



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO. 43 OF 2018

DORIS KAIGONGI NCHEBERE.....PLAINTIFF

VS

JANE MBUYA MURERWA.....DEFENDANT

JUDGMENT

1. Vide her amended plaint dated 4/3/2020, the Plaintiff prays for judgment *inter alia* against the Defendant THAT;

i. A declaration that all that property known as Plot No. 4 ii (9) situated at Murera area within Kiambu County solely belongs to the Plaintiff being the sole actual owner of the suit property.

ii. An order for eviction from the suit property evicting the Defendant or anybody claiming any interest of whatever nature through the Defendant from all that piece of land known as Plot No. 4 ii (9) situated at Murera area within Kiambu County.

iii. An order that the Officer Commanding (OCS) Matangini Police Post or any other officers under him not below the ranks of Assistant Inspector do supervise and provide security during the eviction of the Defendant from all that piece of property known as Plot No. 4 ii (9) situated at Murera area within Kiambu County.

iv. An order or permanent injunction restraining the Defendant by herself, agents, servants, and/or any other persons claiming through her from interfering, cultivating, construction and/or in any other way dealing with all that piece of property known as Plot No. 4 ii (9) situated at Murera area within Kiambu County.

v. General damages.

vi. Costs of the suit.

2. The Plaintiff's case in summary is that she is the registered owner of the plot known as Plot No. 4 ii (9) situated at Murera area within Kiambu County (**hereinafter referred to as the suit property**) having purchased the same from M/S MAKIBUI HELP INVESTMENTS on 15/2/2001. That she was issued with a share certificate No. 706 as proof of ownership and took immediate possession. That sometime in 2006, her sister in-law, the Defendant approached the Plaintiff seeking temporary shelter following matrimonial differences with her husband. The said husband is the Plaintiff's brother.

3. That out of trust, sympathy and mercy, the Plaintiff acceded to the Defendant's request and allowed her to settle on the suit property on condition that she would vacate it upon request. That the Defendant continued to enjoy free occupation of the suit land for over three years and in 2017, the Plaintiff requested her to vacate to no avail. The Plaintiff further accused the Defendant of constructing other structures on the suit land without her express permission hence the suit.

4. The Plaintiff's case is denied. The Defendant filed her **amended statement of defence and counter claim** dated 22/5/2021. She stated that she purchased the suit property from the Plaintiff in June 2005 for Kshs. 100,000/=. That she obtained vacant possession of the suit property and constructed a permanent building thereon and connected water and electricity. The Defendant acknowledged that the Plaintiff helped her secure employment at Kenyatta University so that she can pay the balance of the purchase price. That upon paying the purchase price, the Plaintiff gave her a copy of the share certificate contrary to the Defendant's demand to be issued with a title document.

5. In her counter claim, the Defendant pleaded constructive trust and proprietary estoppel to the suit land in her favour in view of the parties' dealings. She urged the Court to compel the Plaintiff to transfer the suit land to her and enter Judgment in her favour *inter alia* that; a declaration that the Defendant is the legal and rightful owner of the suit land, an order compelling the Plaintiff to transfer the suit land to the

Defendant and a permanent injunction restraining the Plaintiff by herself, employees or agents from interfering with the Defendant's peaceful occupation of the suit land.

6. The matter proceeded for viva voce hearing on 3/11/2021.

7. The Plaintiff called 3 witnesses. The Plaintiff, **Doris Kaigongi Nchebere** testified as PW1 and adopted her witness statement dated 14/1/2021. That she purchased the suit land in 2001 from Makibui Help Investments having worked at KU until 2014. She was issued with a share certificate no. 706 which she produced the original as **Pexh. 1**. It is worth noting that Pexh.1 on the face of it is issued by **Wakibui Help Group Investments** and not **Makibui Help Investments**.

