



Wanjau (Suing as the Legal Representative of the Estate of Joseph Mathenge Kamutu) v Karanja & another (Environment & Land Case 501env of 2017) [2023] KEELC 18010 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18010 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 501ENV OF 2017**

YM ANGIMA, J

JUNE 15, 2023

BETWEEN

JOSEPH MURIITHI WANJAU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH MATHENGE KAMUTU) PLAINTIFF

AND

JOSEPH WAINAINA KARANJA 1ST DEFENDANT

NANCY WANJIRA WAINAINA 2ND DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated 15.05.2014 the Plaintiff sued the Defendants seeking the following reliefs:
 - a. An order for specific performance of the agreement dated 16th August, 2008, directing the Defendants to complete the transaction as agreed therein.
 - b. In the alternative and without prejudice to prayer (a) above an order directing the Defendants to pay to the Plaintiff the full value of the suit property at the current market value.
 - c. Costs of the suit and interest on the same.
2. The original Plaintiff Joseph Mathenge Kamutu (the deceased) pleaded that vide a sale agreement dated 16.08.2008 the Defendants agreed to sell him Title Nos. Nyandarua/Mbuya/55 & 56 (the suit properties) at an agreed consideration of Kshs 550,000/=. He pleaded that it was agreed in the said agreement that he would pay a deposit of Kshs 400,000/= upon execution of the agreement whereas the balance of Kshs 150,000/= was to be paid upon the Defendants obtaining the consent of the Land Control Board (LCB).



3. The deceased further pleaded that upon payment of the deposit of Kshs 400,000/= he was put into possession of the suit properties which he occupied and developed over the years. It was further pleaded that the Defendants had failed to apply for the consent of the LCB to facilitate transfer of the suit properties despite payment of an additional deposit of Kshs 65,000/= on 16.10.2010.
4. It was pleaded that the Defendants were in breach of the terms of the sale agreement dated 16.08.2008 hence they should be compelled by an order of specific performance to complete the transaction. In the alternative, the deceased sought compensation to the extent of the current market value of the suit properties in lieu to specific performance. It was pleaded that the Plaintiff was ready and willing to perform his part of the agreement.

B. The Defendants' Defence and Counterclaim

5. The Defendants filed a joint statement of defence and counterclaim dated 26.05.2014 in response to the suit. By their defence, they admitted the existence of the sale agreement dated 16.08.2008 but denied liability for the Plaintiff's claim. They admitted receipt of the deposit of Kshs 465,000/= but pleaded that the sale transaction was null and void for lack of consent of the relevant LCB under the provisions of Section 6 of the Land Control Act (Cap.302). It was contended that the deceased had failed to execute the application form for such consent within 6 months from the date of the agreement or at all.
6. The Defendants further pleaded that the deceased was in breach of the terms of the sale agreement by failing to pay the balance of the purchase price and that he had deliberately refused to sign the application form for consent of the LCB because he was unable to raise the balance of the purchase price. The Defendants further pleaded that they were ready and willing to refund the deposit of Kshs 465,000/= paid on account of the sale agreement upon being granted vacant possession of the suit properties.
7. By their counterclaim, the Defendants reiterated the contents of their defence and pleaded that the sale agreement became null and void by operation of law and that the deceased's continued occupation of the suit properties constituted trespass. The Defendants consequently sought the following reliefs against the Plaintiff in the counterclaim:
 - a. The Plaintiff's suit be dismissed with costs.
 - b. A declaration that the agreement dated 16.08.2008 is void for all purposes and is unenforceable for non-compliance with the Land Control Act and the Defendants be allowed to deposit in court the amount paid under the agreement.
 - c. The Plaintiff's continued possession of Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu/56 is trespass and hence unlawful and consequential order for eviction be granted.
 - d. Costs of the counter-claim and interest at court rates.

C. The Plaintiff's Response

8. The deceased filed a reply to defence and defence to counterclaim dated 13.06.2014. He joined issue upon the Defendants' defence and reiterated the contents of the plaint. It was denied that the deceased had failed to sign the application form for consent of the LCB. The deceased stated that at all material times he was ready and willing to perform his part of the agreement including payment of the balance of the purchase price.



