



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC APPEAL NO. 14 OF 2019

RUTH NDUME MWANGANGI.....APPELLANT

VERSUS

JOSEPH MBITHI NTHENGE.....1ST RESPONDENT

WAMBUA NTHENGE.....2ND RESPONDENT

(An Appeal against the Judgment of Senior Principal Magistrate, Hon. D. Orimba

in Kangundo PMC ELC No. 136 of 2018 delivered on 3rd April 2019)

JUDGEMENT

Introduction:

By a Memorandum of Appeal dated the 24th April, 2019, the Appellant appeals against the whole of the Judgement delivered by Hon. D. Orimba, Senior Principal Magistrate at Kangundo Senior Principal Magistrates Court on the 3rd April, 2019. The genesis of this appeal is the Judgement of the Senior Principal Magistrate Hon. D. M in Kangundo PMC ELC No. 136 of 2018, where the trial court proceeded to enter judgement in favour of the Plaintiffs (Respondents) against the Defendant (Appellant) by dismissing the Counterclaim and directing her to be evicted from a portion suit lands, and only to retain one (1) acre.

The Appellant being dissatisfied by the whole Judgement filed an appeal at the Machakos Environment and Land Court on 24th April, 2019.

The Memorandum of Appeal contained the following grounds:

1. That the Honourable Learned Magistrate erred in law and fact in dismissing her counterclaim.
2. That the Honourable Learned Magistrate erred in law in applying the Section 8 of the Land Control Act in an oppressive manner contrary to the recent Court of Appeal decisions.
3. That the Honourable Learned Magistrate erred in law and fact in failing to uphold the terms of the Sale Agreements (which documents are not contested) concerning the suit property.
4. That the Honourable Learned Magistrate erred in law and fact in shifting the burden of proof entirely to the Appellant notwithstanding that the court was moved by the Respondent.
5. That the Honourable Learned Magistrate erred in law in failing to pay regard to the Appellant's written submissions.

It is proposed to ask the court for orders that:

1. That the appeal be allowed.
2. That this Honourable Court be pleased to allow the Appellant's Counterclaim.
3. That the Respondent does pay the costs of this appeal and the costs in the lower court.

4. That such further relief as may appear just to the Honourable Court.

The appeal was canvassed by way of written submissions.

Submissions:

Appellant's Submissions:

The Appellant in her submissions contends that her husband purchased two acres of land from the deceased. She made reference to the two agreements dated 21st April, 1993 and 8th March, 1994 and sought to rely on the same. She further submitted that effect of failure to procure consent of the Land Control board could not negate the transaction herein as together with her family, they have been in occupation of the suit lands for over three (3) decades. Further, her deceased husband was buried on the suit lands which they have extensively developed and there was a family meeting where the vendor's family agreed to transfer two (2) acres of the disputed land to her. She further relied on Hon. Justice Kemei's decision in **Estate of Jackson Nthenge Mbithi (deceased) [2018] eKLR** which was made in respect to the deceased vendor's estate and touching on dispute over the suit lands. She reiterated that the superior court is vested with power to extend time to apply for consent of the Land Control Board. To buttress her averments, she relied on the following decisions: **re Estate of Jackson Nthenge Mbithi (deceased) [2018] eKLR; Jerusha Wangari Mwangi V Beatrice Muthoni Karanja & 2 Others [2018] eKLR; Willy Kimutai Kitilit V Michael Kibet [2018] eKLR; William Kiptarbei Korir & 6 Others V Danson Muniu Njeru (2018) eKLR and Charles Kangaiya V Alfred Musavi & Another [2020] eKLR.**

The Respondents in their submissions contend that a party who fails to comply with sections 6 and 8 of the Land Control Act cannot run to court to remedy the failure. Further, that the claim by the Appellant is untenable for failure to comply with mandatory provisions of the law. They submitted that they had pleaded and proved their case in the lower court while the Appellant's testimony was weak. Further, that the Counterclaim was weak. To support their arguments, they relied on the following decisions: **Abok James Odera t/a A. J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR as cited with approval in the case of Dorcas Wangithi Nderi V Samuel Kiburu Mwaura & Another (2015) eKLR; Moses Kamande Nyambura V Francis Munyua Ngugi (2018) eKLR adopting the reasoning of Chesoni J (as he then was) in Hirani Ngaithe Githire V Wanjiku Munge (1979) KLR 50; Anne Wambui Ndiritu V Joseph Kiprono Ropkoi & Another (2005) 1 EA 334.**

Analysis and Determination:

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Whether the Appellant is entitled to the two (2) acres of land from MAVOKO TOWN BLOCK 12/4906 & MAVOKO TOWN BLOCK 12/4907 owned by the estate of JACKSON NTHENGE MBITHI (deceased).
- Whether the Appeal is merited.
- Who should bear the costs of the Appeal.