8. That upon learning of the marital strife between her brother and the Defendant culminating to their separation, the Defendant visited her in Lang'ata, Nairobi seeking temporary shelter. Upon interventions from the Plaintiff's mother who was present when the Defendant visited the Plaintiff, the Plaintiff orally agreed to host the Defendant as well as her children on the suit land. That at that time the Plaintiff was finalizing construction of her current house in Mugutha area and thus offered the Defendant building materials to enable her build a temporary shelter.

9. That upon settling down, one of the Defendant's sons, Patrick Kimathi approached PW1 and told her some strangers were claiming ownership over the suit land. It is at that point that PW1 decided to give the Defendant a copy of the share certificate to affirm ownership of the suit land as against the said strangers. According to PW1, she did not have immediate use of the suit land and thus had no problem accommodating the Defendant thereon. That when the Defendant sought more time to get her own home and cited economic constraints, the Plaintiff assisted the Defendant to secure a job at Kenyatta University as a casual laborer. That PW1 was however shocked in 2015 when she visited the suit land and realized that the Defendant had put up permanent structures without her authority. When she raised her reservations, one of the Defendant's son became abusive and attempts to have the Defendant vacate the suit land became futile. PW1 produced a copy of the demand letter as **Pexh.2** thereof.

10. On **cross-examination**, PW1 denied receiving Kshs. 70,000/= from the Defendant and maintained she only allowed the Defendant to reside on the suit land due to her matrimonial issues. That the land was idle without water and electricity. That she even offered to mediate between the couple's strife in vain. PW1 explained that she did not offer the Defendant shelter at Mugutha because her brother was living nearby. However that PW1 allowed the Defendant to ferry construction materials from Mugutha to the suit land.

11. PW2 was **Anna Kambura**, the Plaintiff's mother and Defendant's mother in-law. She adopted her witness statement dated 11/2/2021. It was her evidence that she was visiting her daughter for her clinical checkups when the Defendant sought PW1's help in 2006. PW2 corroborated PW1's evidence for housing the Defendant on the suit land as opposed to Mugutha where her estranged husband lived.

12. Upon being cross-examined, PW2 told the Court that her efforts to reconcile the warring couple were futile. That she only learnt of the suit land dispute from the PW1 and not the Defendant.

13. The Plaintiff's son, **Ben Manyara Kaimenyi** testified as PW3. He also adopted his statement dated 14/1/2021 as evidence in chief. He acknowledged that the Defendant as his aunt and said she offered a goat for his graduation party in the year 2015. That she learnt of the suit land from her mother who had allowed the Defendant to reside thereon. That PW1 further confided in him that she wished to take possession of the suit land but the Defendant would not yield. He then advised PW1 to formally demand the suit land and a demand letter was issued.

14. On cross-examination, PW3 said he never visited the suit land but his younger brother would. He maintained that the relationship between his mother and the Defendant was cordial hence the Defendant brought a goat for his graduation party. That if there was any agreement between his mother and the Defendant, it was purely verbal for temporary shelter but not selling the suit land.

15. That was the end of the Plaintiff's case.

16. On the other hand, the Defendant called 4 witnesses.

17. The Defendant, **Jane Mbuya Murerwa** took the stand as DW1. She adopted her statement dated 18/7/2019 and List of Documents dated 22/5/2021. She testified that upon falling out with her husband in 2005, she approached her sister in law the Plaintiff who offered to sell to her the suit land. That later she and her son **Eliud Mwirigi** met PW1 at Kimbo who proceeded to show them the location of the suit land. Upon arrival, they met Veronica Warigia who live next to the suit land and PW1 informed Veronica that she had sold the suit land to them. That DW1 was shown the 40x 60 plot; without any structure or crops thereon. That the purchase price was agreed at Kshs. 10,000/= with a deposit of Kshs. 70K paid in cash on the same day. DW1 was categorical that she asked for title documents but was only given a copy of the share certificate.