9. The deceased further pleaded that at the material time of executing the sale agreement the suit properties were still charged to the Settlement Fund Trustees (SFT) hence the consent of the LCB was not required by virtue of the provisions of Section 6(3)(b) of the *Land Control Act* (Cap. 302).
10. In his defence to counter-claim, the deceased reiterated the contents of his earlier pleading and denied that he was in breach of the sale agreement. He also denied that he had refused to sign the application form for consent of the LCB and denied that the transaction had become null and void by operation of law. Consequently, he prayed for dismissal of the counterclaim with costs.

D. Summary of Evidence at the Trial

a. The Plaintiff's Evidence

11. At the trial hereof, the substituted Plaintiff testified as the legal representative of the deceased as the sole witness. He adopted the contents of his witness statement dated 22.03.2022 as his evidence in-chief and produced the documents in the Plaintiff's list and supplementary list as exhibits P1 – P9. The gist of his evidence was that there was a valid sale agreement dated 16.08.2008 between the Defendants and the deceased for the sale of the suit properties and that the Defendants had defaulted thereon by failing to obtain the consent of the LCB as per the terms of the agreement.
12. It was his evidence that the court had granted an extension of time within which to apply for consent of the LCB and that such consent had been duly obtained during the pendency of the suit. It was the Plaintiff's evidence that he was ready and willing to pay the balance of the purchase price and transfer fee at the opportune moment.

b. The Defendants' Evidence

13. The 1st Defendant, Joseph Wainaina Karanja, testified on his own behalf and on behalf of the 2nd Defendant. He similarly adopted the contents of the witness statement dated 26.05.2014 as his evidence in-chief and produced the documents in his list of documents and supplementary list as exhibits D1 – D13. The gist of his evidence was that although the Defendants sold the suit properties in 2008 and handed over possession, it was the deceased who had failed to sign the application form for consent of the LCB thus frustrating completion of the sale. It was the Defendants' position that the sale agreement was null and void for want of consent of the LCB hence they should be allowed to recover the suit properties and refund the deposit of the purchase price.

E. Directions on Submissions

14. Upon conclusion of the trial the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on 20.04.2023 whereas the Defendants' submissions were filed on 26.04.2023.

F. Issues for Determination

15. The court has noted from the record that the parties did not file an agreed statement of issues for determination. However, the separate issues filed by the parties were very similar to each other. Under Order 15 rule 2 of the *Civil Procedure Rules, 2010* the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings.
 - b. The allegations contained in sworn statements by or on behalf of the parties.
 - c. The contents of documents produced by the parties.



16. The court has considered the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following issues arise for determination herein:
- a. Whether the sale agreement dated 16.08.2003 is valid and enforceable or null and void hence unenforceable.
 - b. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - c. Whether the Defendants are entitled to the reliefs sought in the counter-claim.
 - d. Who shall bear costs of the suit and the counterclaim.

G. Analysis and Determination

a. Whether the sale agreement dated 16.08.2008 is valid and enforceable or null and void hence unenforceable

17. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that the sale agreement was still valid and enforceable, the Defendants submitted that the same was null and void hence unenforceable for lack of the requisite consent of the LCB under the *Land Control Act* (Cap. 302). The Defendants also contended that the deceased was in default by failing to pay the balance of the purchase price.
18. It was the Defendants' contention in both their defence and counterclaim and their evidence that it was the deceased who had frustrated completion of the sale by refusing to sign the application for consent of the LCB despite several requests to do so. When questioned during cross-examination whether he had copies of the filled application forms which the deceased allegedly refused to sign, the 1st Defendant stated that he had misplaced or lost the forms. When further asked to produce a copy of any letter he had sent to the deceased asking him to sign the application forms he stated that he had none.
19. The court has noted that in his demand letter dated 08.04.2014 to the deceased the Defendants' advocates did not allege that he had failed to execute his part of the application form for LCB consent. The only allegation contained in the said letter was that the deceased was in breach of the sale agreement by failing to pay costs for the transfer. If it were true that the deceased had failed to sign the relevant application form that issue ought to have featured in the demand letter as one of the particulars of breach rather than solely the alleged failure to pay transfer 'costs'. It is a matter of judicial notice that it would be superfluous to pay transfer fee in the absence of the consent of the LCB. Accordingly, any demand for transfer fee before consent of the LCB is obtained would be premature.
20. Although the application form for consent is usually signed by both the vendor and the purchaser, the sale agreement obligated the Defendants as vendors to initiate the process and to lodge the application. Clause 5 of the agreement stipulated that:
- “The vendor shall immediately apply to the Ndaragwa Divisional Land Control Board for the consent to transfer the land parcel to the purchaser.”
21. It was thus the responsibility of the Defendants to obtain and fill the application forms for LCB consent and have them signed by the deceased before lodging them with the Ndaragwa Land Control Board. The Defendants did not produce any such forms at the trial and they did not produce copies of any letters requesting the deceased to sign his part to facilitate the lodging of the applications for



