



REPUBLIC OF KENYA



KENYA LAW
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**Ilunga & another v Owire (Environment and Land Appeal
005 of 2020) [2022] KEELC 3805 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3805 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL 005 OF 2020**

**AA OMOLLO, J
JUNE 29, 2022**

BETWEEN

JUDITH EKESA ILUNGA 1ST APPELLANT

BONIFACE OJUMA ODWALI 2ND APPELLANT

AND

BONIFACE WAFULA OWIRE RESPONDENT

(An appeal from the judgement and decree made in Busia Chief Magistrate's Court by Hon. Chepseba CM and delivered by Hon. Lucy Ambasi CM on the 1st of July, 2020 in Busia Chief Magistrate Court Civil Case No. 453 of 2007)

JUDGMENT

1. This appeal arises from the judgement and decree made in Busia Chief Magistrate's Court Civil Case No. 453 of 2007 by Hon. Chepseba CM and delivered by Hon. Lucy Ambasi CM on the 1st of July, 2020. The appeal is premised on the grounds listed in their Memorandum of Appeal dated 21st of July 2020;
 1. That the Learned Magistrate erred in law and fact when he dismissed the appellants' suit and allowed the Respondent's counterclaim which had the effect of granting specific performance by ordering the transfer of land in a sale agreement that had become null and void as provided by the [Land Control Act](#);
 2. That the Learned Magistrate erred in law and fact when he failed to objectively consider the 2nd Appellant's freedom of contract and his reasons for pulling out of the subject sale of land agreement and consequently arrived at an unfair decision;



3. The Learned Magistrate erred in law and in fact when he failed to properly consider the pleadings and evaluate the evidence and the appellants filed written submissions and made an unjust decision; and
 4. The Learned Magistrate erred in law and in fact by allowing the Respondent's counterclaim which prayed for the cancellation of the appellant's sale transaction with a third party who had neither been enjoined in the lower court's proceedings nor served with the counterclaim in breach of the Court's inherent duty to hear all affected persons.
2. The Appellants urged the court to:
1. Find merit in her appeal and be allowed with costs
 2. The Lower Court's order dismissing the appellants' claim be set aside and be substituted with an order allowing the appellants' claim
 3. An order dismissing the Respondent's counterclaim with costs.
 4. The record of appeal was filed on the 5th of November, 2020 and the same was admitted to hearing on the 6th of October, 2021. The Court issued directions on the same day that the appeal be dispensed of by way of written submissions and parties were given 21 days each to file their submissions.
5. The Appellants filed their submissions on the 29th of July, 2021 and supplementary submissions on the 9th of February, 2022. They submitted that they are the registered proprietors of L.R. No. South Teso/Apokor/262, 263 and 1644. That they entered into an agreement for sale of land with the Respondent for the sale of 2 acres from each of his neighbouring parcels of land at a consideration of KShs.140,000/= but the parties erroneously captured the title No. 1644 that was located on a map sheet 10 away from the sold portion of 4 acres. That the sale involved matrimonial land and the 2nd Appellant contested the same so they asked the Respondent to take back his money. The Appellants contend that the 2nd Appellant had not made an application to the Land Control Board as required under section 6 thus rendering the sale null and void and cannot be enforced as the suit land constituted agricultural land. That the Respondent declined to collect his refund and continues to use the said land illegally in contravention with section 22 of the [Land Control Act](#).
6. The Appellants submitted further that the Respondent entered into the sale agreement freely and knowing that the sale involved ancestral/matrimonial land where other family members had the right to contest the sale and it was due to the contest that he asked the Respondent to collect his refund. That the trial Court failed to consider their submissions that they had filed and that the same were overlooked to avoid addressing the matters raised therein. That the trial court's act of allowing the Respondent's counterclaim that cancelled the transaction of a third party without the party being heard amounted to the breach of the Court's inherent duty to hear all affected parties.
7. In their further submissions, the Appellants submitted that the sale agreement became null and void for lack of the Land Control Board consent and it was rendered illegal by statute making it impossible to order specific performance in respect of a void contract. That the Appellants clearly explained that the sale agreement was affected by mistake as title for land parcel number South Teso/Apokor/1644 was wrongly included in the agreement. They concluded by stating that the issue of trust that was raised by the Respondent was never pleaded not raised during trial in the lower court and the same cannot be introduced at this appeal stage.