18. It was DW1's further evidence that the next day she commenced construction of a single room the next day whilst residing at good Samaritans' homes including one **Charity Kanorio**. That she built a pit latrine, dug a well and connected electricity to the suit land. She denied that PW1 helped her with the said construction and refuted any averments by PW1 that she let DW1 reside on her land on 'humanitarian grounds'. That DW1 was unable to pay the balance of Kshs. 30K necessitating PW1 intervention to get her a job at KU from whence she paid off PW1 in installments. That upon paying the balance and asking a title deed, PW1 told her that the title would be processed in the Plaintiff's name to DW1's chagrin of being dragged to Court.

19. On **cross-examination**, DW1 was emphatic that PW1 offered to sell her the suit land and she paid Kshs. 70,000/= as deposit. That there was no agreement to that effect as she was oblivious of the requirement that she needed to sign an agreement. Tasked to explain why she did not opt to rent elsewhere due to the fact that she had money, DW1 replied that she sought her sister in-law's help and lived in neighbors' houses. DW1 added that there was no acknowledgment of the payments she made because she never envisaged the instant turn of events.

20. **Joseph Gitu** testified as DW2. He adopted his statement dated 18/7/2019 that he knew the DW1 since 2010. That at one time DW1

approached him and told him that there was a lady who had sold her a piece of land and DW1 wished to offer her a gift of appreciation. That accordingly DW1 requested DW2 to accompany her and the Plaintiff received a goat as appreciation for selling the suit land.

21. On **cross-examination**, DW2 was candid that he was not present when the parties in the sale of the suit land. That he did not know whether DW1 bought the suit land or was simply authorized to utilize it. That he simply accompanied DW1 to the Plaintiff's home in Mugutha but could not confirm the purpose of the goat.

22. DW3 was Veronica Warigi. She similarly adopted her statement dated 18/7/2019 as her evidence in chief.

23. On **cross-examination**, she said PW1 and DW1 visited the suit land in 2005 in company of two men. Just like DW2, DW3 explained that he did not participate in the discussions regarding the suit land and neither did she witness any payment of money. That she saw DW1 deposit building materials on the suit land and constructed a single room.

24. The last witness was also the Defendant's neighbor **Pierre Karimi Laikuru**, DW4. He relied on his statement dated 18/7/2019. He informed the Court he saw DW1 construct her house on the suit land and would occasionally visit her on site. Later DW1 asked DW4 to accompany her to PW1's house to plead with PW1 for more time to settle the balance of the purchase price. That PW1 consented to the request and went ahead to secure DW1's employment at KU.

25. On **cross-examination**, DW4 admitted that he was not present when DW1 entered the suit land. That DW1 told her she had paid Kshs. 70K as deposit for the suit land.

26. That was the close of the defence case.

27. Parties elected to file their final submissions. Only the Defendant filed submissions dated 18/1/2022 through the firm of **Nyambura Njuguna & Njuguna Advocates**.

28. The Defendant detailed the genesis of the suit and rival evidence adduced in Court. According to her, she had established a good defence to the Plaintiff's claim and proven her counter claim to the requisite standard. That her testimony of the purchase of the suit land was well corroborated by her witnesses. That she purchased the suit land with monies from her farming activities and proceeds from sale of a cow.

29. The Defendant submitted that failure to have a written sale agreement was not a bar to the Defendant's claim. She relied on the doctrine of constructive trust and proprietary estoppel as espoused in the Land Act and the Court of Appeal case of **Willie Kimutai Kitilit –vs- Michael Kibet CA No. 51 of 2015** and **Nakuru ELC Case No. 26 of 2013 Caroline Cherono Kirui –vs- Liner Cherono Towett**.

30. The main issues for determination in my view are; is the counter claim merited; do the doctrines of constructive trust and proprietary estoppel arise and lastly has the Plaintiff proven her case.

31. It is trite that he who alleges must prove. The balance of proof in civil arise cases as this is on a balance of probabilities. **Sections 107, 108 and 109** of the Evidence Act state;

“107. Burden of proof

(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

32. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. This is unofficially described as the 51% test. This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.

