



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC CASE NO. 272 OF 2016

(FORMERLY KERICHO HCCC NO. 06 OF 2006)

JOHANA KIPKEMOI SANG (Suing as a personal representative of the estate of

MARAMBI KIPSANG NGASURA (DECEASED).....PLAINTIFF

-VERSUS-

RODA MOIGE KOROSO.....DEFENDANT

JUDGMENT

1. By a Plaint dated 27th July, 2006 the Plaintiff filed suit against the Defendant seeking *inter alia* the following reliefs;

i. A permanent injunction restraining that the Defendant by herself, servants and/or agents from further entering trespassing, occupying and/or any in any manner dealing with land parcel number, MOLO SOUTH/LANGWENDA/SET KOTES BLOCK 3 (SET KOTES) 22 (hereinafter referred to as “the suit property”).

ii. In the alternative and without prejudice to the foregoing, if there was any contract of sale of the suit property, the same be declared null and void and a mandatory injunction do issue restraining the Defendant by herself servants and/or agents from further entering trespassing, occupying and/or any in any manner dealing with the suit property.

iii. Costs of this suit.

iv. Any other further relief that this Honourable Court may deem fit and just to grant.

2. The Defendant filed an Amended Defence and Counterclaim on 24th November, 2006. In the counterclaim the Defendant seeks:

a) An order compelling the Plaintiff to transfer to her 12 ½ acres of the Suit Property.

b) should the Plaintiff fail to do so, the Executive Officer of the Honourable Court be ordered to sign the documents facilitating the transfer of the said section of the suit property to the Plaintiff by the Land Registrar at Nakuru.

c) In the alternative, the Plaintiff be compelled to refund to her a sum of Kshs. 500,000 plus interest arising from the date of payment.

d) Costs and interests of the suit.

e) Any other further relief that this Honourable Court may deem fit and just to grant.

3. The matter was heard and both parties testified and closed their cases after the testimonies of all witnesses on 17th June, 2020.

4. Thereafter parties were directed to file their written submissions. The Plaintiff filed their submissions on 11th November, 2020 while the Defendant filed their submissions on 2nd December, 2020.

THE PLAINTIFF'S CASE

5. The Plaintiff is personal representative of the estate of **MARAMBI KIPSANG NGASURA (Deceased)** who was the registered owner and proprietor of suit property.
6. The Plaintiff filed the suit on behalf of the family and had a limited grant giving him the powers to file this suit on their behalf.
7. The Plaintiff claims that the Defendant entered into the suit property in the year 1999 and started cultivating thereon claiming to have purchased the same from the Plaintiff's late father although she did not have any documents in support of her claim.
8. The Plaintiff alleged that the Defendant entered into the suit property during land clashes and did not get any authority from his father who died in 2001 after he fell sick. It is his testimony that prior to his demise the deceased was not of sound mind.
9. He stated that if at all there was an agreement as the Defendant alleged, then her late husband did not pay the entire purchase price. He only paid Kshs. 500,000 as opposed to Kshs1.12 m which is claimed to have been the agreed purchase price in the sale agreement.
10. He further averred that if at all a transaction did occur, the same did not have the consent of the local Land Control Board. He prayed that judgment be entered as prayed in his Plaintiff.

