



Mukua & another v Kariuki & 2 others (Environment & Land Case 521 of 2017) [2022] KEELC 3243 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3243 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 521 OF 2017**

**JG KEMEI, J
JULY 28, 2022**

BETWEEN

JAMES MWANIKI MUKUA 1ST PLAINTIFF

GEORGE MUNYUA MBIRA 2ND PLAINTIFF

AND

MARK MUGEKENYI KARIUKI 1ST DEFENDANT

CALVARY TEMPLOE VICTORY CHURCH 2ND DEFENDANT

BISHOP MUGEKENYI ACADEMY 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs filed suit by way of a Plaint dated the 25/4/2017 against the Defendants seeking the following orders;
 - a. An order do issue that the 3rd Defendant do vacate failure to which forceful eviction of the 3rd Defendant from the parcel of land known as Limuru/Kamirithu/3214 (suit land) do issue.
 - b. A permanent injunction restraining the Defendants or their agents from cultivating planting building and or trespassing on the suit land.
 - c. The OCS Tigon Police Station to oversee and supervise the eviction of the Defendants.
 - d. Lastly costs of the suit.
2. According to the Plaintiffs claim, the 1st Plaintiff is the registered owner of the land measuring 0.07 ha having purchased it from the 2nd Plaintiff. It is alleged that the suit land was a resultant subdivision of parcel No Limuru/Kamirithu/596 which was registered in the family patriarch namely Joshua Mbira Gathahu, deceased. Upon his demise his estate was succeeded amongst the 7 houses and the children/dependants of the deceased. At the initial stage the estate was registered in the name of the Public



Trustee and thereafter subdivided and distributed to the many beneficiaries, (the Plaintiffs included) after subdivision.

3. After the subdivision, the suit land became registered in the name of the 2nd Plaintiff.
4. It is the Plaintiffs case that the Defendants leased a portion of the mother parcel (596) on the 2/1/2009 from Wilfred Mukoma Mbira, a brother of the 2nd Plaintiff. Upon the successful succession of the estate of the Plaintiff's father, the land was registered in the name of the Public Trustee upto 9/5/2016 when subdivisions were concluded leading to the registration of sub parcel 3214 in the name of the 2nd Plaintiff being his share of his father's estate.
5. The Plaintiffs aver that Wilfred Mukoma Mbira had no authority to lease the suit land to the Defendants as he sought no consent from the 2nd Plaintiff. That it is in 2009 that the 2nd Plaintiff discovered that the Defendants have encroached on his land who had built a school namely Bishop Mugekenyi Academy. That the Defendants refused to vacate the land and instead renegotiated to pay to the 2nd Plaintiff for the years they had utilised the land through banker's cheques. That the arrears for the first 10 years was Kshs. 180,000/-. That there was an extension for another 10 years in the sum of Kshs. 180,000/- out of which Kshs. 120,000/- was paid by the Defendants leaving the balance of Kshs. 60,000/- as unpaid rent.
6. That the Defendants failed to pay the balance of the rent and in 2016 the 2nd Plaintiff sold the land to the 1st Plaintiff who has been denied access by the Defendants.
7. By way of defence and counterclaim filed on the 4/12/2017, the Defendants opposed the Plaintiffs' claim. The Defendants contended that that the 1st Plaintiff is a stranger to the dealings between them and the 2nd Plaintiff. The Defendants contended that they purchased the suit land from the 2nd Plaintiff at the sum of Kshs. 400,000/- out of which they paid the sum of Kshs. 300,000/- leaving the balance of Kshs. 100,000/- payable at the time of the transfer of the suit land. That the sum of Kshs. 300,000/- was paid through banker's cheques dated the 20/4/2010, 21/6/2010 and 15/10/2010. That they have been in possession of the suit land since 1999 to date and therefore claim title by way of adverse possession. That the 2nd Plaintiff was to transfer the land directly to the Defendants upon completion of the succession of the estate of their late father.
8. The Defendants aver that they were put into possession by the 2nd Plaintiff who went ahead and pointed out the beacons of the suit land for which they have developed a Church and a school. That the 2nd Plaintiff is in breach of contract to the detriment of the Defendants. Particulars of breach are enumerated under para 17 of the Defence.
9. Further the Defendants state that the Plaintiffs are in breach of trust, wilful default misrepresentation, duress and undue influence and have given particulars of the same under para 19 of the Counterclaim. That despite making payments towards the purchase of the property the Plaintiffs have failed neglected and or ignored to complete the transfer of the suit land to them. The Defendants sought the following orders in the counterclaim;
 - a. An order for specific performance compelling the 2nd Plaintiff to complete the sale and accept the balance of purchase price or in alternative an Order that the 2nd Plaintiff do accept payment of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) by the Defendant and the Plaintiffs do transfer Limuru/Kamirithu 3214 to Defendants at the Plaintiff's costs forthwith.
 - b. General damages and aggravated damages.