I will deal with the three issues jointly but before I do so, I wish to provide a background of the Appeal herein. The Respondents had sued the Appellant in the Lower Court where they sought to evict her from the aforementioned suit lands

and insisted the Appellant's deceased husband only purchased one (1) acre of land from their late father and not the two acres claimed. The Appellant who is the widow of the late Shadrack John Mwangangi Mutua claims her late husband purchased two acres from the aforementioned suit lands in 1993 upto 1994 respectively. The Respondents sought for the following orders:

- **An order of declaration that the agreement made on 21st April, 1993 between Jackson Nthenge Mbithi (Deceased) and the Defendant over the sale and purchase of 1 acre out of parcel of land currently registered as land title Nos. MAVOKO TOWN BLOCK 12/4906 & MAVOKO TOWN BLOCK 12/4907 is null and void.**
- **An order of eviction against the Defendant and her agents from parcel of land currently registered as title numbers MAVOKO TOWN BLOCK 12/4906 & MAVOKO TOWN BLOCK 12/4907.**
- **An order directing the Machakos County Land Registrar to remove the caution placed on 23rd May, 2012 against Land Title Nos. MAVOKO TOWN BLOCK 12/4906 & MAVOKO TOWN BLOCK 12/4907.**
- **Costs of the suit.**

The Appellant filed a Defence and Counterclaim where she sought for the following orders:

- **A declaration that the late Jackson Nthenge Mbithi (deceased vendor) sold 2 acres out of the property formerly known as Mavoko Block 12/250 (currently MAVOKO TOWN BLOCK 12/4906 & MAVOKO TOWN BLOCK 12/4907) to the late Shadrack John Mwangangi Mutua on the strength of the Sale Agreements dated 21st April, 1993 and 8th March, 1994.**
- **A declaration that the failure to procure the Land Control Board consent at the instance of the late Jackson Nthenge Mbithi and the same is curable/ can be dispensed with. Alternatively, the administrators of the late Jackson Nthenge Mbithi be compelled to secure the said consent and comply with the prerequisite steps to regularize the sale of the property to the late Shadrack John Mwangangi Mutua.**
- **A declaration that any other transactions defeating the interest of the estate of the late Shadrack John Mwangangi**

- **Mutua are illegal, null and void.**
- **A prohibitive injunction restraining the Plaintiffs from interfering with the late Shadrack John Mwangangi Mutua's 2 acres interest in the suit property.**
- **A mandatory injunction compelling the Plaintiffs as administrators of the estate of the late Jackson Nthenge Mbithi to transfer 2 acres of the suit property (that is the entire 1 acre of Mavoko Town Block 12/4907) and an additional 1 acre to be excised from Mavoko Town Block 12/4906 to the estate of the late Shadrack John Mwangangi Mutua.**

It is not in dispute that the Respondents are the legal representatives of the owner of land parcel numbers MAVOKO TOWN BLOCK 12/4906 & MAVOKO TOWN BLOCK 12/4907. It is further not in dispute that the Appellant is in occupation of a portion of the said suit lands and her deceased husband was buried thereon. The Appellant in the lower court produced two Sale Agreements dated 21st April, 1993 and 8th March, 1994 respectively to confirm her deceased husband bought two acres of land from the Respondents' late father. The Appellant claimed they took possession of the two acres of the land immediately after purchase and constructed a permanent home thereon.

The Respondents in their evidence in the lower court denied that their father sold two acres of land to the Appellant's late husband and insisted it was only one acre. In the testimony of one witness JOSEPH MBITHI NTHENGE, he confirmed that the Appellant entered the suit lands when his father was alive and there is a building on it. Further, that the High Court had directed them to give the Appellant land. He further confirmed that in the Agreement dated 21st April, 1993, it talks of additional one acre. The Appellant in her evidence in the lower court confirmed that she had resided on the suit lands for the last 25 years, the deceased vendor was paid the full purchase price for the two acres but the land had no title. DW2 DICKSON KIMANI KATUVA also confirmed during cross examination that he was the drafter of the 1993 Agreement wherein the Seller was paid Kshs. 20,000 for 2 acres. I have perused the Sale Agreements which were produced in the Lower Court as exhibit and I note on 8th March, 1994, it actually indicates the deceased vendor added the deceased purchaser another one acre. Further, I note the vendor continued to receive monies from the purchaser upto 3rd September, 1996. At this point I wish to make reference to the proceedings in the High Court in **re Estate of Jackson Nthenge Mbithi (deceased) [2018] eKLR** which was a decision made in respect to the deceased vendor's estate in relation to dispute over the suit lands. I wish to reproduce an excerpt therefrom: ***I have carefully considered the protest herein and the submissions tendered thereto together with authorities cited. I have also done so bearing in mind that the underlying factor here is the issue of ownership of the subject property which is not within my jurisdiction to determine. It is noteworthy that the protestor's allegation that the 1st Respondent was present at the family meeting annexure 'R4' admitted that the deceased sold the land to the Protestor's husband has not been rebutted. In view of the failure I reiterate Hon. Judge Mabeya's finding in and find that the protestor's allegations are prima facie. In view of the disposition, I am inclined to order that the said properties be removed from the schedule of the deceased until the issue of ownership is determined by the proper court. In the alternative the Administrators are hereby directed to assign 2 acres to the protestors husband's estate i.e 1 acre from MAVOKO TOWN BLOCK 12/4906 and the other be excised from MAVOKO TOWN BLOCK 12/4907.***