THE DEFENDANTS CASE

11. The Defendant on her part averred that she was a widow of the late Isaac Andrew Koros who died on 19th September, 1998.
12. Her late husband and the late Marambi Kipsang Ngasura, the Plaintiff's late father, entered into an agreement for the sale of the suit property measuring 28 acres on 2nd May, 1997 at a consideration of Kshs. 1,120,000. Her husband did pay a deposit of Kshs. 500,000 on the date of execution of the Agreement. He later fell sick and died without clearing the balance.
13. She averred that after her husband's death, she looked for one witness who was present during the execution of the Agreement, one Mr. Andrew Ombati Nyambati who accompanied her to the home of the vendor, the late Marambi Kipsang Ngasura so that they could have the agreement finalized.
14. She informed the vendor that her husband had died and asked him to give her a portion of the suit property equivalent to the sum her husband had paid since she did not have any other means of raising the balance.
15. While agreeing to the proposal, the late Marambi Kipsang Ngasura told her that since the agreement was that an acre was to go for Kshs. 40,000 each, it would mean therefore that she was to get 12 ½ acres. Both parties agreed and she looked for the Surveyor to exercise the 12 ½ acres from the suit property.
16. Since they had already taken possession of 28 acres initially, she surrendered the remaining 15 ½ acres to the late Marambi Kipsang Ngasura. By the time her husband bought the suit property, the late Marambi Kipsang Ngasura did not have a title deed. She paid for him to get the title deed and he promised to transfer the 12 ½ acres of the suit property to her. He died before he could transfer the 12 ½ acres to her as agreed. The title was finally issued on 23rd May, 2003 two years after he died.
17. The Defendant however enjoyed quite possession of the 12.5 acres after the vendor died. She fenced the property and constructed a home thereon. She confirmed carrying on farming activities. A problem only arose in 2006 when his sons, Hillary, Robert and Johana (the Plaintiff herein) invaded her land and demolished her house. She reported the matter at Molo Police station after which the Plaintiff and his 2 brothers were arrested and charged with the offense of trespass in MOLO SRM CR. NO.469 OF 2006. They were subsequently convicted and fined.
18. After the criminal case the Plaintiff vacated the suit property and left the Defendant in occupation of the suit land together with her 4 children. The Plaintiff testified that the suit property is their home and only source of livelihood. She prayed for the dismissal of the Plaintiff's case and that judgment be entered on her counterclaim so that the Plaintiff could transfer the 12.5 acres of the suit property to her. In the alternative, she prayed that the Executive Officer of the court be directed to sign all transfer documents if the Plaintiff failed to do so. She indicated that she no longer wanted to pursue her prayer for a refund of the purchase price as prayed in her counterclaim.

PLAINTIFF'S SUBMISSIONS

19. Counsel for the Plaintiff's majorly submitted on three issues.
 - (i) Whether there existed an agreement between the late Marambi Kipsang Ngasura, the Plaintiff's late husband for the entire suit property measuring 28 acres.
 - (ii) Whether there was an agreement between the Defendant and the late Marambi Kipsang Ngasura for the sale of 12.5 acres out of the suit property.
 - (iii) Whether the two agreements had a consent from the Land Controls Board and if not whether the absence of the said consent was fatal to the sale agreement.

20. On the first limb regarding the agreement between the late Marambi Kipsang Ngasura the Plaintiff's late husband, learned counsel for the Plaintiff submits that as much as there existed a written agreement between Marambi Kipsang Ngasura and the Plaintiff's late husband as explained vividly by the plaintiff in her testimony, only Kshs. 500,000 was paid out of the 1,120,000 purchase price. Kshs. 620, 000 which was to be paid on or before 30th August, 1997 was never paid and has never been paid. He argues that the understanding in the said agreement was that the purchaser was to take possession immediately which it appears he did, but the transfer was never effected to the Defendant.

21. It was his submission that since the payment of the balance was couched in mandatory terms, it implied that the transfer was only possible after full payment of the purchase price within the stipulated period stated in the agreement. However, the payment has never been done to date.

22. On the second limb regarding the agreement between the Defendant and the late Marambi Kipsang Ngasura, counsel submitted that there was no agreement as alleged by the Defendant. This is because the agreement to acquire 12.5 acres which was meant to alter the previous agreement was a verbal one which took place four years after the death of her husband. He further submitted that the same was never reduced into writing. Counsel further submitted that if the court was to buy the argument that there was a verbal agreement between the Defendant and the Plaintiff's late father, the same shall amount to the court drawing an agreement in the middle of proceedings which would be a travesty of justice.

23. He concluded that since the only agreement was the one between the late Marambi Kipsang Ngasura and the Plaintiff's late husband, and the same was breached thus rendering it null and void. It was his submission that the Defendants claim for 12.5 acres based on the verbal agreement should be disallowed. He also went on to conclude that the Plaintiff should only be allowed to recover the Kshs. 500,000 paid by her husband with no interest thereon because she has been gaining profit from the property which profit should be taken as sufficient compensation to her.

24. On the third issue of consent from the Land Control Board, Counsel submitted that the agreement between the late Marambi Kipsang Ngasura and the Defendant's late husband did not meet the requirements of Section 6(1) (a) of the Land Control Act which makes it mandatory that agreements of this nature must have the consent of the Land Control Board within 6 months of their execution. Since the agreement was entered on 2nd May, 1997 it was due for the consent of the Land Control Board by 2nd November, 1997 which was not done. He submits that there was no tangible effort made by the Defendant to try and obtain the consent for a period of 4 years before the Plaintiff's father died. He concluded therefore that the agreement was voided by the aforementioned mandatory provision of the Land Control Act hence the Defendant had no authority to claim the suit property.