8. The Respondent filed his submissions on the 25th of January, 2022 and the issue of being a controlled transaction, submitted that the law allowed any party to a controlled transaction to apply to the relevant Land Control Board and that despite urging the Appellant to go, the 2nd Appellant declined to do so. That the issue of spousal consent cannot be raised at this juncture as the sale agreement was entered into in the year 2005 before the mandatory requirement for spousal consent for transactions involving matrimonial property. Therefore, the 2nd Appellant did not require his wife's approval or consent to obtain the Land Control Board consent making the failure of doing so his own. That the Land Control Board declined to give consent in respect of a transaction between the 2nd Appellant and a 3rd party because of the prior transaction with the Respondent.
9. On the issue of freedom of contract raised as the second ground of the appeal, the Respondent submitted that freedom to contract comes with obligations, responsibilities and remedies/reliefs in case of a breach thereof. That when the purchaser paid the consideration, the onus is with the seller to ensure that the land is transferred. That the agreement was entered into freely by both parties and the issue of whether it was ancestral land or not was never raised at the agreement stage. He submitted that the agreement spoke for itself and the argument that the same is void because of the Land Control Board consent cannot stand. That it was the 2nd Appellant who breached the agreement leaving him with no choice but to ask for specific performance since he was not interested in a refund.
10. The Respondent contended that although the 2nd Appellant testified and confirmed that he took Martin Okasiba to the Land Control Board, he had no *locus* to speak on behalf of the 3rd party and he should remedy the 3rd party independently. That the 3rd party was free to apply to be enjoined in the suit if he so wished. That the issue of mistake or misrepresentation was never pleaded and no evidence provided as to the alleged mistake of the parcel numbers in the agreement. While relying on the case of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR the Respondent concluded by submitting that the lack of the land control board consent does not preclude this court from giving effect to equitable principles. He stated that he had been in occupation of the suit portion having been placed in such possession or occupation by the 2nd Appellant who is the registered owner immediately after the execution of the agreement in 2005. He urged this Court to find that the appeal has no merit and that the Appellants have failed to prove any of the grounds of appeal hence the same should be dismissed with costs.
11. The Court frames the following issues for the determination of this appeal:
 - a) Whether the lack of the Land Control Board consent made the sale agreement between the parties void;
 - b) Whether the appeal has merit; and
 - c) Who pays the costs of the appeal?
12. The suit was initiated against the Respondent vide a plaint dated 18th December, 2007 for; a declaration that the agreement for sale of the suit land had become void, an order directing the refund of the purchase price without any interest and costs of the suit. The Respondent in his amended defence and counterclaim dated 7th June, 2020 admitted that he entered into the agreement for sale and that there were consultations with the 1st Appellant's of family. He denied the 2nd Appellant's averments that the land was family land and stated that this was a conspiracy between the Appellants to have the land sold to a third party. In his counterclaim, the Respondent prayed for specific performance of the sale agreement dated 3rd January, 2005 and the transfer of land number South Teso/Apokor/1644 and



1899 into his names. The Respondent also prayed for the nullification of the purported sale agreement between the Appellants and one Martin Okasiba Aluku.

13. Does the lack of the Land control board consent invalidate the agreement for sale? This is the crux of this appeal that the parties did not obtain consent of the Land Control Board rendered the agreement for sale null and void as the transaction involved agricultural land. Section 6 of the [Land Control Act](#), cap 302 provides thus: -

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;
- ...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.