33. On the Defendant's counter claim, DW1 testified that she paid Kshs. 70,000/= and later a balance of Kshs. 30,000/= in installments. That the alleged sale was a verbal agreement and there were no acknowledgement of payments in the form of receipts. There is no credible evidence as to whether this amount of money was paid if at all. I say so because in her witness statement and indeed cross-examination, the Defendant stated that she paid the Plaintiff while on the suit land but none of the people present (**Charity, Veronica and her son Eliud**) witnessed the payment. This is confirmed by the Defendant in her re-examination when she said “*there was no witness to the payment or negotiations about the land issue*”. The Plaintiff vehemently denies receiving such payment.

34. It is not disputed that there are developments on the land. The Plaintiff contended that the Defendant constructed a permanent building without her permission. The Defendant produced **Dexh. 2-4** - copies of utility payments to Magomano Water project and Besure Metal Works. The said receipts are only proof of payment for the respective utilities. They are not proof of ownership of the suit land. In any event, the Defendant pleaded that's she dug a well on the land and it is not conceivable how a water bill arose in respect to a sunk well.

35. The Defendant submission that she adduced credible, cogent and steadfast evidence that was corroborated in Court fall short of the standard of proof set out above. This is because for instance, DW2 said all he knew is that the Defendant lives on the suit land. He could not tell whether the DW1 bought it or was simply allowed to utilize it. Further DW2 could not confirm the purpose of the goat that was allegedly taken to the Plaintiff as a token of appreciation.

36. Likewise, DW3's evidence was that she saw the Defendant deposit building materials on the land. She did not know whether they were bought from the neighborhood or elsewhere. She was also not conversant with land purchase procedures.

37. The Defendant pleaded constructive trust and proprietary estoppel in her favor at **para. 22** of her amended defence. That the legal doctrine for constructive and proprietary estoppel as expounded in **Section 38(2)(b)** of the Land Act be construed in her favor. She also relied on the case of **Willy** supra whereby the appellant was challenging the trial Court decision to dismiss his case and allowing the Respondent's claim.

38. The brief facts of that case were that the appellant offered to sell the suit land to the Respondent who allegedly failed to pay the entire purchase price despite taking possession thereof. The appellant sought a declaration that the Respondent had no proprietary right over the land and a temporary injunction restraining the Respondent from trespassing upon or interfering with the suit land. The Respondent denied the claims and prayed for specific performance in his counter claim. The trial Court dismissed the appellant's case and allowed the counter claim on the basis *inter alia* that; there was a written sale agreement, the purchase price had been paid and the Respondent had been in occupation of the land with the appellant's full knowledge. Further the trial Court relied on the Court of Appeal case of **Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR** -held that the appellant's action of receiving the full purchase price and putting the Respondent in possession created a constructive trust in favour of the Respondent.

39. That case is distinguished from the instant case in two ways. First, there was a written sale agreement between the parties as opposed to the instant case. The intention to offer was made and the Respondent accepted by paying consideration that was not disputed like in this case.

40. Secondly the Court of Appeal did not oust the requirement for contracts in land to be in writing but it was more concerned with the lack of Land Control Board consent in that transaction. The appellant wanted to void the transaction for want of Land Control Board consent but the Court declined and invoked the equitable remedies of constructive trust and proprietary estoppel and stated at para. 23 thus;

“[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 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. [Emphasis added]”

41. The circumstances of this case are therefore distinguished and the plea of proprietary estoppel in my view, does not arise.

42. Section 38 Land Act states;

“Regaining possession of land after concluding contract of sale of land.

38. (1) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

(2) SubSection (1) shall not apply to a contract made in the course of a public auction nor shall anything in that subSection affect the creation or operation of a resulting, implied or a constructive trust.”

43. The above provision echoes Section 3 of the Law of Contract Act. The exception in Section 38(2) above relates to contract of land in respect to public auctions or constructive trust.

44. The persuasive authority of Potter Ag. J in **Kagua v Gachigi [1982]eKLR** is significant in this case. The Plaintiff had sued the

Defendant for eviction from his land. In his defence, the Defendant explained that he had entered into an oral agreement with the Plaintiff to purchase once acre of land for Kshs. 5,000/-. That he paid Kshs. 1,620 as deposit which the Plaintiff acknowledged in writing but LCB consent was never obtained. The Court declined to imply a trust for want of the relevant consent and went ahead to enter judgment for the Plaintiff subject to the refund of the part payment to the Defendant.