- c. In alternative the Plaintiffs do pay the Defendant the current value of Limuru/Kamirithu 3214.
 - d. A declaration that the transfer of Limuru/Kamirithu 3214 to the 1st Plaintiff was illegal, irregular and fraudulent and the said title to the 1st Plaintiff is hereby cancelled forthwith.
 - e. The County Land Registrar Kiambu do cancel the title entries of Limuru/Kamirithu 3214 as currently entered or issued and substitute it with the name of the Defendants in place of the 1st Plaintiff and or in the alternative the title be issued to the Defendants.
 - f. A permanent injunction or der restraining the Plaintiffs by themselves and/or their servants and agents or otherwise howsoever from interfering with the Defendant's quiet enjoyment possession, construction of the suit property as a purchaser or from evicting the Defendants.
 - g. An order that the Plaintiffs do execute the transfer documents and deliver the title documents and/or in their place (i.e the Plaintiffs) the Deputy Registrar of the Environment Land Court at Thika do execute the title documents in favour of the Defendants.
 - h. Interest at Court rates.
 - i. Costs of the suit.
10. At the hearing date neither the Plaintiffs nor their counsel was present in Court. The Court having been satisfied that they were served, (their lawyer having been present during the online call over earlier in the morning) directed the hearing to proceed.
 11. On application by the Defendants the Plaintiffs suit was dismissed for non-attendance and or want of prosecution. The Defendants counterclaim proceeded for hearing.
 12. The Defendant called one witness, the 1st Defendant. He adopted his witness statement dated the 21/11/2017 and produced documents marked as PEX NO 1-8.
 13. The witness informed the Court that he is a Bishop serving with the 2nd and 3rd Defendants. That the 2nd Plaintiff sold land to the Church in 1999 at the sum of Kshs. 400,000/-. That they were put in possession whereupon they have developed a school, Church and fenced the land whose value is estimated to be Kshs. 60 Million. That other than the suit land, the Defendants also purchased several plots from the siblings and family of the Plaintiffs. That their quiet possession was interrupted by the 1st Plaintiff who claimed the land in 2017. That unknown to the Defendants the 2nd Plaintiff had sold the land to the 1st Defendant without their knowledge. In his view the 2nd Plaintiff held no interest capable of being transferred to the 1st Plaintiff on account of the sale to them. That the 1st Plaintiff lives around 100 meters from the suit land and being a member of the Mbira family was aware that the Defendants had purchased the land.
 14. In his further testimony the witness stated that the Plaintiffs have refused ignored and or neglected to transfer the suit land the Defendants despite their readiness and willingness to pay the balance of the purchase price in the sum of Kshs. 100,000/-
 15. To secure their interests the witness informed the Court that they lodged a restriction on the suit land on the 24/3/2017.
 16. With that the Defendants closed their case.
 17. The Defendants in their brief written submissions filed on the 9/11/2021 stated that their developments are valued at over Kshs. 50 Million. That the 1st Plaintiff in cohorts with the 2nd Plaintiff



have colluded to deny them the land which belongs to them and urged the Court to allow their counterclaim.

18. Having read and considered the pleadings on record, the evidence adduced during the hearing, the brief written submissions and all the materials placed before me, the issues that commend themselves for determination are;
 - a. Whether there was a sale between the 2nd Defendant and the Defendants with respect to the suit land.
 - b. Was the transfer of the suit land by the 2nd Plaintiff to the 1st Plaintiff valid?
 - c. Whether the Court should order specific performance in the circumstances of this case.
 - d. Are the Defendants entitled to general and aggravated damages?
 - e. What orders should the Court grant?
19. It is not in dispute that the Plaintiffs are brothers, being the sons of the late Joshua Mbira Githahu. According to the record the said Githahu had 7 wives and several children. The Late Githahu left a sizable estate going by the assets listed in the confirmed grant dated the 9/2/2000 where all the assets were shared among his wives and children according to the 7 houses (wives), each getting 14.28%. It is not disclosed when Mzee Mbira died but the grant of the estate was issued to the Public Trustee who undertook the arduous task of distributing the properties to the beneficiaries after the attendant subdivisions were made.
20. The property in issue is Parcel Limuru/Kamirithu/596. According to the confirmation of grant aforesaid the 2nd Plaintiff with others had a share of 14.28%. It has not been disclosed the size of the mother title save to note that the resultant portion, the subject matter in this suit is 0.07 Ha or 0.172 acres to be precise.
21. Following the dismissal of the Plaintiff's case the Defendants proceeded with the formal proof of their counterclaim which for all purposes and intents stood undefended. That said the onus to proof their case however undefended rests on the shoulders of the Defendants.
22. I shall now deal with issue No (a) above. Section 38 (1) and (2) of the Land Act makes provisions with respect to the validity of contracts in sale of land as follows;

