



Nyaga Enterprises Limited v Opande & another (Sued as administrator of the Estate of the Late Peter Opande - Deceased) (Civil Suit 796 of 2009) [2023] KEHC 26192 (KLR) (Commercial and Tax) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 796 OF 2009
JWW MONG'ARE, J
NOVEMBER 23, 2023**

BETWEEN

NYAGA ENTERPRISES LIMITED PLAINTIFF

AND

TERESA KWAMBOKA OPANDE 1ST DEFENDANT

JOSHUA MIREGWA OPANDE 2ND DEFENDANT

**SUED AS ADMINISTRATOR OF THE ESTATE OF THE LATE PETER OPANDE
- DECEASED**

JUDGMENT

1. The Plaintiff herein Nyaga Enterprises Limited, a Limited Liability Company incorporated in Kenya, moved this Honourable Court by way of a Plaint dated 26th October 2009, and amended on 27th October 2010 seeking judgment against the Defendant for:-
 - a. an order for eviction and or vacant possession of the aforesaid suit property against the Defendant.
 - b. General damages for trespass.
 - c. A declaration to be entitled to retain the whole of the property known as L.R. No. 9230/6 (original No. 9230/3)
 - d. A permanent injunction restraining the Defendant by himself, servant and or agents from occupying, selling, disposing and/or alienating all that property known as L.R. 9230/6 (original number 9230/3).



- e. A declaration that the sale agreement signed on 12th July 2015 between the Plaintiff and the Defendant was illegal, null and void.
 - f. A declaration that the purported sale agreement was illegal, null and void because it was made contrary to the Law Society (1989) conditions for sale.
 - g. A declaration that the purported sale and possession by the Plaintiff to the Defendant was illegal, null and void to the extent it did not comply with the Law Society of Kenya (1989) conditions of sale.
 - h. An order directing the Defendant to unconditionally and with immediate effect vacate the portion occupied by the Defendant on the property known as L.R. Numbers 9230/6 (original numbers 9230/3).
 - i. Costs of the suit.
 - j. Any other relief or order that this court may deem fit.
2. The Plaintiff filed the suit seeking to declare the sale invalid and served the Defendant with summons to enter appearance thereto. The Defendant filed its defence on 18th November 2009 together with a counterclaim which was later amended on 29th November 2010. The Defendant, in his defence denied being in breach of a sale agreement and averred that any breach of the agreement, if any, was occasioned solely by the Plaintiff who failed to provide the completion documents. The Defendant sought for judgment against the Plaintiff in the counterclaim as follows:-
- a. A declaration that the Plaintiff's actions of knowingly obtaining purchase money from the Defendant and wilfully granting actual possession and occupation of the demarcated fifty (50) acres of the subject L.R. no. 9230/6 Original 9230/3 Kitale to the Defendant as bona fide purchaser for value created a constructive trust and/or property estoppel entitling the Defendant to registration of the said land, and which creation of a trust does not require the consent of the Land Control Board.
 - b. An order that the Plaintiff to avail and/or execute as the case may be within the next ninety (90) days all consents, certificates, approvals, clearances, deeds, documents and transfers necessary for the registration of a trust property being the subject fifty (50) acres in L.R. 9230/6 in the names of the Defendant failing which the Defendant be at liberty to execute/enforce compliance or the Deputy Registrar of the court do execute the instrument for and on behalf of the Plaintiff.
 - c. In the alternative and without prejudice to a and b above, the court be pleased to grant the following reliefs:
 - i. A declaration that the completion period for the agreement for sale dated 12th July 2005 was extended indefinitely by necessary implication and/or estoppel
 - ii. A declaration that the Plaintiff is in breach of the contract dated 12th July 2005 which is valid and binding
 - iii. An order that the period for obtaining the land control board consent for the subdivision and transfer of the suit property be renewed for 6 months
 - iv. An order of specific performance