From the proceedings and findings in the High Court, I note the Respondents admitted therein that their father sold two (2) acres of land to the Appellant but in the Lower Court they denied and insisted it was only one acre. The trial Magistrate after considering the evidence entered judgement in favour of the Respondents and dismissed the counterclaim. I have reproduced an excerpt from the said judgement herebelow:

- **'That the Defendant retains only one acre and vacates the rest and hand over vacant possession to the Plaintiff.**
- **That the Machakos County Land Registrar remove the caution placed against land title number Mavoko Town Block 12/4906.**
- **That the Machakos County Land Registrar remove the caution placed against land title number Mavoko Town Block 12/4907.**
- **That the Plaintiff to facilitate the transfer to the Defendant one acre on which she currently stays.**
- **Each party to bear its own costs.'**

From the judgement, it is evident that the trial Magistrate indeed found that the Appellant had been on the suit lands since it was purchased by her deceased husband. He however proceeded to discredit the second Sale Agreement and only accepted one. He further proceeded to hold that the Appellant was entitled to one (1) acre but the Sale Agreements were null and void due to the Appellant's husband's failure to procure consent of the Land Control Board within six (6) months after the said Sale Agreements, in accordance to section 6 of the Land Control Act.

In the Court of Appeal decision of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, it held that:

'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.....Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.'

Further in the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** the Court of Appeal observed

that: ‘a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention’

While in the case of *William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR*, the Court of Appeal held as follows: ‘Taking into account the *Macharia Mwangi Maina decision* and the *Willy Kimutai Kitilit decision* alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created. We agree with the English decision *Yaxley v Gotts & Another, (2000) Ch 162*, where 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. This was also the approach taken in *Macharia Mwangi Maina decision* where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege. We come to the conclusion that the in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the Land Control Act. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent. In the circumstances, we find that the first appellate court, made the correct decision, and we have no justification to interfere with that decision. ‘

Based on my analysis above while relying on the three Court of Appeal decisions, I find that since the Respondents’ father had received the purchase price from the Appellant’s late husband, allowed them to take possession of the two acres after which they constructed thereon. Further, since even the deceased purchaser was buried on the suit lands and the Respondents having not denied the Appellant and her family have been on the suit lands for more than twenty five (25) years, it is my view that insofar as there was no consent of the Land Control Board, an element of trust was created when the Appellant and her deceased husband took occupation of the portion they purchased. Further, the said trust became an overriding interest over the suit lands and the deceased vendor was now merely holding the said portion in trust for the Appellant and her family. Insofar as the Appellant’s late husband failed to obtain the necessary Consent from the Land Control Board within the required period of six (6) months, to enable them acquire the title of the two acres in his name; I find that the transaction is not void but enforceable by virtue of the doctrine of constructive trust and the Appellant is entitled to have the said two (2) acres registered in the deceased’s purchaser’s name. In the circumstances, I find that the Learned Magistrate erred in law and fact in dismissing the Appellant’s counterclaim as well as in applying the Section 8 of the Land Control Act in an oppressive manner. I further find that the Learned Magistrate erred in law and fact in failing to uphold the terms of the Sale Agreements in respect to the suit lands (which documents were not contested). I also find that the Learned Magistrate erred in law and fact in shifting the burden of proof entirely to the Appellant notwithstanding that the court was moved by the Respondents who were expected to prove their case. I suffice to say that the Learned Magistrate by disregarding the set precedents from the Court of Appeal on constructive trust which is an equitable remedy erred in law and in fact in failing to uphold the Appellant’s occupation of the suit lands.

It is against the foregoing that I find the Appeal merited and will allow it. I proceed to set aside the Judgment of the Lower Court and make the following final orders:

- i. That Judgement and Decree by Senior Principal Magistrate, Hon. D. Orimba in Kangundo PMC ELC No. 136 of 2018 delivered on 3rd April, 2019 be and is hereby set aside.
- ii. A declaration be and is hereby issued that the Appellant has proved her case on a balance of probability as per the counter claim which was filed in Kangundo PMC ELC No. 136 of 2018.
- iii. The Respondents be and are hereby directed to obtain consent of the Land Control Board and effect transfer of the two (2) acres of land out of land parcel numbers MAVOKO TOWN BLOCK 12/4906 & MAVOKO TOWN BLOCK 12/4907 respectively, where the Appellant occupies, within the next 90 days from the date hereof, failure of which the Deputy Registrar, Environment and Land Court will execute the said Transfer Forms.
- iv. A permanent injunction be and is hereby issued restraining the Respondents from interfering with the late Shadrack John Mwangangi Mutua’s interest in 2 acres from land parcel numbers MAVOKO TOWN BLOCK 12/4906 & MAVOKO TOWN BLOCK 12/4907 respectively.
- v. The cost of the appeal is awarded to the appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 14TH DAY OF FEBRUARY, 2022

CHRISTINE OCHIENG

JUDGE