45. Recently Njoroge J in **Jane Jemeli Kipngeny v Rotich Chesum [2018] eKLR** allowed a Plaintiff's claim for the Defendant to transfer parcel of land to her pursuant to agreements made in 1995 and 2013. The Plaintiff's case was that in 1995 the Defendant agreed to give the Plaintiff two acres and a heifer equivalent in value to half an acre and the Plaintiff took possession of the land immediately and uninterruptedly utilized. That the same agreement was renewed on 16/7/2013 before the chief but the Defendant failed to transfer the suit land to the Plaintiff despite demand. In finding for the Plaintiff, the Court found that there was overwhelming evidence to support he agreements including burial of the Plaintiff's husband on the suit land to impute a constructive trust.

46. The facts in the case of Jane are distinct from the instant facts. There is no overwhelming evidence in favour of the Defendant's counterclaim. As already analyzed the elements of this case did not disclose reasonable grounds for the Court to imply a constructive trust and thus the counterclaim fails.

47. Unto the last issue now, in proving her case, the Plaintiff produced the original share certificate as **Pexh.1** and a demand letter for the Defendant to vacate the suit land as **Pexh. 2**. The Defendant did not object to the exhibits. Indeed **D.exh1** was a copy of the Plaintiff's share certificate. According to the oral testimonies of PW2 and PW3, the suit land belongs to the Plaintiff. PW2 admitted that the Defendant had wrangles with her husband and efforts to reconcile them were futile. That the Plaintiff had two plots and agreed to accommodate her sister in law on a temporary basis. PW3 also confirmed that the suit belonged to his mother.

48. As highlighted in para. 33 above, the standard of proof required herein is on balance of probabilities. All that the Court requires is to be satisfied that on the evidence before it, the occurrence of an event was more likely than not.

49. When tasked to explain why she did not buy any other land since she had Kshs. 70,000/=, the Defendant said, **"I sought help from my sister in law. I did not rent. I lived in a neighbor's house when I was chased by my husband."** The import of this is that the Defendant approached her sister for help having fallen out with her husband. She could have for all intent and purposes approached any other person or relative for such help. It is common knowledge that in African setting, families and relatives certainly are the first point of call for any assistance. The Defendant admits that the Plaintiff helped her to secure employment at Kenyatta University. DW4 as well was employed at Kenyatta University at the Plaintiff's instance.

50. In view of the forgoing I opine that the Plaintiff's evidence when weighed against the Defendant's arguments, it is more probable than not that the Plaintiff offered the suit land to the Defendant as a temporary measure in view of her matrimonial predicament.

51. The totality of the above is that the Plaintiff has proven her case on a balance of probabilities. The same be allowed save for costs. The Plaintiff failed to prosecute her claim for general damages. I make no orders in respect to the same.

52. Noting the relationship between the parties, the commendable order is for each party to bear its costs.

53. Final orders;

a. A declaration that all that property known as Plot No. 4 ii (9) situated at Murera area within Kiambu County solely belongs to the Plaintiff being the sole actual owner of the suit property.

b. The Defendant is granted 12 months to vacate voluntarily in default eviction to ensue.

c. An order that the Officer Commanding (OCS) Matangini Police Post or any other Officers under him do supervise and provide security during the eviction of the Defendant from all that piece of property known as Plot No. 4 ii (9) situated at Murera area within Kiambu County.

d. Thereafter an order of permanent injunction restraining the Defendant by herself, agents, servants, and/or any other persons claiming through her from interfering, cultivating, construction and/or in any other way dealing with all that piece of property known as Plot No. 4 ii (9) situated at Murera area within Kiambu County.

e. General damages is denied

f. Each to bear their costs.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS PLATFORM.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff - Absent

Defendant - Mrs. Mangura

Ms. Phyllis – Court Assistant