



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 128 OF 2020

JACOB KIBET CHEPKWONY.....1ST APPELLANT

CHRISTOPHER KIPROTICH CHEPKWONY.....2ND APPELLANT

VERSUS

JOHN WACIRA CHIRI.....RESPONDENT

(Appeal from the Judgement and Decree of Hon J.B. Kalo delivered at Nakuru on 29th April 2020 in Nakuru CMCC NO.1165 OF 2011)

JUDGMENT

BACKGROUND

1. This appeal arises from a suit filed by the plaintiff against the defendants seeking orders of permanent injunction to restrain the defendant from selling and disposing of alienating, transferring to 3rd parties, or interfering with the plaintiff's peaceful possession and use of L.R. No. MITI MINGI/MBARUK BLOCK 3/1552 (Barut).
2. The plaintiffs pleaded that they are the owners of the parcel of land measuring 1.87 Hectares registered in the name of defendant having acquired the same through sale vide an agreement dated 18th January 2010.
3. The appellants pleaded that, pursuant to the said agreement they paid the agreed purchase price of Kshs. 500,000/= and took possession of the parcel of land and the defendants committed themselves to facilitate the transfer of the title deed at a cost of Kshs. 34,000/= and plaintiffs paid a total of Kshs. 30,000/=.
4. The plaintiffs argued that the defendant failed to deliver the new title within a period of one week as was agreed and as a consequent resulted to being evasive and on 3rd March 2010 requested for the balance of Kshs 4,000 from the plaintiff and has failed to transfer the land to them.
5. The defendant denied the plaintiffs' claim and pleaded that suit is bad in law, ambiguous, and fails to disclose the proper particulars of the claim. The defendant argued that plaintiffs failed to attend the land control board to obtain the land control board consent within the requisite 6 months' period, despite there being a court order in Nakuru H.C. MISC Case No. 12 of 2012 on extension of time and stated that they were also in breach of the terms of the sale agreement.
6. The defendant stated that he was ready to refund the purchase price paid by the plaintiffs and upon the refund, the plaintiffs to vacate the suit premises within a period of thirty (30) days.
7. After hearing and submissions being filed by counsels for the parties, the trial magistrate dismissed the plaintiffs/appellants claim on ground that the transaction between the appellants/plaintiffs and the respondent/ defendant was null and void. The appellants being aggrieved the trial magistrate's decision filed this on the following grounds and filed this appeal raising 7 grounds of appeal namely that the learned magistrate erred in law and in fact:

(1) That the learned magistrate erred in law and in fact in failing to appreciate and take into consideration the evidence adduced by the appellants and made a wrong decision in dismissing the plaintiffs' case.

(2) That the learned magistrate erred in law and in fact by failing to grant the plaintiffs an order for permanent injunction having

lawfully purchased the suit property and paid the full amount of the purchase price.

(3) That the learned magistrate erred in law and in fact by failing to grant the Plaintiffs an order for specific performance being an equitable remedy prescribed under the Kenyan land laws for breach of the contractual agreement.

(4) That the learned magistrate erred in law and in fact by failing to consider that the defendant blatantly delayed and evaded the execution of the sale agreement thereby being in blatant breach of the contractual agreement.

(5) That the learned magistrate erred in law and in fact In dismissing the Plaintiffs suit on grounds that the transaction between the plaintiffs and the defendant was null and void due to the absence of the consent of the land control board.

(6) That the learned magistrate erred in law and in fact by failing to consider that the defendant himself blatantly and maliciously delayed the process of obtaining consent from the land control board by refusing to execute the required documents.

(7) That the learned magistrate erred in law and in fact by exercising his discretion unfairly.

8. The appeal proceeded by way of written submissions.

APPELLANTS' SUBMISSIONS

9. The appellants submitted that lack of the land control board consent does not preclude the court from giving effect to equitable principles. Reliance was placed in the case of **Willy Kimutai Kitilit v Michael Kibet (2018) eKLR** where the court stated: -

“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 a constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purposes of the two statutes are 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 were 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.”

10. The appellants further submitted that by virtue of **Article 10(2) (b) of the constitution**, equity as a principle of justice to a constitutional principle is elevated and **Article 159(2)** requires the courts in exercising judicial authority to protect and promote that principle and submitted that the trial court erred in failing to consider equitable remedies that would promote justice and protect the rights of the appellants.

11. The appellant cited the case of **Joseph Kuyo Legei v Kuntai Ole Ntusero [2019] eKLR** where the court held as follows: -

“...insofar as the Defendant failed to procure the necessary Consent from the Land Control Board within the required period of six (6) months, to enable him to transfer the 10 acres into the Plaintiff's names... even though he failed to transfer the land to the Plaintiff's name and proceeded to subdivide the 10 acres of land into 5 acres each, I hold that the transaction he entered into with the Plaintiff in 2006 is not void but enforceable by virtue of the doctrine of constructive trust which is a Constitutional principle. It is against the foregoing that I find that Plaintiff is indeed entitled to be transferred to the 10 acres of land which he purchased from Defendant...”

12. The appellants further submitted that the court failed to appreciate the efforts made by the appellants to obtain the consent of the land control board and the respondent intentionally refused to execute the consent forms and delayed the transfer process. The trial court also failed to apply equitable remedies to protect the appellants from mistakes and wrongdoing of the respondent.