- d. An order that any increase in stamp duty fees for transfer, caused by the appreciation of the worth of the suit property from the mutually agreed/contracted Kshs.6,000,000/= of the year 2005 to a current valuation to be assessed, be paid by the Plaintiff and be recoverable by the Defendant from the Balance of the purchase price in priority before releasing any surplus of the purchase price money to the Plaintiff.
 - e. An injunction to prevent the Plaintiff and its servants, agents, directors and shareholders from evicting the Defendant and or otherwise harassing, intimidating him and/or interfering with his quiet possession and enjoyment of the suit property of 50 acres
 - f. costs and interest in the suit
 - g. any other reliefs this court may deem fit.
3. At the close of the pleadings, the matter proceeded to a full hearing. Each side called one witness to give evidence on its behalf. The Plaintiff called Anthony Githumbi Gathuni, the Managing Director of the Plaintiff who also confirmed that he was also a shareholder of the Plaintiff Company and had full authority of the Plaintiff's Board to testify in this case on its behalf as PW1. During his testimony, he adopted his written witnesses statement and produced in evidence the Plaintiff's bundle of documents. He testified that Plaintiff was and still is the registered owner of all that parcel of land known as Land Reference No. 9230/6 measuring 238.1 hectares or thereabouts and the interest therein is leasehold for a term of 950 years from 1958. He confirmed the use of the property was agricultural and that the same was also the Plaintiffs farm commonly referred to as Sebel Farm.
 4. PW1 testified that the Company, under the stewardship of his late father Simon Gathiuni Danson (deceased) had sometimes in the year 2005, contracted with one Peter Opande (also deceased) for sale of a portion of the suit property measuring about to 50 acres. He denied however that the sale agreement was executed by his late father and disowned the agreement prepared by M/S Kiarie & Company Advocates and signed by the late Peter Opande and one Elisabeth Gathiuni, his sister, whom he alleged was not a director of the Plaintiff and had no authority to commit the Plaintiff as she was a stranger. He urged the court to find that by that reason the agreement was illegal, void and unenforceable in law for reasons that; consent to transfer the portion from the Land Control Board was never been obtained up to date, 15 years after the alleged agreement was entered. He further testified that although part of the purchase funds was paid, the full purchase price was not paid within the stipulated time and that the sale transaction was not sanctioned by the Plaintiff or its Board of Directors and that the same went against its Memorandum and Articles of Association.
 5. PW1 further testified that the payments made by the Defendant were made by Elizabeth Gathiuni who was a stranger and not a director of the Plaintiff company with authority to represent it and some payments were done way after the expiry date of the impugned agreement and in violation of the agreement which had since lapsed and hence non-existent by then.
 6. It was the testimony of PW1 testified that Elizabeth Gathiuni was not a director of the Plaintiff and had no authority to receive payments on behalf of the Plaintiff. He testified the occupation by the Defendant of the 50 acres of the suit premises amounted to trespass and despite demands made by the Plaintiff for the Defendant to vacate the premises issued on 12th March 2009 and 4th May 2012 the Defendants had refused to heed to the same and continued with of their illegal occupation of the same. He alleged that the Defendants were engaged in criminal activities to the great detriment of the Plaintiff in which the Defendant ordered the destruction of the wall and main gate and setting the Plaintiff's farm on fire, destroying the Plaintiff property and crops.



