



**Milgo v Sang & another (Environment and Land Appeal E2 of 2020)
[2023] KEELC 18048 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18048 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E2 OF 2020
FM NJOROGE, J
JUNE 19, 2023**

BETWEEN

SIMON MILGO APPELLANT

AND

JOSEPH KIPCHUMBA SANG 1ST RESPONDENT

CAROLINE SANG 2ND RESPONDENT

((Being an Appeal Against the Judgment and Decree of Hon. E. Nderitu, C.M. Delivered On 6/10/2020 in CMCC ELC No. 74 of 2018))

JUDGMENT

1. This is a judgement in respect of an appeal brought by way of a Memorandum of Appeal dated 19/10/2020 against the judgement and decree of Hon. E. Nderitu, C.M. delivered on 6/10/2020 in CMCC ELC No. 74 of 2018. The appellant sought that the appeal be allowed and the judgement in favour of the respondents be set aside together with the order for costs.
2. The background of the appeal was that on 2/02/2017 the appellant filed ELC 27 of 2017 in Nakuru Environment and Land Court that was later transferred to Molo Law Courts on 9/11/2018 and given CMCC ELC No. 74 of 2018. He sought for the following orders in his plaint:
 - a. A declaration that the Plaintiff is the owner and is entitled to exclusive and unimpeded right of possession and occupation of all that land parcel known as NAKURU/TINET/SOTIK SETTLEMENT SCHEME/469;
 - b. An order that the defendants be evicted from the plaintiff's land parcel No. NAKURU/TINET/SOTIK SETTLEMENT SCHEME/ 469;



- c. A permanent injunction restraining the defendants by themselves, their agents, hooligans, goons, hoodlums, servants, hirelings, employees and proxies from further trespassing unto, entering, encroaching, damaging, destroying, alienating or in any way dealing with the suit properties;
 - d. General damages for trespass; and
 - e. The Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
3. The respondents filed their statement of defence and counterclaim dated 6/04/2017 where they denied the appellant's claim and sought the following orders:
- a. A declaration that the defendants now the plaintiffs are the rightful owners of parcel number NAKURU/ TINET /SOTIK SETTLEMENT SCHEME/469 measuring 2.00 hectares.
 - b. A permanent injunction restraining the plaintiff now the defendant and or his agents, servants and or employees from interfering with the defendants' now the plaintiffs' quiet possession and occupation of land parcel number NAKURU/ TINET /SOTIK SETTLEMENT SCHEME/469 measuring 2.00 hectares.
 - c. An order directing the plaintiff now the defendant to sign the necessary transfer forms in respect of parcel number NAKURU/ TINET /SOTIK SETTLEMENT SCHEME/469 measuring 2.00 hectares in favour of the defendants now the plaintiffs.
 - d. Costs of this suit.
 - e. Any other relief deem fit to grant.
4. The suit was heard on 23/04/2019, 20/08/2019 and judgment was delivered on 6/10/2020 where the court dismissed the plaintiff's claim and allowed the defendants counterclaim in the following terms:
- a. A declaration that the defendants are the rightful owners of Nakuru/Tinet/Sotik Settlement Scheme/469.
 - b. A permanent injunction restraining the plaintiff and his agents, servants and/or employees from interfering with the defendants' quiet possession and occupation of land parcel Nakuru/ Tinet/Sotik Settlement Scheme/469.
 - c. An order directing the plaintiff to sign the necessary transfer forms in favour of the defendant to effect transfer into the defendant's name within the next 30 days.
 - d. The defendant shall have the cost of the suit plus interest on costs at court's rates from the date of assessment till payment in full.
5. Being dissatisfied with the said judgement, the appellant appealed to this court and set forth the following grounds of appeal:
- a. The Learned Magistrate erred in law and fact by finding that the Respondents were the legal and rightful owners of the subject property.
 - b. The Learned Magistrate erred in Law and fact by assuming that there was an oral Sale Agreement when no evidence demonstrated existence.
 - c. The Learned Magistrate erred in law and fact by misdirecting herself and going beyond the pleadings of the parties and giving extraneous orders.