“(1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land —

- 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. a contract made in the course of a public action;
 - b. the creation or operation of a resulting, implied or a constructive trust; or



- c. any agreement or contract made or entered into before the commencement of this Act, provided that-
 - i. the verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and
 - ii. the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.”
23. The law as expressed in the *Land Act* exempts contracts made in the course of a public auction as well as in the creation or operation of a resulting, implied or a constructive trust.
 24. In the case at hand the Defendants led evidence that they purchased the suit land in 1999 and were put in possession by the 2nd Plaintiff. That they have developed the land by carrying out fencing and construction of a Church as well as a school. The Photographs adduced in evidence no doubt show that the structures on the land are not recent.
 25. It is not in dispute that there is no written agreement between the 2nd Plaintiff and the Defendants. Courts in this country have held that contracts in sale of land must be in writing with the exceptions being in respect of public auction and where a trust has been created. However the common law position which is applicable in Kenya provide that an oral agreement that has been acted upon by the parties is as valid as written contract. In this case the Defendants have demonstrated that they paid the sum of Kshs. 300,000/- out of Kshs. 400,000/- agreed vide the bankers cheques dated the 20/4/2010, 21/6/2010 and 15/10/2010. All the cheques are endorsed with the following words;

‘Part of Church plot payment. Witnessed by;

Pastor Mark M Kariuki - signed – ID xxxx

Wilfred Mukoma - signed – ID xxxx

George Munyua Mbira - signed – ID xxxx.”
 26. All the payments were made in the name of George Munyua Mbira, the 2nd Plaintiff.
 27. It is not in dispute that the Defendants were put in possession in 1999/2000 by the 2nd Plaintiff who had by then been allocated the suit land according to the certificate of confirmation of grant and that explains the payments via cheques above which were made in 2010 after the successful succession of the estate in 2000.
 28. The 2nd Plaintiff has averred that the payments were in respect to a lease of the land by the Defendants. There was no evidence led to support the existence of the lease. There is also no evidence that the Plaintiffs demanded for the rental payments from the Defendants since 2010.
 29. The Defendants led evidence to show that they also purchased other portions of land from the siblings and relatives of the Plaintiffs in 2008/2009. This evidence in my view is material to show that the sale of the land to the Defendants was not an isolated event but taken together with the other sales reinforces the probability that the transaction was a sale and not a lease.
 30. In my view the fact of the unchallenged possession, the payments and the circumstances of this case the Court is persuaded that indeed there was a valid sale between the parties. I say so because if it were otherwise the Plaintiffs would have removed the Defendants from way back in 2000 when the land was distributed to the 2nd Plaintiff vide the confirmation of grant. It is therefore true that given the



actions of the parties the parties did change their positions based on the representation made by the 2nd Plaintiff to their detriment. The Defendants paid part of the purchase price and was put in possession. The Defendant explained that the balance of the purchase price was due in exchange with the transfer documents but the 2nd Plaintiff kept dodging them and failed to comply with his obligation to deliver title to the Defendants even after he became registered owner in 2016. According to the green card he quickly transferred the land to his brother, the 1st Plaintiff. There is no evidence whether there was a valid sale between the two or it was to keep the property away from the reach of the Defendants by creating a proxy transfer.

