



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

ELC CASE NO. 72B OF 2019

PHILIP KIPROTICH TUITOEK.....PLAINTIFF

VERSUS

EDNA JEBIWOTT KIPLAGAT.....1ST DEFENDANT

THE LAND REGISTRAR, UASIN GISHU COUNTY.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

By a plaint dated 23rd May 2019 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) An order for extension of the period within which the consent to transfer the parcel of land known as SERGOIT/KELJI BLOCK 1 (NGOCHOI)/22 in favour of the plaintiff be extended.
- b) An order compelling the defendant to attend the necessary Land Control Board to facilitate transfer of the suit land.

The defendants were served with summons to enter appearance but neither filed a memorandum of appearance nor a defence within the stipulated period. Judgment was therefore entered and a date for formal proof fixed.

During the hearing of formal proof, Counsel for the plaintiff agreed with the State Counsel that the names of the 2nd and 3rd defendants be struck out of the pleadings as there was no cause of action against them. The court struck out the names of the 2nd and 3rd defendants and the case proceeded against the 1st defendant.

PLAINTIFF'S CASE

The plaintiff gave evidence and stated that he entered into a sale agreement dated 7th March 2017 with the 1st defendant for the purchase of 100 acres at a consideration of Kshs. 40,000,000/-. (Forty Million) which amount was paid in full.

It was the plaintiff's evidence that on 21st May 2018 the defendant signed the application for consent and transfer forms and took immediate possession of the suit land and started farming of which he has been in occupation to date. The plaintiff further stated that after payment of the full purchase price to the defendant, he was given a duly signed transfer form, application for consent form and a title deed which he produced as exhibits before the court. It was his evidence that the title deed was still in the name of the person who sold the land to the defendant and that he facilitated the transfer of the title to the defendant's name which he produced receipts to show the same.

The plaintiff testified that he paid Kshs. 400,000/ to R M Wafula & Co Advocates for processing of the title deed and Kshs. 300,000/ to Valley Maps Surveyors for the survey of the suit land and a further Kshs 700,000/ for processing of title deed in the defendants name. It was the plaintiff's evidence that the defendant stopped communicating with him after she had received the full purchase price.

The plaintiff therefore urged the court to extend time within which to apply for land Control Board consent as per Section 8 of the Land Control Act plus costs of the suit.

Analysis and Determination

The plaintiff served the defendant with summons to enter appearance but she never bothered to file any response to the claim. The plaintiff's claim is therefore uncontroverted. The plaintiff stated that he entered into a sale agreement with the defendant for sale of 100 acres at a

consideration of Ksh. 40 Million which was paid in full. The issue for determination is whether the plaintiff is entitled to the orders sought for extension of time to apply for Land Control Board consent.

The plaintiff produced the sale agreement, an acknowledgement, payment receipts for survey fees, title deed processing fee, title deed in the name of the previous owner, title deed in the name of the defendant, official search, duly signed application form for Land Control Board Consent and duly signed transfer of land form.

This is proof that the plaintiff entered into a legally binding agreement with the defendant. It is also proof that the plaintiff fulfilled his part of the bargain by payment of the full purchase price as per the agreement. It is further proof that the defendant did not fulfil her part of the bargain. It is not clear why there was a breakdown in communication after signing all the documents and receiving the full purchase price. We will not go into the commitments that made the defendant not obtain the requisite Land Control Board consent within the stipulated period as she was not in court to tell us her reasons.

It is not in dispute that the suit land is agricultural land and as such is subject to the Land Control Board Act. The purpose of the Land Control Act is to control transactions in respect of agricultural land. Section 6 of the Land Control Act therefore provides that;

(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.

(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 the period of six months may have expired, extend that period where it considers that there is sufficient reason to do so, if any, as it may deem fit.”

Section 8 (1) of the Land Control Act gives the court powers to extend time within which to apply for a consent of the Land Control Board out of the stipulated 6 months period if the applicant gives sufficient reasons for such extension.

The Act provides that transactions involving agricultural land must comply with the provisions of Section 6 of the Land Control Act failure of which the transaction is null and void. This makes the plaintiff's transaction for all practical purposes null and void but the plaintiff has a saving grace in the provisions of Section 8 of the Land Control Act. This further makes the plaintiff's claim a claim for specific performance which is an equitable remedy. This is a remedy that is discretionary in nature.

The remedy of specific performance is based on the existence of a valid, enforceable contract and any litigant seeking the remedy must meet the requirements to qualify for specific performance; existence of a valid contract, conduct of the parties must commend itself to equity – come to equity with clean hands, remedy should not cause hardship and damages must be insufficient or cannot be established. I have stated above that the plaintiff entered into a valid sale agreement with the defendant who did not fulfil her part of the bargain. The plaintiff dutifully fulfilled the terms of the agreement

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

This decision reflects the current position of the courts with regards to the voidability of controlled transactions.

In **Caroline Cherono Kirui v Liner Cherono Towett [2018] eKLR** the court held;

As observed earlier, the plaintiff has sought an order that time within which to apply for the consent of the Land Control Board by the parties herein be extended. As such, the process of seeking the consent as well as consideration of the application for consent is still underway. In the circumstances, I find and hold that the transaction between the plaintiff and the defendant as embodied in the sale agreement dated 20th March 2012, is not voided for want of consent of the land control board. This should be obvious since otherwise it would be pointless to give the court power to enlarge time notwithstanding that the period of six months may have expired.

I have considered the pleadings, the exhibits produced and the relevant judicial authorities and find that this is a case where the court can use the provisions of section 8 of the Land Control Act to extend time within which to apply for Land Control Board Consent. The plaintiff has therefore proved his case on a balance of probabilities and enter judgment as prayed in the plaint together with costs of the suit.

DATED and DELIVERED at ELDORET this 17TH DAY OF DECEMBER, 2019.

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Omusundi holding brief for Mr.Mogire for Plaintiff and in the absence of the Defendant.

Ms. Sarah – Court Assistant