- d. The Learned Magistrate erred in law and fact by finding that the Respondents legally bought the land when there was no consent from the Land Control Board.
 - e. The Learned Magistrate erred in law and fact by disregarding clear provisions of the law on Consents and Requirement of written agreements in sale of land.
 - f. The Learned Magistrate erred in law and fact by finding that the Appellant created an implied or constructive trust in favour of the Respondents who had paid the purchase price.
 - g. The Learned Magistrate erred in Law and fact in finding that the Appellant was paid the purchase price in full when no evidence was adduced.
 - h. The learned Magistrate erred in law and fact in relying on contradictory evidence to find that the entire purchase price was paid.
 - i. he Learned Magistrate erred in law and fact by finding that the Appellant had failed to proof his case on a balance of probability.
 - j. The Learned Magistrate erred in law and in fact by failing to take into account and to accord due weight the evidence adduced by the Appellant.
 - k. The Learned Magistrate failed to appreciate the submissions of the Learned Counsel for the Appellant by finding in favour of the Respondents herein.
 - l. The Learned Magistrate erred in law and fact by misdirecting herself and going beyond the pleadings of the parties and giving extraneous orders.
 - m. In all the circumstances of the case, the findings of the learned Magistrate are insupportable in Law or on the basis of the evidence adduced.
6. The appellant prayed that the appeal be allowed and the judgment in favour of the respondents and the order on costs be set aside and that he be awarded costs of the appeal and those in the proceedings before the Chief Magistrate's Court. The appeal was admitted for hearing on 1/3/2023 and the court gave directions that it be canvassed by way of written submissions.

Submissions

7. The appellant filed his submissions dated 30/03/2023 on 19/04/2023 while the respondents filed their submissions dated 14/04/2023 on 18/04/2023.
8. Submitted for the appellant: the issues arising for determination are: (a) Whether there was an oral sale agreement and consent from land Control board; (b) Whether the appellant created an implied or constructive trust in favour of the respondents who paid the purchase price; (c) Whether the respondents are the legal and rightful owners of the subject property.
9. On issue (a): that though Section 3(3) of the [Law of Contract Act](#) all land sale agreements for have to be in writing the respondents were seeking to enforce an oral agreement; relying on Section 44 of the [Land Registration Act](#), the cases of Daudi Ledama Morintat v Mary Christine Karie & 2 Others [2017] eKLR, Kukul Properties Development Limited vs Tafazzal H. Maloo & 3 Others [1993], Silverbird Kenya Limited vs Junction Limited and 3 Others [2013] eKLR, that since there was no sale agreement between the appellant and the respondents, the sale of the suit property to the respondents was null and void; relying on Sections 6 and 8 of the [Land Control Act](#), the cases of Wamukota v Donati [1987] KLR, Leonard Njonjo Kariuki v Njoroge Kariuki alias Benson Njonjo CA No. 26 of 1979, Simiyu v Watambamala [1985], that there being no consent of the Land Control Board, the alleged



sale and transfer was in transgression of the law; that the sale agreement was void. Regarding issue (b): Relying on sections 107, 108 and 109 of the *Evidence Act*, the cases of David Ole Tukai vs Francis Arap Muge & 2 others [2014] eKLR, Willy Kimutai Kitilit v Michael Kibet [2018] eKLR, that the doctrine of constructive trust was only applicable to contracts that had met the threshold of being valid and enforceable; that in the present matter, there was no contract between the appellant and the respondents; that therefore the learned trial magistrate made a wrong finding by concluding that the unlawful actions of the respondents in his parcel of land constituted a constructive trust in their favor. On issue (c): relying on Section 24(a) and 25(1) of the *Land Registration Act*, that the rights of a registered owner are indefeasible.

10. Submitted for the respondents: the issues arising for determination are: (a) Whether the trial magistrate erred in law and in fact in finding that the defendants had purchased the suit property; (b) Whether the trial magistrate erred in finding that there was an oral agreement between the parties herein; (c) Whether the trial magistrate erred in law and in fact in awarding the respondents counterclaim and dismissing the appellant's case; (c) Who should be awarded costs of appeal. On issue (a) that the appellant sold to them the suit property for valuable consideration paid to the appellant being money, a cow and a calf; they took possession of the of suit property and cultivated and put up a house which evidence was corroborated by their witness and affirmed by the trial magistrate in the judgement. Regarding issue (b), relying on the case of Willy Kimutai Kitilit vs Michael Kibet [2018], that they had been in occupation of the suit property since the year 1997 till 2006 before the appellant began to claim the suit property and therefore the appellant was a constructive trustee of the respondents. On issue (c), that the learned trial magistrate did not err in dismissing the appellant's case and allowing their statement of defence and counterclaim.