7. It was the testimony by the PW1 that the transaction having stalled, the Plaintiff have no further intention of selling the property. That there is no iota of evidence to prove the completion date was extended and that the property being sold relates to agricultural land which inhibits the importation of constructive trust and estoppel. Further, the Plaintiff testified that the non-payment of the purchase price amounted to the repudiation and cancellation of the contract and therefore no order of specific performance can be issued to the Defendant who failed to complete his obligation. PW1 further argued that the alleged payments of 23rd November 2005, 12th June 2006 and 30th November 2007 vide cheques for the sum of Kshs. 100, 000, 500, 000 and 200, 000 were issued to Elisabeth Wairimu Gathiuni and the alleged Kshs.100,000/- paid to the wife of the deceased managing director sometime in 2006 and that the said payments were made to strangers and not the Plaintiff and that at the time of the purported sale, the directors of the company were Simon Gathiuni Danson and Morris Ngare Wahome.
8. Teresia Kwamboka Opande, the wife to the late Peter Opande and the administrator of the estate of Peter Opande testified as the Defendant's witness. She relied on her witness's statement dated 2nd January 2020 which she adopted as her evidence in chief and produced the Defendant's bundle of documents which were marked as Defendant's exhibits numbers 1-19. In her testimony, she urged the court to dismiss the Plaintiff's suit and allow the Defendant's Counterclaim. She confirmed that they had bought the 50 acres from the Plaintiff at an agreed price of Kshs.6,000,000/- and that that a total sum of Kshs.4.2 million was paid towards the purchase price, thus leaving a balance of Kshs.1.8 million, which she has been ready and willing to pay upon being given the completion documents. She told the Court the Defendant took possession of the suit property on 1st July 2005 and has continuously being utilising the land as their own and that they were neighbours with the Plaintiffs.
9. During cross-examination she testified she could not remember if she was present during the signing of the agreement but the Late Opande signed the agreement. She averred that the signature on page 29 was her husband's second signature. She told the court Clause 3 of the agreement stipulated the deposit was to be paid to the advocate but was instead paid to the late Mr. Gathiuni, a director of the Plaintiff who needed to attend to a medical emergency outside the country. She states the agreement was signed by Elisabeth a daughter of Gathiuni and a director of the Plaintiff. She had no proof to show that Gathiuni and Elizabeth were directors of the Company. She confirmed that she had known the family of Mr. Gathiuni as they were friends and neighbours.
10. She told the court that in Gathuini's will their interest in the land was not mentioned as the will was prepared on 19th April 2015 before the sale. She told the court as per the company's return of 1993, Priscilla Gathiuni, the wife of the late Mr. Gathiuni and mother to Elizabeth and PW1, was a director of the company and thus the payments collected by Priscilla and witnessed by Anthony were collected on behalf of the Plaintiff. The payment was made through cheques.
11. She clarified that she farms in part of the disputed suit while the Gathiuni's family live on the land. She told the court that Elisabeth and Priscilla did not deny receiving money on behalf of the Plaintiff.
12. It was the Defendants evidence, that the agreement for sale was signed by Elisabeth Wairimu, Priscilla Ngima Gathiuni And Anthony Githumbi Gathuini as directors of the company, and under the supervision of their then advocate M/S Kiarie & Co. Advocates, who drew the agreement and that the Plaintiff failed to apply and obtain a copy of the Land Control Board in order to frustrate the sale but the Plaintiff has been and continues to be in actual possession of the property as he is a bona fide purchaser, despite failure to transfer the same for lack of the Land Control Board Consent. She urged the court to dismiss the Plaintiff's case and allow the counterclaim as filed by the Defendant.



Analysis And Determination.

13. I have carefully considered the pleadings, the evidence adduced and the rival submissions by counsels. To my mind the issues that emerge for determination are as follows:-
- a. whether there was a valid sale and if so, whether the sale agreement was properly executed.
 - b. Which party is in breach of the agreement date 12th July 2005.
 - c. Whether the failure to obtain the Land Control Board consent renders the sale agreement null and void.
 - d. Whether either party proved the respective claims and/or reliefs claimed?
 - e. Whether there was a valid sale and is so, whether the sale agreement was properly executed.
14. In the testimony put forward by the Plaintiff it argues that the contract was null and void as it was not properly executed by the parties as envisaged under Section 3(3) of the Contract Act. According to the Plaintiff, the parties who executed the agreement on behalf of the Plaintiff were strangers and were not directors of the Plaintiff while on the part of the Defendant, a Mr. Samson Opande signed on behalf of the purchase clear indication it was in contravention with Section 3(3) of the Law of Contract Act.
15. The provisions of Section 3 (3) of the Law of Contract Act provide: “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 parties thereto and
 - b. the signature of each party signing has been attested by a witness who was present when the contract was signed by such party:

provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act nor shall anything in it affect the creation of a resulting, implied or constructive trust.
16. I have perused the sale agreement entered on 12th July 2005 between the Plaintiff and the Defendant, it is evident it was executed by a director of the Plaintiff and Peter Opande in the presence of Advocate Edel Fuchaka who appeared for the Plaintiff. The sale agreement was properly witnessed and its is clear from the said agree agreement that is agreement that the Vendor intended to sell 50 acres to be exercised from L.R. No. 9230/6 (original No. 9230/3) and the intention was reduced into writing by the parties. The parties vowed to be bound by the clauses in the agreement and part of compliance was done by payment of the initial deposit of Kshs.3,000,000/= which was followed by the taking of possession.
- a. In Halsbury’s law of England 4th edition Vol 9 (1) paragraph 622 states:

“where the intention of the parties has in fact been reduced to writing under the so-called parole evidence rule, it is generally not permissible to adduce extrinsic evidence whether oral or written either to show the intention or to contradict, vary or add to the terms of the documents, including implied terms.’
17. Having perused the agreement produced in the bundle of documents herein, I am satisfied that the sale agreement was properly executed. This court finds the sale agreement is validly executed and witnessed



in accordance with the law. The court finds that there was no irregularity in having the agreement drafted by the purchaser's advocate as the same is a normal and is common practice that where counsels do agree to the terms of the agreement the same is binding on the parties. The court is satisfied that the agreement was properly witnessed in accordance with law upon execution by the parties.

Which party is in breach of the agreement dated 12th July 2005?

18. In the agreement subject matter of the suit herein. It was a term and condition of the agreement that the completion date was 30th March 2006. Clause 3(b)(ii) of the sale agreement provided "the balance of the purchase price (of Kshs.2,400,000/=) shall be paid by the Purchaser on or before the completion date only upon receipt of the following completion documents.-
 - a. the original certificate of title for the property
 - b. A duly executed transfer of the subdivision by the vendor to the purchaser
 - c. A duly executed consent of the land control board to transfer
 - d. the original and registered deed plan for the sub-division
 - e. the Land rent clearance certificate
 - f. A valid rates clearance certificate.
 - g. A duly completed stamp duty valuation forms
 - h. Any other certificates, clearance, consent or other documents necessary for registration of the transfer in favour of the purchaser.
19. The Defendant maintains that the Plaintiff breached the contract as it failed to avail the completion documents after it had been partly paid the purchase price. That the completion date and payment of the balance of the purchase price was conditional to the availing of the completion documents as listed in the agreement executed by the parties. Failure on the part of the Plaintiff to procure the Land Board Consent and to avail the rest of the completion documents amounted to a breach of its obligations in the agreement. The Defendant maintains that she has always been ready and willing to pay the remaining balance upon receipt of the said documents.
20. It is evident that to date the Plaintiff has not furnished the completion documents to the Defendant, it cannot be allowed to shift goalposts and blame the Defendant for its omissions or acts, whereas the remaining balance is Kshs.1,200,000/=
21. In light of the above, I find and hold that Plaintiff breached the agreement, it failed to obtain consent from the Land Control Board as well as furnish the Defendant with the completion documents, within the requisite 90 days of completion.

Whether the failure to obtain the land control board consent render the sale agreement null and void?

22. The Defendant faults the Plaintiff who was to obtain the Land Control Board consent as part of its obligations under the sale agreement. The Plaintiff was required to furnish the same to the Defendant as per clause 3 (b) (ii) of the agreement in order for the Defendant to complete the payment. The parties herein agree that the suit land is agricultural land. They also agree that Land Control Board consent was not obtained. Therefore Section 6 of the Land Control Board requires the parties to obtain consent. The section provides:
 1. Each of the following transactions that is to say—



- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
- c. the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

23. I do not agree with counsel for the Plaintiff that failure to obtain a Land Control Board Consent renders the transaction null and void. That was the position previously held in *David Sironga Ole Tukai v Francis Arap Muge & 2 others* Nairobi Civil Appeal No. 76 of 2014 this position was overturned by the Court of Appeal in the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR stated as follows:-

“A contract for the sale of land to which the *Land Control Act* applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)). The *Land Control Act* prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making of the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the *Land Control Act* for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.

