and is dismissed with costs. The interim injunction orders issued on 21st January 2014 is hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 7TH DAY OF DECEMBER 2016