14. The 2nd Appellant during cross-examination in the lower court's proceedings confirmed that although he had all intentions of obtaining consent from the Board, he did not because the 1st Appellant stopped him (page 71 of the record). The 2nd Appellant stated that he took the third party to the Board to obtain consent. The Court of Appeal in the recent case of [William Kipsoi Segei v Kipkoech Arusei and Another](#) (2019) eKLR said that in rejecting the arguments in the [Sironga Ole Tukai](#) (2014) eKLR decision and following the Macharia Mwangi Maina decision this Court in Willy Kimutai Kitilit (2018) eKLR decision noted among other things, that:

“The phrase ‘declaration of trust of agricultural land’ refers to an express creation of a trust by parties over agricultural land by deed or instruments envisaged by section 36 as read with section 66 of the [Land Registration Act](#) or section 126 of the repealed [Registered Land Act](#), not a constructive trust or trust created by operation of the law.”

The Court further noted that equity is one of the national values that the Courts must apply in interpreting the Constitution stating as follows:

“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.”

15. The Court of Appeal in William Kipsoi supra held thus, “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 was created” In the instant appeal, the facts are similar save



for the duration of stay which is two years for the Respondent before the Appellants initiated their suit in the year 2007.

16. Nothing stops a Court from inferring a constructive trust where the same was not pleaded in a scenario where Land Control Board consent was not obtained but the purchase price was paid in full and the Respondent put in possession of the sold portion. The case of *Odd Jobs v Mubia* [1970] EA476, empowered Courts to base their decision on an un-pleaded issues if it appears from the cause followed at the trial that the issue has been left to the Court for decision.
17. Does this appeal have merit? The Court in the case of *Caroline Cheron Kirui v Liner Cheron Towett* [2018] eKLR stated that, “an important consideration in determining whether or not to order specific performance as opposed to damages is whether the former will do more justice than the latter”. In the case of *Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 the Court of Appeal stated as follows:

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages, the focus being whether or not specific performance will do more perfect and complete justice than an award of damages”.
18. The 2nd Appellant admitted that he entered into the sale agreement voluntarily and accepted the full purchase price on different dates. He confirmed in his evidence that among the witnesses to the agreement of sale was his wife Hellen. He also confirmed that the Respondent has been using the suit land from the time he bought it in 2005 and that although the Respondent asked him severally to go to the Board, the 1st Appellant refused. The sale agreement as is, therefore constituted the full terms of the agreements between parties including the identity and portions of the parcels of land sold. The Appellants are estopped from disowning an agreement due to an alleged mistake which does not reduce the size of land sold.
19. Furthermore, Courts cannot rewrite the contract between parties, its sole duty is to interpret the contract as is and gauge the intention of the parties. In the holding in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR it was rendered that:

“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
20. The Appellants have not proved any mistake, fraud, coercion and or undue influence in the drafting and or execution of the contract. The difference in location of where Parcel No. 1644 where the contested 2 acres is does not vitiate the contract since all the 2nd Appellant is obligated to do is transfer the sold portion comprised in 1644. Furthermore, the Appellant’s confirmation that the Respondent took possession of the land immediately after purchase and at the time of filing the suit in December 2007 and subsequently after the Respondent has continued to be in possession during the pendency of the case in the court below.
21. It is noteworthy the 2nd Appellant knowingly declined to obtain consent for the transfer of the suit land to the Respondent but was willing to do so for a third party under the guise that the 1st Appellant declined to give consent this means that the Appellants came to court with unclean hands. How does the suit land constitute ancestral/matrimonial land in so far as the interest of the Respondent is concerned but not in relation to other 3rd parties. It was only fair and equitable that the Appellants



were ordered to fulfil their obligations under them towards the Respondent. Consequently, the orders made by the subordinate Court cannot be faulted.

22. In light of the analysis given above I find that this Appeal has no merit and the same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 29TH DAY OF JUNE 2022.

A. OMOLLO

JUDGE