consent. In their letter dated 23.04.2014 the Defendants did not contend that it was the deceased who had failed to sign the relevant application forms. They simply stated that:

“Furthermore, the parties never applied for or obtained the requisite consent from the local land control board as provided for under Section 6 of the *Land Control Act* Chapter 302 of the Laws of Kenya. Consequently, the contract made on 16.08.2008 became void by operation of the law as provided under the said Act.”

22. The above notwithstanding, there is evidence on record to demonstrate that the Plaintiff eventually applied for extension of time to apply for consent of the LCB out of time. The record shows that the said application was granted despite opposition by the Defendants. There is no indication on record to demonstrate that the Defendants ever challenged the said decision by way of review or appeal. There is also no indication that they challenged the grant of the actual consent by the LCB. It is thus evident that although no consent had been granted for the sale transaction at the time of filing suit, the consent was available by the time of trial of the action. The court is of the opinion that a consent granted by the LCB after extension of time is just as valid and effective as the consent granted in the first instance within 6 months of the making of a sale agreement.
23. In the premises, the court is of the opinion that although the Defendants had defaulted in applying for the consent of the LCB in terms of clause 5 of the sale agreement and although the agreement may have been unenforceable at the commencement of the proceedings, all that changed the moment the Plaintiff applied for extension of time and successfully obtained the consent of the LCB. The court is thus of the opinion that the sale agreement dated 16.08.2008 is still valid and legally enforceable in a court of law.
24. Even if the court had found that there was no valid consent of the LCB, it would still have been inclined to imply a constructive trust in the circumstances of this case on the basis of the Court of Appeal authorities in the cases of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR and *George C. Aliaza v Zephaniah Khisa Saul* (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June, 2022) (Judgment). In the latter case, the Court of Appeal readily implied a constructive trust and found in favour of a purchaser in similar circumstances even though the doctrine of constructive trust had not been specifically pleaded by him.
25. In the latter case, Kiage JA in a concurring judgment stated as follows:
 46. It is time, I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times.
 47. It seems ill that the respondent, having freely sold his land to the appellant, and having received full payment therefor, and put the appellant in possession where the latter proceeded to carry out developments, should now argue before a court of law and, emboldened by a statutory provision, confidently assert a right to resile from his contractual obligations on the spurious reason that no consent to the transaction was given by the Land Control Board. Under that statute, it is required that both the vendor and the purchaser must sign the relevant application for consent. The appellant made no effort to obtain that consent. He basically tries to benefit from his own default to defeat



the appellant's rights and escape from his contractual obligations. And that is how a once well-intentioned provision of law as set out by my sister Judge, now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And courts which are just and honourable, should put the matter right by requiring him to meet his just obligations and denying him the benefits of default and deceit.

48. Thus, whether on the basis of constructive trust or to avoid unjust enrichment as an equitable estoppel, the respondent's attempt to hide under the *Land Control Act* in the circumstances of this case must be named for what they are and rebuffed. And the appellant should succeed."

b. Whether the Plaintiff is entitled to the reliefs sought in the plaint

26. The Plaintiff sought an order for specific performance of the agreement dated 16.08.2008 and an alternative prayer for compensation to the extent of the current market value of the suit properties. The Plaintiff can only get one prayer but not both of them.
27. The principles to be considered in either granting or refusing an order for specific performance were considered in the case of *Reliable Electrical Engineers (K) Ltd v Mantrack Kenya Limited* [2006] eKLR as follows:

"Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.