31. In the case of *Mwangi & Another vs. Mwangi* (1986)KLR 328, where it was held that the rights of a person in possession of occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability. Further as was stated by Lord Reid in *Steadman vs. Steadman* (1976)AC 536, 540:-

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”

32. I find that there was part performance on the side of the 2nd Plaintiff as well as the Defendants.
33. The Court answers the first issue in the positive.
34. With respect to issue No b, the Defendants state that they waited for the 2nd Plaintiff to transfer the land to them in vain. That instead he transferred it to the 1st Plaintiff his own brother. It is the view of the Court that this transfer was hollow so much so that the 2nd Plaintiff transferred nothing as he had already relinquished his interest right and title in the suit land in exchange for payment.
35. Evidence was led by the Defendant that the 1st Plaintiff lives 100 meters away from the suit land and must have seen the Defendants fencing, constructing and carrying on its activities on land that was acquired from his brother, the 2nd Plaintiff. Had he carried out due diligence on the land he would have known that the Defendants were in possession and given the level of developments made that should have given him an inkling that the land was no longer in the hands of the 2nd Plaintiff. See the case of the cattle dip officials.
36. It is the view of the Court that no interest was conveyed to the 1st Plaintiff in the circumstance of this case. This is because the 2nd Plaintiff held the title in trust for the Defendants as a Trustee. Section 25 of the Registered *Land Act* on trusts.
37. In the case of *Willy Kimutai Kitilit vs. Michael Kibet* (2018)eKLR applied the doctrine of constructive trust by stating that-

“By the time the Appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the Respondent and it would be unjust and inequitable to allow the Appellant to retain the 2 acres that he had sold to the Respondent in the circumstances of the case.”

38. In the case of *William Kipsoi Sigei vs. Kipkoach Arusei & Another* [2019] eKLR where the Court stated;
- “That since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, 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 are in breach of the Land Control Act and have unreasonable delayed in performing.”

Further the Court stated;

“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 trust and proprietary estoppel to a contract rendered void by lack of consent of the land control board will largely depend on the circumstances of each particular case.” (emphasis is mine).

39. Section 30(g) of Registered Land Act (repealed) provided as follows:-

“The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”

40. That the equitable remedies of estoppel and trust as enshrined in the new Constitution are therefore applicable to such a sale that would have rendered the sale agreement void for want of form. A constructive trust can either be express or implied. A constructive trust can arise in fiduciary relationships, as a direct consequence of unlawful transaction or from the rule that no person should benefit from his own crime. The concept of remedial constructive trust grants the Courts the discretion to grant justice tailored on the facts of the case where the rules are strict.
41. That the Defendants are entitled to the relief of specific performance as it was ready, willing and able to complete its obligations under the agreement whilst the Defendant wilfully declined to discharge his obligations under the agreement and instead elected to transfer the property to his brother to defeat the interest of the Defendants.
42. Specific performance is an equitable remedy grounded in the equitable maxim that equity regards as done that which ought to be done and as an equitable remedy it is decreed at the discretion of the Court and the basic rule is that specific performance will not be decreed where the common law remedy such as damages would be adequate to put the Plaintiff in the position he would have been but for the breach.
43. In the case of Joyce Mugure Mwangi & 7 others Vs Joachim Ngugi Kiarie & 16 others (2019) eKLR the Court stated that specific performance like any other equitable remedy is discretionary and the Court will only grant it on well-known principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. The Court went ahead to state that even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.
44. The Court is of the view that specific performance is allowable in the circumstances.
45. In answer to issue no b the Court answers it in the negative.
46. On the issue of general and aggravated damages, the Court is constrained to determine this one on account of the failure by the Defendant to prove trespass as well as demonstrate by way of evidence the level of damages they have suffered.



47. For the reasons given above in my view the appropriate orders are as follows;
- a. An order for specific performance compelling the 2nd Plaintiff to complete the sale and accept the balance of purchase price in the sum of Kshs. 100,000/-.
 - b. General damages and aggravated damages is declined.
 - c. A declaration that the transfer of Limuru/Kamirithu 3214 to the 1st Plaintiff was illegal, irregular and fraudulent and the said title to the 1st Plaintiff is hereby cancelled forthwith.
 - d. The County Land Registrar Kiambu do cancel the title entries of Limuru/Kamirithu 3214 as currently entered or issued and substitute it with the name of the Defendants in place of the 1st Plaintiff.
 - e. A permanent injunction restraining the Plaintiffs by themselves and/or their servants and agents or otherwise howsoever from interfering with the Defendant's quiet enjoyment possession, construction of the suit property as a purchaser or from evicting the Defendants.
 - f. In the alternative an order that the Plaintiffs do execute the transfer documents in default the Deputy Registrar of the Environment Land Court at Thika do execute the title documents in favour of the Defendants.
 - g. I make no orders as to costs.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF JULY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Masinde holding brief for Mungai for 1st and 2nd Plaintiffs

Kahuthu for 1st, 2nd, 3rd and 4th Defendants

Court Assistant – Phyllis Mwangi