Analysis and determination

11. After considering the memorandum of appeal and the submissions, the following issues arise for determination:
 - a. Whether the trial court erred in finding that the respondents were the rightful owners of the suit property;
 - b. Who should bear the costs of the appeal.
12. The appellant's case before the trial court was that he was allocated land parcel No. Nakuru/Tinet Settlement Scheme/469 in the year 1997 and was later issued with a title deed in the year 2006. It was also his case that he had allowed the respondents to occupy the suit property for some time from the year 2000 but when he asked them to vacate, they refused and so he sought for a declaration that he was the owner of the suit property and for the respondents to be evicted.
13. The respondents case before the trial court was that though they did not dispute the initial allocation of the land to the appellant, they subsequently purchased the suit property from the appellant between the years 1997 to 1998 when title had not yet issued. It was also their case that they paid Kshs. 175,000/= cash together with a cow and a calf for three shares of the suit property. The respondents stated that their agreement with the appellant was oral and that soon after they paid the purchase price they took possession. It was the respondents' case that they had agreed that during the issuance of title deeds by the government, they would be given title for the suit property; however, when they followed up, they realized that the appellant had already acquired the title deed to the suit property. Soon thereafter, the appellant begun to demand that the respondents vacate the suit property and that the matter even went to the Lands Dispute Tribunal.



14. In the present appeal, the appellant argued that before the trial court, the respondents relied on an oral agreement for sale which was not enforceable. The appellant also argued that no consent of the land control board had been obtained and therefore the doctrine of constructive trust was not applicable. The respondents on the other hand argued that the trial court did not err in dismissing the appellant's case and allowing their counterclaim. The trial court in its judgement held as follows:

“It is the holding of this court that the action of the plaintiff in entering into a sale agreement with the defendant albeit oral, receiving the purchase price, putting the defendant into possession and allowing him to develop created an implied or constructive trust in favour of the defendants and noting in Section 3(3) of the law of Contract or Section 6(1) of the Land Control Board Act can affect the creation of a resulting, implied or constructive trust.”

15. This court has to first determine if there was an oral sale agreement for sale of land between the appellant and the respondents as the appellant denies its existence. The appellant urges that since there was no written agreement in this case the learned trial magistrate made an error of law and fact by making an assumption that there existed an agreement between the parties. It is further argued that the trial magistrate erred by invoking equitable doctrines to override the provisions of the Land Control Act. As pointed out before, the appellant's evidence before the trial court was that he had allowed the respondents to occupy his property and when he asked them to move out, they refused. The respondents on the other hand testified that they had entered into an oral sale agreement with the appellant for the sale of the suit property. The appellant's admission means only one thing: that from inception of the respondents' entry of the suit land in the year 2000, he was conscious, aware of their presence on the suit land and no force or deception or secrecy was employed by the respondents to attain possession. The evidence of Joseph Kipchumba Arap Sang, the 1st respondent was that he bought the then untitled suit property from the appellant for Kshs. 180,000/= on the understanding that when the government issued title deeds, the title deed would be in his name. This evidence was corroborated by the evidence of Catherine Cherotich Koech the 2nd respondent who was his wife who also concurred that the appellant had been allocated the suit property by the government; she stated that the appellant sold the suit property so that he could move to Marioshoni. The 2nd respondent testified that the agreement for sale was oral and that they paid Kshs. 175,000/= together with a cow and a calf. It was her evidence that they took possession in the year 1997 on the understanding that when title deed would be issued, it would be in the respondents' names. In her evidence she stated that they were informed by their friend, Samuel Kipchumba, that the appellant was selling the property. The said Samuel also corroborated the respondents' evidence that he informed the respondents that the appellant was selling the suit property. He also confirmed that the respondents paid Kshs. 175,000/= as the purchase price and that he was the one who delivered the cow and calf to the appellant. He further confirmed that the respondents have been in occupation of the suit property since the year 1998. Samuel knew the two opposing parties to this case even before the dispute arose. He gave evidence that shows that he knows the affairs of the appellant and the respondents very well. Besides, this court notes that the tribunal that tried the matter was comprised of local elders. They found on a site visit on 15/11/2006 that the respondents herein had put up three houses and a store, dug a water well, cleared the plot, planted maize and vegetables, planted cypress and wattle trees and kept livestock. It would appear that the houses were not temporary for the panel in its findings stated as follows:

“That the objector permitted the claimants to practice farming in parcel no 469 and putting up (sic) some permanent houses in the plot without him stopping them is an indication that he has admitted the sale.”