DEFENDANT'S SUBMISSIONS

25. Counsel for the Defendant basically submitted by responding to the issues raised by counsel for the Plaintiff. He argued that the two agreements between the parties existed and were legal. Specifically regarding the verbal agreement between the Defendant and the Plaintiff's late father, he submitted that the fact that the same was not reduced into writing did not make the agreement void or incurable. To support his argument, he relied on the case of **Serah Njeri Mwobi vs John Kimani Njorioge [2013] eKLR** where the Court of Appeal held:

“It therefore follows that where one party by his words or conduct, made the other party a promise or assurance which was intended to affect the legal relations between them and to be acted on, and the other party has taken his word and acted upon it, the other party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made him but he must accept their legal relationship subject to the qualification which he himself has introduced”.

26. Counsel argued that once the Surveyor was contracted to subdivide the property, both parties were bound by the agreement. He submits that before the Plaintiff's father died, the Defendant enjoyed quite possession of the 12.5 acres he had allocated to her peacefully and did not confront her at any point.

27. Learned Counsel also submitted that the Plaintiff's claim that the Defendant is a trespasser is baseless because it was his father who entered into an agreement to subdivide the property and not him as he was never a party to the agreement and should therefore distance himself from the contract between his late father and the Defendant. To support his argument, counsel relied on the case of **Finance Corporation vs Lengetia Limited (1984)** where it was held that:

“as general rule, a contract affects only parties to it and cannot be enforced by or against a person who was not party, even if the contract is made for the benefit or purports to give him the right to sue or to make him liable upon it”.

28. It was also counsel's submission that, the Plaintiff's late father before passing away, was pursuing the title deed to enable him transfer the land to the Defendant. The Surveyor produced a sketch map of the demarcation that was agreed on between the Plaintiff's late father and the Defendant in the presence of the Plaintiff's brother one Robert, the Defendant and Mr. Andrew Ombati hence the Plaintiff cannot allege that there was no agreement between his father and the Defendant. He supported this argument by relying on the case of **Shah Vs Guiders International Bank Ltd (2003) eKLR**.

29. On the issue of the agreement not having the consent of the Land Control Board as required by Section 6 (1) of the Land Control Act, counsel argued that the same is curable by the law as it was held in the case of **Willy Kimtai Kitilit Vs Michael Kibet (2018) eKLR**. The High court affirmed the Applicability of the principles of equity and natural justice and section 8 of the Land Control Act which provides that;

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land

Control Board within six months of the making of the agreement for the controlled transaction thereto; Provided that the High Court, may notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do upon such conditions if any as it may think fit”.

30. On whether the Defendant should be refunded the sum of Kshs. 500,000 paid by her husband as deposit of the purchase price which was Kshs. 1.12M, counsel submitted that it was contradictory for the Plaintiff to claim for trespass and quickly backtrack in his claim that he is ready to refund the Defendant that sum of Kshs. 500,000. It is his argument that the value for the said parcel of land has escalated from Kshs. 40,000 per acre to more than Kshs. 1Million per acre and if the Plaintiff was to refund the Defendant then he should do so at the current market value. He in a quick rejoinder argues that the Defendant is however not interested in the refund but the suit property as the same is the only inheritance she got from her late husband.

31. He concluded by arguing that the Plaintiff had failed to prove his case against the Defendant. It is his submission that the plaintiff had earlier failed to get injunction orders restraining the Defendant from accessing the land because he could not prove trespass on the part of the Defendant. He also contended that the fact that the Defendant was convicted for trespassing into the plaintiff's land, betrays him and thus he is not entitled to any equitable remedy. He cited the case **Francis Munyoki Kilonzo Vs Francis Mutua Mutiso (2013) eKLR**. He therefore prayed that the Plaintiff's Counterclaim be allowed with costs.

