Kariuki v Rotich & 2 others (Environment and Land Appeal 5 of 2019)
[2022] KEELC 15098 (KLR) (23 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15098 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND APPEAL 5 OF 2019

SM KIBUNJA, J

NOVEMBER 23, 2022

BETWEEN

MICHAEL NJURU KARIUKI ..... APPELLANT

AND

ESTHER TOROITICH ROTICH ..... 1ST RESPONDENT

DANIEL KIPTARUS MASE ROTICH ..... 2ND RESPONDENT

TIMOTHY KIBET LAGAT ..... 3RD RESPONDENT

(Being an appeal against the judgment of Hon N Wairimu, Principal Magistrate, delivered on the 18th day of December 2018 in the Eldoret Chief Magistrate's Court Civil Suit No 345 of 2011)

JUDGMENT

1. This appeal emanates from the judgment delivered on December 18, 2018 by the Hon Wairimu, then Principal Magistrate, in Eldoret CM Civil Suit No 345 of 2018, in which she *inter alia* concluded that the contract dated October 19, 2010 entered between the appellant and the 1st respondent had been frustrated by failure to obtain Land Control Board consent within six months, and that both parties had breached the terms of the said agreement by not making the payment and delivering the documents within the timelines set. Further, that the order of specific performance is not available to the appellant under the circumstances. The learned trial magistrate therefore ordered that the 1st defendant who had received a deposit of Kshs 1,060,000/= to refund the same to the appellant, and that the appellant was to pay the costs.

2. That aggrieved by the said judgment, the appellant filed the memorandum of appeal on the January 16, 2019 wherein he raised 14 grounds of appeal. The same was served upon the respondents and the court directed the parties to put in their submissions. The court gave directions on filing and exchanging

submissions, and the learned counsel for the appellant and respondent filed theirs dated the February 30, 2022 and May 31, 2022 respectively.

3. In his submissions, the appellant proposed four issues for determination, which are;

   a. Whether the land in dispute falls within controlled transaction requiring land control board consent.

   b. Whether a constructive trust can be created.

   c. Whether the respondents applied for consent.

   d. Specific performance.

On the first issue of whether the suit land falls within the controlled transactions requiring Land Control Board consent, the appellant argued that the suit land does not require the Land Control Board consent since it does not fall under the controlled transactions. He referred to the definition given to agricultural land under the *Land Control Act* chapter 302 of laws of Kenya, and submitted that the said Act defines "agricultural land" to mean;

> a. "Land that is not within- a municipality or a township; or an area which was, on or at any time after the July 1, 1952, a township under the Townships Act (cap 133, 1948 now repealed) or an area which was, on or at any time after the July 1, 1952, a trading centre under the trading Centre Act (Cap 278, 1948 now repealed) or a market;
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> b. Land in the Nairobi Area or in any municipality, township or urban centre that is declared by the minister, by notice in the gazette, to be agricultural land for the purpose of this act other than land which, by reason of any condition or covenat in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose;"

Furthermore, the appellant has also invoked section 6 of the *Land Control Act* which provides for control in the dealings in agricultural land, and submitted that the suit land falls within the municipality, and thus does not require the Land Control Board consent, and further that the respondents failed to produce evidence before the trial court to prove the contrary. Moreover, the suit land is a leasehold interest and not an absolute proprietorship, and therefore Land Control Board consent is not a requirement in such transactions. He cited various superior courts decisions to buttress his reasoning. On the question of the existence of a constructive trust, the appellant submitted that, having paid more than half the purchase price, and having been given vacant possession by the respondents, a constructive trust had been created. It is his submission that having performed part of his duty, and being ready and willing to complete his obligations under the contract, the respondents were holding the suit property in trust on his behalf. That even if the Land Control Board consent was required in the transaction, which he disputed, he submitted that it cannot deter the creation of a constructive trust, and that the court should apply its discretion and award an equitable remedy. He pegged his reasoning on the court's decision in the case of *Willy Kimutai Kitili vs Michael Kibet* (2018) eKLR. The appellant went on and submitted that no attempt was ever made by the respondents to apply for consent from the required authority, and they did not furnish the trial court with any evidence to show that they made initiatives to apply for the consent. It is his submission to this court that the respondents used the absence of the Land Control Board consent as a tactic to frustrate the contract. On the issue of specific performance, the appellant submitted that the court has a discretional