13. On whether a constructive trust was created in favor of the appellants, the appellants submitted that the rights of the appellants who are in possession cannot be easily defeated by the rights of the registered proprietor who put them in possession as bona fide purchasers for value.

14. While it is not in dispute that the transaction did not have the consent of the Land Control Board as required in law, evidence show that the appellants entered into a valid written agreement for the sale of property belonging to the respondent for a consideration which was paid in full and the appellants took possession of the property with full consent and knowledge of the respondent. The facts also show that the respondent intentionally delayed the transfer process and refused to execute the Land Control Board Consent forms.

15. **Section 25 of the Land Registration Act** provides that the rights of a proprietor of land whether acquired on first registration or subsequently for valuable consideration or by an order of the court shall not be liable to be defeated except as provided in the Act and further, **Section 25(2)** provides that the provisions of the Section does not relieve a proprietor from any duty or obligation to which the proprietor is subject to as a trustee.

16. **Section 28 of the Land Registration Act** provide that all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law.

17. The intention of the parties at the time of making the sale agreement was to transfer property to the appellants at a consideration paid to the respondent. This created a contractual relationship that bound the parties as soon as it was executed. The respondent, therefore, created a constructive trust in favor of the appellants when he received the purchase price and when he voluntarily allowed the appellants to take possession of the property.

RESPONDENT'S SUBMISSIONS

18. The respondent submitted that the appellants' evidence on record is not sufficient to sustain setting aside of the judgment and further submitted that the suit revolved around **Section 8 of the Land Control Act**, where the appellants sought to extend the time within which to obtain the consent and after the extension of the time, the appellants further failed to obtain consent.

19. The respondent submitted that the principles of natural justice and equity are not applicable in the current circumstances as the appellants have no valid reason for failing or neglecting to apply for consent after the High Court invoked its discretion to grant an extension of time.

20. The respondent further submitted that specific performance is an equitable remedy and anyone who seeks the same must come with clean hands and submitted that the appellants are not deserving of the favor of equity; that they are to blame for their own misfortune by failing to fulfill their obligation to present the completion documents for registration for an outrageously long period after time was extended by the High Court. On position of the courts with regards to the voidability of controlled transaction the appellant cited the case of **Willy Kimutai Kitilit Vs Michael Kibet [2018] eKLR** where the court 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 the application to the time of the determination of the may obviously take time. However, the appeal, if any, 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”.

21. The respondent submitted that the trial magistrate rightfully considered the facts and evidence placed before him in finding that the appellants had abused the court process by failing to obtain the land control board consent.

ANALYSIS AND DETERMINATION

22. This being the first appellate court, I am obligated to reevaluate evidence adduced before the trial court and make an independent determination. This I do with the knowledge that unlike the trial court, I never got the benefit of taking evidence first hand and observe demeanor of witnesses. For this I will give due allowances. The principles governing the first appellate court were stated in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

23. In view of the above, I have perused proceedings before the trial court, pleadings and submissions and considered submissions by parties in this appeal. There is no dispute that the parties entered into the sale agreement dated 18th January 2010, pursuant to which the defendant sold the property to the plaintiffs. Does the property fall within agricultural land? The requirement of consent in respect to a transaction relating to agricultural land is emphasized in **Section 6 of the Land Control Act** which provides as follows: -

“6. Transactions affecting agricultural land

(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.”

24. The Court of Appeal stated recently in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** as follows:

“(1) 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 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”.

[23] 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 that 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 the Land Control Board will largely depend on the circumstances of each particular case”.

25. Having established that the property in dispute falls under agricultural land the land control board consent is a vital document in the above transaction. **Section 8 Land Control Board provides:**

“8. (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”

26. The appellants filed an application before the High Court to extend the time within which to obtain the land board consent and extension was granted but appellant’s action to obtain the consent were thwarted by the respondents who declined to sign the prescribed forms and the appellants were forced to go to the High Court declined the second time to extend the time to obtain the consent to transfer.

27. It is clear from the pleadings that the appellants were desirous in completing the transaction having paid the full purchase price of Kshs. 500,000/= as well as the transfer fees of Kshs. 34,000/= as ordered by the respondent; however, the respondent was not desirous in transferring the property; instead he chose to take the appellants in circle as he was well aware that the failure to obtain the consent would render the transaction void and null. The appellants was forced to seek the intervention of the court to address the frustrations by the respondent.

28. I do associate with the learned judge in the cited case of **Joseph Kuyo Legei v Kuntai Ole Ntusero [2019] eKLR** and find that a constructive trust was created after the appellants and the respondent executed the agreement for the sale of the property and hold that the transaction is not void but enforceable by the virtue of the doctrine of the constructive trust.

29. The trial magistrate failed to take note of the fact that the defendant contributed in delaying the process of obtaining the land board consent to transfer to the plaintiff/appellants. From the foregoing I see merit in this appeal.

30. FINAL ORDERS

- 1) Appeal is allowed.**
- 2) Time within which to obtain the land board consent be extended by 6 months from the date of this judgment.**
- 3) The respondent to execute all the necessary documents to effect the transfer of the property to the appellant.**
- 4) The cost of the appeal be borne by the respondent.**

JUDGMENT dated, signed and delivered via zoom at Nakuru this 29th day of July, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

Mr. Kirui for Appellants

No appearance for Respondent