28. The court has already found and held that the sale agreement of 16.08.2008 is valid and enforceable. The court has found that the consent of the LCB was duly obtained after the Plaintiff obtained an extension of time. The evidence on record shows that none of the parties ever rescinded the agreement and none of them ever gave a notice of rescission on account of breach.
29. The court does not agree with the Defendants' contention that the deceased was in breach of the agreement by either failing to sign the application forms for LCB or by failing to pay the transfer fee for reasons already given earlier in the judgment. The court does not agree with the Defendants' contention that the deceased was in default by failing to pay the balance of the purchase price.
30. The terms of the sale agreement and in particular clause 4 thereof stipulated that the balance of Kshs 150,000/= shall become payable upon the consent of the LCB being granted. As indicated before, the Defendants are the ones who defaulted in applying for the consent. In spite of their default, the deceased still went ahead and paid them an additional Kshs 65,000/= in 2010 thereby leaving an outstanding balance of Kshs 85,000/= only. So, there was actually an overpayment by the deceased



as at 16.10.2010. The Plaintiff testified at the trial that he was still ready, able and willing to pay the balance of Kshs 85,000/=.

31. In the circumstances, the court is satisfied that the Plaintiff has satisfied the requirements for the grant of an order of specific performance of the sale agreement dated 16.08.2008. The Plaintiff is still able and willing to fulfil his part of the agreement by making payment of the balance of the purchase price and the transfer fee. In the result, the court finds and holds that the Plaintiff is entitled to prayer (a) of the plaint. It would, therefore, follow that the Plaintiff is not entitled to the alternative prayer (b) of the plaint and as such it does not warrant any consideration.

c. Whether the Defendants are entitled to the reliefs sought in the counter-claim

32. It is evident from the pleadings and material on record that the Defendants' counterclaim was hinged upon their contention that the sale agreement dated 16.08.2008 was null, void and unenforceable for want of consent of the LCB. That is why they sought recovery of the suit properties and to be allowed to refund the deposit of the purchase price paid.
33. The court has already found and held against the Defendants on the validity and enforceability of the said sale agreement. The court has held that the agreement is not null and void or unenforceable either for lack of consent of the LCB or for breach on the part of the deceased. The Defendants cannot, therefore, be allowed to resile from the agreement and recover the suit properties. It would, therefore, follow that the Defendants are not entitled to the reliefs sought in the counter-claim or any one of them.

d. Who shall bear costs of the suit and the counterclaim

34. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court has found that the Plaintiff has proved his claim to the required standard whereas the Defendants have failed to prove their counter-claim. The court finds no good reason why the successful Plaintiff should not be awarded costs of the suit as well as costs of the counter-claim. In the premises, the Plaintiff shall be awarded costs of both the suit and the counterclaim against the 1st and 2nd Defendants jointly and severally.

H. Conclusion and Disposal Orders

35. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his claim against the Defendants on a balance of probabilities as required by law whereas the Defendants have failed to prove their counterclaim against the Plaintiff to the required standard. Consequently, the court makes the following orders for disposal of the suit and counterclaim:
- a. Judgment be and is hereby entered for the Plaintiff against the Defendants in the following terms:
 - i. An order is hereby made for specific performance of the sale agreement dated 16.08.2008.
 - ii. The 1st and 2nd Defendants shall sign all necessary forms, documents and instruments to facilitate transfer of Title Nos. Nyandarua/Mbuyu/55 & 56 to the Plaintiff, Johnson Muriithi Wanjau as the legal representative of Joseph Mathenge Kamutu (deceased) within 14 days from the date hereon.



- iii. In the event of the Defendants' default in compliance with Order (ii) hereof, the Deputy Registrar of the court shall sign all the necessary documents on their behalf.
 - iv. The Land Registrar – Nyandarua County shall dispense with production of the original title deeds, copies of the Defendants' Identity Cards, PIN certificates, Passport size photographs, and any other documents within the possession, custody or control of the Defendants while transferring the suit properties to the Plaintiff.
- b. The Defendants' counterclaim be and is hereby dismissed in its entirety.
 - c. The Plaintiff is hereby awarded costs of the suit and the counter-claim to be borne by the 1st and 2nd Defendants jointly and severally.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 15TH DAY OF JUNE, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Nderitu Komu for the Plaintiff

Ms. Mwangi for the Defendant