power to grant this equitable remedy, as he had performed his part in the contract diligently, and that the purported frustration had been orchestrated by the respondents. He therefore, prayed that the court exercises its discretional powers and order for specific performance by the respondents. He cited the case of *John Mark Wandolo V Paul Nganganage* (2020) eKLR.

4. The respondents in their submissions identified three issues for determinations being;

   a. Whether the contract entered herein between the parties was frustrated.

   b. Whether there was a breach of contract.

   c. Whether the plaintiff is entitled to the orders of specific performance.

   And submitted that the contract dated October 19, 2010 was frustrated and the parties were bound to be reverted to their original position. It is their submission that, under clause 4.1 (C) of the agreement, the completion period was strictly 90 days. They submit that parties failed to perform their obligations within 90 days thus frustrating the whole contract. They have cited the case of *Kenya Airways Limited vs Satwant Signh Flora* where the court set out guidelines to be considered when determining the rights and obligations of parties where one party pleads an illegality of the contract as justification for refusal to be bound under it. On the second issue, of whether there was a breach of contract, the respondents referred to clause number 5.1 of the contract, and they submitted that the same was breached by both parties when they failed to complete their obligations within the stipulated 90 days. The respondents cited the case of *Mose Kamande Nyambura vs Francis Munyua Ngugi* (2018) eKLR, where the court held that where the completion period is clearly stated in the contract and neither the consent had been obtained, nor the full purchase price was paid, both parties were in breach of the contract. The respondents further submitted that no constructive trust had been created in this case. They cited a number of superior courts decisions and submitted that trust exists in two folds, constructive trust and resulting trust. That trust is either created expressly or by operation of law. Furthermore, they went on to submit that a trust may be inferred in favour of the beneficiary where a person who is in a position of trust takes advantage of his/her position, for his own benefit, to the detriment of the beneficiary. They concluded their submissions by praying that the appeal herein be dismissed with costs to the respondents.

5. This being the first appeal, the role to be played by the court is as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 (referred to in *David Oteba Ooko v Peter Joe Emongor* [2020] eKLR) that;

   > " ...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

   It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to the evidence. I have perused all the submissions filed by the parties herein and it is clear that the issues for determination are as follows;

   a. Whether the contract was frustrated by the parties.

   b. Whether the remedy of specific performance is available for the appellant.

c. Who pays the costs.

6. That upon considering the grounds of appeal, submissions by both learned counsel, the superior courts decisions cited, the trial court record, the court has come to the following conclusions;

a. The respondents have argued that the contract dated October 19, 2010 was frustrated because the parties did not perform their obligations within 90 days as stipulated under clause 5.1 of the agreement. On the other hand, the Appellant submits that the transaction never required the Land Control Board consent as it was not an agricultural land. The *Land Control Act* defines "Agricultural land" to mean;

> "a. Land that is not within- a municipality or a township; or an area which was, on or at any time after the July 1, 1952, a township under the Townships Act (Cap 133, 1948 now repealed) or an area which was, on or at any time after the July 1, 1952, a trading centre under the trading Centre Act (Cap 278, 1948 now repealed) or a market;
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> b. Land in the Nairobi Area or in any municipality, township or urban centre that is declared by the minister, by notice in the gazette, to be agricultural land for the purpose of this act other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose;"

It is Important to note that section 6 of the *Land Control Act* provides for control in the dealings in agricultural land including;
The lease the transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area,The division of any agricultural land into two or more parcels to be held under separate titles, other that 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 from the time being apply.The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a privet 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