ISSUES, ANALYSIS AND DETERMINATION

32. In this suit, I deduce the following issues for determination:

- (i) Whether there existed an agreement between the late Marambi Kipsang Ngasura and the Plaintiff's late husband for the entire suit property measuring 28 acres.
- (ii) Whether there was an agreement between the Defendant and the late Marambi Kipsang Ngasura for the sale of 12.5 acres out of the suit property.
- (iii) Whether the two agreements had the consent of the Land Control Board and if not, whether the absence of the said consent was fatal to the sale agreement

33. There has been an extensive argument by both parties concerning the validity of two agreements which are; the agreement between the Plaintiff's father and the Defendants husband and that between the Plaintiff's father and the Defendant. The Plaintiff argues that the former was voided by the fact the Defendant's late husband breached the contract by not paying the balance of the purchase price and that the same did not meet the requirements of Section 6 of the Land Control Act while the later was voided by the fact that the same was verbal.

34. The Defendant on their part relied on the principals of equity especially the principal of proprietary estoppel which they highlighted clearly by referring the court to the case of **Serah Njeri Mwobi vs John Kimani Njoroge (supra)** and further argued that the mandatory provisions of Section 6 of the Land Control Act have been cured by the case of **Willy Kimtai Kitilit (supra)** which stated that the principles of equity should be applicable in such circumstances to cure the harshness of the provisions of Section 6 of the Land Control Act. They further argued that Section 8 of the same Act gives the court powers to extend time for the consent. According to the Defendant, the Plaintiff was not privy to the agreement.

35. I will begin by considering whether the contract between the Plaintiff's father and the Defendants husband was breached by Defendant's husband's failure to pay the balance of the purchase price, hence voiding the agreement. I find this argument unfounded because as it has been averred by the Defendant that the Plaintiff's father did not take any step to terminate the agreement up to the time he died in 2001. Therefore, the Plaintiff who was not party to the sale agreement cannot purport to argue that the contract was voided on the said grounds. I rely on the principles in the case of **Finance Corporation vs Lengetia limited (1984)** highlighted by the Plaintiff's counsel. The Plaintiff's father obtained cash from the Defendant's husband and in exchange he surrendered his land to him and he never confronted the Defendant's husband or the Defendant to surrender possession or to vacate the land. On the issue of the mandatory provisions of the section 6 of the Land Control Act, I fully adopt the position taken by the Court of Appeal in the case of **Willy Kimutai Kitlit Vs Michael Kibet (supra)** which held that;

As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.

36. The fact that there is demonstration that the Plaintiff's father surrendered possession to the Defendant's husband after receiving the Kshs. 500,000 shows that there was constructive trust in his favor and the Plaintiff's claim of there being no consent cannot defeat the Defendants claim over the suit property.

37. Regarding the contract between the Defendant and the Plaintiff's being verbal there is need to look at the provisions of the Contract Act. Section 3 (3). Section 3(3) of the said Act provides that;

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 by a witness who is present when the contract was signed by such party:

38. However, Section 3(3) is subject subsection 7 which provides that;

The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection.

39. Subsection 7 above cures the danger of applying the provisions of section 3 (3) retrospectively. It important to note that Subsection 3 was amended in 1968, 1990, 1996, 2002 and lately in 2020. Having determined from the testimony of the defendant that the verbal agreement took place around 2001, the appropriate amendment that would be relevant is the one of 1990 specifically with regards to section 3(3). The said amendment reads partly;

“Repeal subsection (3) and insert the following new subsections (3) 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 (iii) incorporates all the terms which the parties have expressly agreed in one document; and (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

(4) Subsection (3) 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.....”

40. It is clear from the amendment highlighted above that it was not mandatory that agreement for the agreement to be in writing, given that I have already determined that a constructive arose when the Plaintiff surrendered possession to the Defendant and her family. Therefore, I find that there existed a valid agreement between the Plaintiff’s late father and the defendant’s late husband.

41. In the light of the aforesaid, I dismiss the Plaintiff’s claim as against the Defendant and enter judgment for the Defendant on her counterclaim and make the following final orders;

a) An order is hereby issued compelling the Plaintiff to transfer to the Defendant 12 ½ acres of land parcel No. **MOLO SOUTH LANGWENDA/SET KOTES/BLOCK 3 (SET KOTES) 22** to the Defendant within 30 days. Should the Plaintiff fail to do so, the Deputy Registrar of this Honourable Court is hereby ordered to sign the necessary documents to facilitate the transfer of the said portion of the suit property to the Plaintiff by the Land Registrar, Nakuru.

b) The Defendant shall have the costs of this suit and the Counterclaim.

It is so ordered.

Dated, signed and delivered at Kisii this 17th day of February, 2021.

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J.M ONYANGO

JUDGE