16. As per the holding Patrick Njuguna Kimondo v Geoffrey Vamba Mbuti [2019] eKLR that the court re-evaluates and re-considers the evidence adduced before the trial court and make its own findings on appeal, I have done so in this case as is evident herein above and the prospects hardly seem inspiring for the appellant's appeal. Having regard to the totality of the evidence before the trial court, it is clear that the trial magistrate did not arrive at a mere assumption but a firm conclusion based on the facts before her. From the evidence taken in the suit before the trial court, this court is persuaded that existed an oral agreement for sale of the suit land to the respondents and they had taken up possession of the suit land and extensively developed it.
17. The court in the case of Douglas Maina Kangangi v Jackson Njagi Gichaki [2017] eKLR held as follows on enforcement of oral agreements:
- “The parties entered into an oral agreement for the purchase of the suit land in 1984. That was before the commencement of Section 3 (3) of the Law of Contract Act which came into effect on 1st June 2003. Before that date, the law allowed enforcement of an oral agreement for the sale of land so long as the purchaser had taken possession of the property or any party thereof or, being in possession, continues to be in possession and does so other act in furtherance of the contract. There is also evidence that the relevant consent was sought and obtained as required by law (Plaintiff's Exhibits 4 and 5). The plaintiff has been in occupation of the suit land since 1984 and has developed it as evidenced by the photographs of his home (Plaintiff's Exhibit 9). The plaintiff is thereof entitled to the orders of specific performance of his oral agreement entered into in 1984 with respect to the suit land.”
18. A distinguishing point in the Douglas Maina Kangangi case (supra) is that consent had been obtained. In a case where consent had not been obtained, the Court of Appeal in Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR held as follows:
- “It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots. In Mwangi & another –vs – Mwangi (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126 (1) of the Registered Land Act is merely permissive and not mandatory. In Mutsonga – vs- Nyati (1984) KLR 425 and Kanyi – vs- Muthiora (1984) KLR 712, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity.
- In Yaxley – vs- Gotts & Another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel.” (emphasis mine)
19. Conflating the holding in the case of Macharia Mwangi Maina & 87 Others (supra) with the argument in the Willy Kimutai Kitilit case (supra) to the effect that “...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”, it is evident that the magistrate did not err in invoking equitable doctrines into the matter as urged by the appellant’s counsel.

20. The case of the purchaser in *Daudi Ledama Morintat v Mary Christine Karie & 2 Others* [2017] eKLR is distinguishable in that he sought an order for a mandatory injunction requiring the defendant to deliver up quiet occupation of the property, meaning he had not, unlike in the present case, been put into possession. In *Kukul Properties Development Limited vs Tafazzal H. Maloo & 3 Others* [1993], by the transactions evidenced in writing the appellant wished to sell 2 maisonettes to the purchasers at a price of Kshs. 600,000/- each on the terms and conditions contained in the said sale documents subject to the respondents obtaining a loan from any financial institution within 40 days before the completion date. The respondent accepted the offer and paid the 10% deposit for each maisonette. However, the financial arrangements were not successful in time as stipulated in the sale documents whereupon the appellant rescinded and cancelled the intended agreements. Being aggrieved by the cancellations of the agreements, the respondents jointly brought action for specific performance of the agreements on the ground that the appellant was in breach of the said agreements. After a protracted trial the learned trial judge found for the respondents and ordered specific performance of the agreements by the appellant with costs of suit but the decision was reversed by the Court of Appeal. Actual possession and full payment of consideration by the purchasers did not therefore feature and the facts of the case distinguish it from the present case. *Silverbird Kenya Limited vs Junction Limited and 3 Others* [2013] eKLR is also distinguishable in that the plaintiff’s claim was based on a letter which the Defendants objected to on the basis of Section 3 of the [Law of Contract Act](#) and contended did not constitute a lease and further did not transfer any interest to the plaintiff from the existing tenant, arguing further that the same could not pass any interest in land as the mandatory provisions of the [Law of Contract Act](#) require that a contract for the disposition of land should be in writing, signed by all the parties and attested and therefore could not lawfully create an enforceable lease and/or tenancy relationship. Neither the issue of possession nor payment in full of consideration arose in that case.
21. The upshot of the foregoing is that this court is therefore in agreement with the finding of the learned trial magistrate that the appellant had created a constructive trust in favour of the respondents by putting them in occupation of the suit property even though it was on the basis of an oral land sale agreement. Consequently, it is this court’s view that the appellant’s appeal lacks merit and it is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Nakuru via electronic mail on this 19th day of June 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.