The elephant in the room is whether the transaction herein required the Land Control Board consent. Both parties herein did not furnish evidence to the trial court to show whether or not indeed the transaction between them needed the Land Control Board consent. In the case of Nakuru ELC No 294 of 2013 *Mary W Gitonga Vs Samuel Kago Mutura and Susan Wanjiru Kago* the court held *inter-alia*

> ''From the definition of agricultural land, that there may be certain land within municipalities which may be subject to the Land Control Act. The only way in which it can be held that the land is not subject to the Land Control Act is if there were pleadings to that effect, and if evidence was led, that the land was not subject to the consent of the Land Control Act. Nowhere in the pleadings did the plaintiff plead that the land was not subject to the Land Control Act, and the plaintiff did not lead any evidence that the land was not subject to the Land Control Act. The parties

themselves were convinced at the time of transacting that the land was subject to the Land Control Act, and the only way that a conclusive determination can be made that the land was not subject to the Land Control Act, is if the plaintiff pleaded and tendered evidence that they were mutually mistaken, that the land was subject to the consent of the Land Control Act, whereas was not."

That having found that no concrete evidence was indeed provided before the trial court to ascertain whether the transaction between the parties herein required the Land Control Board consent, the provision of section 107 of the *Evidence Act* chapter 80 of Laws of Kenya becomes important. The section states that;

"107.

(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."

The respondents relied on the above provision, and submitted that the contract required the Land Control Board consent which was never processed in time, thus rendering the contact void. The court however notes that they failed to furnish the trial court, and this court for that matter, with even an iota of evidence to buttress their allegation. Therefore, this court concludes that the respondents failed to satisfy the trial court that the transaction under the contract over the suit land required the Land Control Board consent.

b. That from the pleadings, it is crystal clear that the suit land was a leasehold, and the respondent was issued with a certificate of lease. Transfer of a leasehold interest before the *Constitution of Kenya 2010*, required the consent from the Local Government and or the Land Registrar, and now from the County Government and or National Land Commission [NLC]. That no evidence has been provided that such consent was applied for or obtained. In the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR the court held:

"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.

(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."

Therefore, the failure by the respondents to obtain the required consent invalidated the contract and thus rendered it void.

c. The general rule is that courts do not make contracts for the parties, but only interpret them, as was held in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, where the Court of Appeal stated as hereunder;

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):
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> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

From the contract between the parties herein, it is clear that they had agreed to conclude the whole transaction within 90 days. Furthermore, they expressly made time to be of the essence. In the case of *Sagoo-vs-Dourado* [1983] KLR 365, the Court cited with approval *Halsbury's Laws of England*, 4th Edition, paragraph 481 that states as follows;

> "The modern law in the case of contracts of all types may be summarized as follows. Time will not be considered to be of the essence unless: (1) The parties expressly stipulate that conditions as to time must be strictly complied with; (2) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or; (3) A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence"

In this appeal before me, it is true, that the parties by their own volition made time to be of the essence, as the completion time was 90 days. Having found that time was of the essence,

the next question would be who amongst the parties defaulted. Clause 4.1 (c) of the contract states as follows;

> "As to the balance of Kenya Shillings nine hundred thousand (900,000) only shall be payable as and when the vendor shall have delivered all the relevant documents as per 5.1. hereunder"

The obligation was placed on the vendor [respondents] to comply with the terms of clause 4.1. (c) before being paid the balance of Kshs 900,000/=. The respondent indeed failed to avail all the documents, specifically the much-needed consent for the transfer of the leasehold interest. Therefore, I find that the payment of a balance of Kshs 900,000/= was pegged on the availability of all the prerequisite documents by the respondents to the appellant, which they failed to remit on time. The blame cannot be shifted to the appellant.

d. Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on well-settled 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 as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable, specific performance will, however, not be ordered where there is an adequate alternative remedy. The appellant had sought for specific performance order, but failed to show that he was ready, able, and willing to complete the transaction within the agreed period of 90 days. Therefore, he had not sufficiently proved to the trial court, and this court that he was ready to complete his obligation under the contract within the agreed time. *Halsburys Laws of England* (4th Edition) at paragraph 487 vol 44 states *inter alia*:

> " A plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications ad which ought to have been performed at the date of the wit in the action. However, this rule only applies to terms as which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance or is in default in some non-essential or unimportant term although in such cases it may grant compensation"

Similarly, in Civil Appeal No 165 of 1996 between *Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti*, the court expressed itself thus:

> "When the appellants sought the relief of specific performance of sale of the respondent's property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement...It was never in dispute that the appellants were in breach of an essential term of the agreement in that they failed to deliver up to the respondent the balance of the purchase price of the suit property...as stipulated in the agreement. There was, however, no express stipulation nor was there any indication in the agreement that time was of the essence in the agreement. The appellant's failure to deliver up the balance of the purchase price of the suit property by the appointed date...did not bring the agreement to an end...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do more

perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract that he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation...Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim... The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract.....the court of equity would refuse to grant specific performance and would leave the parties to their other rights...When the appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice".

The court continued and stated that:

> " However, the appellants' conduct has been such as to render it inequitable for specific performance to be granted...There was no evidence that prior to the filing of the suit the applicants tendered the balance of the purchase price to the respondent. This only confirms that they were never ready, able and willing to carry out their part of the contract. Secondly, the appellants simply could not raise the balance of the purchase price on or before the specified time and were in fact in breach of the agreement. Thirdly, the nature of the property and the surrounding circumstances make it inequitable to grant the relief of specific performance. The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value has materially appreciated".

e. In this case, the appellant never indicated that he was ready and willing to complete the transaction within the time set. The appellant did not even show any attempt to pay the respondents the balance of the purchase price within the 90 days for them to reject. In the case of *Nabro Properties Limited –vs- Sky Structures Limited & 2 others* (2002) 2 KLR 300 the court held that,

> " A party seeking specific performance must show and satisfy court that it can comply and be ready and able a mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast upon the appellant".

f. It has also been held that specific performance will not be available as a remedy where it is proved that the contract suffers from some form of defects. I find this in the case of *Reliable Electrical Engineers Ltd V Mantrac Kenya Limited* (2006) eKLR, where the court stated that: -

> " Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well 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 as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant."
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> It is clear that the contract between the parties herein suffered some defect in terms of failure to obtain the pre-requisite consent, and payment of balance of purchase price within 90 days, and therefore in the premises the remedy of specific performance cannot be awarded to the appellant. The court having analyzed the trial court's judgement has not found any basis of faulting or interfering with the overall reasoning and findings by the trial magistrate.

g. The upshot of the foregoing is that the trial magistrate was justified when she found that the only available remedy to the appellant was the refund of all the monies paid to the 1st defendant amounting to Kshs 1,060,000/= (One Million, and sixty Thousand).

h. Lastly, on the prayer for costs, the applicable law is found in section 27 of the *Civil Procedure Act* chapter 21 of laws of Kenya, which provides that costs largely follow the event, unless where for good cause the court directs otherwise. I find no basis of ordering otherwise and the respondents will have the costs in the appeal.

7. Flowing from the foregoing conclusions, the court finds and orders as follows;

a. That the appeal is without merit and is hereby dismissed.

b. The appellant to meet the respondents' costs in the appeal.

c. The file be closed.

6 Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 23rd DAY OF NOVEMBER 2022.

S. M. Kibunja, J.

IN THE PRESENCE OF;

APPELLANT : Absent

RESPONDENTS : Absent

COUNSEL : M/s Mwicigi for Karuga for Appellant

WILSON .. COURT ASSISTANT.

S. M. Kibunja, J.