The *Land Control Act* does not, unlike Section 3 (3) of the *Law of Contract Act* and Section 38 (2) of the *Land Act* save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the *Land Control Act* have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.

24. Flowing from the above, the court is not persuaded that the failure to obtain the Land Board Consent rendered the sale agreement null and void. The evidence adduced herein has established that the Plaintiff breached the agreement by failing to avail the completion documents as per the agreement. Among the documents was the Land Control Board Consent necessary for transfer of agricultural



land such as the suit premises. The Plaintiff now wishes to have the property and sell it to another bidder at the current market price, this court will not aid Plaintiff in defeating the agreement of sale. It is therefore pretentious of the Plaintiff to accuse the Defendant of the breach of the agreement and the failure to pay the balance of the purchase price when they orchestrated the breach in their failure to perform their part of the bargain.

25. Learned counsel for the Defendant urged the court to invoke the doctrine of constructive trust as the Plaintiff continued to accept part payment of the purchase price despite the effluxion of time. The Plaintiff on the other hand avers that the principles of equity and natural justice are not applicable in the instant case.
26. Given the recent court appeal decision this court is alive to the fact that the doctrines of constructive trust and proprietary estoppel apply to contracts which are void and enforceable for lack of consent of the Land Control Board.
27. In the circumstances this court finds that the Plaintiff offered the property for sale and accepted and retained the initial deposit of Kshs.3,000,000/= and a further Kshs.1.2 million over years, and allowed the Defendant the actual possession and use of the suit property since July 2005 when the initial payments was made. This, in my view, created a constructive trust for and on behalf of the Defendant and the Plaintiff is therefore estopped from running away from its contractual obligation.
28. In light of the foregoing I am persuaded that an order for specific performance would be merited in the instant case. The core of this transaction is that the Plaintiff fulfil its part of the contractual obligation, it has received part of the purchase price and it is only equitable and just if it effected the transfer to the Defendants who are already in possession of the suit property. The company acknowledged the agreement which was witnessed by its then advocates and part performance was done. It is clear that in the transaction, the Defendant dealt with the directors of the company and thus the rule in *Turquand* applies. In *Gikonyo J in Daniel Kairu & Anor vs Moyez Bhanji& Anor* (2016) eKLR cited with approval the *Mohoney vs East Holyford Mining Co.* (1875) L.R. 7 HL 69 where the court held:-

“when there are persons conducting affairs of a company in a manner which appears to be perfectly constant with the articles of the association then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the Company.”

29. The upshot, is that the Plaintiff's claim has not been proved to the required threshold and consequentially the Plaintiffs suit herein is dismissed and the Defendant's counterclaim succeeds in the following terms:-
 - a. A declaration that the Plaintiff is in breach of the sale agreement dated 12th July 2005.
 - b. An order of specific performance.
 - c. A declaration that the Plaintiff avail and/or execute within the next ninety (90) days all consents, certificates, approvals, clearances, deeds, documents and transfers necessary for the registration of a trust property being the subject fifty (50) acres in L.R. 9230/6 in the names of the Defendant failing which the Defendant be at liberty to execute/enforce compliance or the Deputy Registrar of the court do execute the instrument for and on behalf of the Plaintiff.
 - d. An injunction to prevent the Plaintiff and its servants, agents, directors and shareholders from evicting the Defendant and or otherwise harassing, intimidating him and/or interfering with his quiet possession and enjoyment of the suit property of 50 acres.



e. costs and interest in the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Mirie for the Plaintiff.

Ms. Nguu holding brief for Mr. Maweu for the Plaintiff.

